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

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This is a Key-Numbered Volume

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

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

JUDGES

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

FIRST CIRCUIT

Hon. OLIVER WENDELL HOLMES, Circuit Justice..... Washington, D. C.
Hon. GEORGE H. BINGHAM, Circuit Judge.....Manchester, N. H.
Hon. CHARLES F. JOHNSON, Circuit Judge.....Portland, Me.
Hon. GEORGE W. ANDERSON, Circuit Judge .....Boston, Mass.
Hon. CLARENCE HALE, District Judge, Maine.....Portland, Me.
Hon. JAMES M. MORTON, Jr., District Judge, Massachusetts.....Boston, Mass.
Hon. EDGAR ALDRICH, District Judge, New Hampshire.....Littleton, N. H.
Hon. ARTHUR L. BROWN, District Judge, Rhode Island.....Providence, R. I.

SECOND CIRCUIT

Hon. LOUIS D. BRANDEIS, Circuit Justice .....Washington, D. C.
Hon. HENRY G. WARD, Circuit Judge[1] .....New York, N. Y.
Hon. HENRY WADE ROGERS, Circuit Judge.....New Haven, Conn.
Hon. CHARLES M. HOUGH, Circuit Judge ....New York, N. Y.
Hon. MARTIN T. MANTON, Circuit Judge ..... New York, N. Y.
Hon. EDWIN S. THOMAS, District Judge, Connecticut..... .....Norwalk, Conn.
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Hon. EDWIN L. GARVIN, District Judge, E. D. New York..... Brooklyn, N. Y.
Hon. GEORGE W. RAY, District Judge, N. D. New York.....Norwich, N. Y.
Hon. FRANK COOPER, District Judge, N. D. New York.....Albany, N. Y.
Hon. LEARNED HAND, District Judge, S. D. New York.....New York, N. Y.
Hon. JULIUS M. MAYER, District Judge, S. D. New York .....New York, N. Y.
Hon. AUGUSTUS N. HAND, District Judge, S. D. New York.....New York, N. Y.
Hon. JOHN CLARK KNOX, District Judge, S. D. New York .....New York, N. Y.
Hon. JOHN R. HAZEL, District Judge, W. D. New York ..... Buffalo, N. Y.
Hon. HARLAND B. HOWE, District Judge, Vermont..... ...Burlington, Vt.

THIRD CIRCUIT

Hon. MAHLON PITNEY, Circuit Justice.....Washington, D. C.
Hon. JOSEPH BUFFINGTON, Circuit Judge..... Pittsburgh, Pa.
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Hon. J. WARREN DAVIS, Circuit Judge.....Trenton, N. J.
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Hon. JOHN RELLSTAB, District Judge, New Jersey.....Trenton, N. J.
Hon. CHARLES F. LYNCH, District Judge, New Jersey.....Newark, N. J.
Hon. JOSEPH L. BODINE, District Judge, New Jersey.....Trenton, N. J.
Hon. J. WHITAKER THOMPSON, District Judge, E. D. Pennsylvania...Philadelphia, Pa.
Hon. OLIVER B. DICKINSON, District Judge, E. D. Pennsylvania.....Philadelphia, Pa.
Hon. CHARLES B. WITMER, District Judge, M. D. Pennsylvania.....Sunbury, Pa.
Hon. CHARLES P. ORR, District Judge, W. D. Pennsylvania..... Pittsburgh, Pa.
Hon. W. H. SEWARD THOMSON, District Judge, W. D. Pennsylvania.....Pittsburgh, Pa.

[1] Resigned June 30, 1921.

FOURTH CIRCUIT

Hon. EDWARD D. WHITE, Circuit Justice[2] ..... Washington, D. C.
Hon. WILLIAM HOWARD TAFT, Circuit Justice[3] ..... Washington, D. C.
Hon. MARTIN A. KNAPP, Circuit Judge..... Washington, D. C.
Hon. CHARLES A. WOODS, Circuit Judge..... Marion, S. C.
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Hon. JOHN C. ROSE, District Judge, Maryland..... Baltimore, Md.
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Hon. EDWIN Y. WEBB, District Judge, W. D. North Carolina..... Charlotte, N. C.
Hon. HENRY A. MIDDLETON SMITH, District Judge, E. D. S. C..... Charleston, S. C.
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Hon. HENRY CLAY McDOWELL, District Judge, W. D. Virginia..... Lynchburg, Va.
Hon. BENJAMIN F. KELLER, District Judge, S. D. West Virginia..... Charleston, W. Va.
Hon. GEORGE W. McCLINTIC, District Judge, S. D. West Virginia[4]... Charleston, W. Va.
Hon. WILLIAM E. BAKER, District Judge, N. D. West Virginia..... Elkins, W. Va.

FIFTH CIRCUIT

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Hon. SAMUEL H. SIBLEY, District Judge, N. D. Georgia ..... Atlanta, Ga.
Hon. BEVERLY D. EVANS, District Judge, S. D. Georgia ..... Savannah, Ga.
Hon. RUFUS E. FOSTER, District Judge, E. D. Louisiana..... New Orleans, La.
Hon. GEORGE W. JACK, District Judge, W. D. Louisiana ..... Shreveport, La.
Hon. EDWIN R. HOLMES, District Judge, N. and S. D. Mississippi ..... Yazoo, Miss.
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Hon. EDWARD R. MEEK, District Judge, N. D. Texas..... Dallas, Tex.
Hon. JAMES CLIFTON WILSON, District Judge, N. D. Texas ..... Fort Worth, Tex.
Hon. DUVAL WEST, District Judge, W. D. Texas ..... San Antonio, Tex.
Hon. JOSEPH C. HUTCHESON, Jr., District Judge, S. D. Texas ..... Houston, Tex.
Hon. WILLIAM R. SMITH, District Judge, W. D. Texas..... El Paso, Tex.

SIXTH CIRCUIT

Hon. WILLIAM R. DAY, Circuit Justice..... Washington, D. C.
Hon. LOYAL E. KNAPPEN, Circuit Judge..... Grand Rapids, Mich.
Hon. ARTHUR C. DENISON, Circuit Judge..... Grand Rapids, Mich.
Hon. MAURICE H. DONAHUE, Circuit Judge..... Columbus, Ohio.
Hon. ANDREW M. J. COCHRAN, District Judge, E. D. Kentucky..... Maysville, Ky.
Hon. WALTER EVANS, District Judge, W. D. Kentucky..... Louisville, Ky.
Hon. ARTHUR J. TUTTLE, District Judge, E. D. Michigan..... Detroit, Mich.
Hon. CLARENCE W. SESSIONS, District Judge, W. D. Michigan..... Grand Rapids, Mich.
Hon. JOHN M. KILLITS, District Judge, N. D. Ohio..... Toledo, Ohio.
Hon. D. C. WESTENHAVER, District Judge, N. D. Ohio ..... Cleveland, Ohio.
Hon. JOHN E. SATER, District Judge, S. D. Ohio..... Columbus, Ohio.
Hon. JOHN W. PECK, District Judge, S. D. Ohio..... Cincinnati, Ohio.
Hon. EDWARD T. SANFORD, District Judge, E. and M. D. Tennessee.. Knoxville, Tenn.
Hon. J. W. ROSS, District Judge, W. D. Tennessee..... Jackson, Tenn.

SEVENTH CIRCUIT

Hon. JOHN H. CLARKE, Circuit Justice ..... Washington, D. C.
Hon. FRANCIS E. BAKER, Circuit Judge..... Goshen, Ind.
Hon. JULIAN W. MACK, Circuit Judge..... Chicago, Ill.
Hon. SAMUEL ALSCHULER, Circuit Judge..... Chicago, Ill.

[2] Died May 19, 1921.
[3] Appointed June 30, 1921, to succeed Hon. Edward D. White.
[4] Appointed July 25, 1921.

Hon. EVAN A. EVANS, Circuit Judge.....Baraboo, Wis.
Hon. GEORGE T. PAGE, Circuit Judge.....Peoria, Ill.
Hon. KENESAW M. LANDIS, District Judge, N. D. Illinois.....Chicago, Ill.
Hon. GEORGE A. CARPENTER, District Judge, N. D. Illinois.....Chicago, Ill.
Hon. LOUIS FITZHENRY, District Judge, S. D. Illinois.....Peoria, Ill.
Hon. GEORGE W. ENGLISH, District Judge, E. D. Illinois.....East St. Louis, Ill.
Hon. ALBERT B. ANDERSON, District Judge, Indiana.....Indianapolis, Ind.
Hon. FERDINAND A. GEIGER, District Judge, E. D. Wisconsin.....Milwaukee, Wis.
Hon. CLAUDE Z. LUSE, District Judge, W. D. Wisconsin.....Superior, Wis.

EIGHTH CIRCUIT

Hon. WILLIS VAN DEVANTER, Circuit Justice.....Washington, D. C.
Hon. WALTER H. SANBORN, Circuit Judge.....St. Paul, Minn.
Hon. WILLIAM C. HOOK, Circuit Judge[1].....Leavenworth, Kan.
Hon. WALTER I. SMITH, Circuit Judge.....Council Bluffs, Iowa.
Hon. JOHN E. CARLAND, Circuit Judge.....Washington, D. C.
Hon. KIMBROUGH STONE, Circuit Judge.....Kansas City, Mo.
Hon. JACOB TRIEBER, District Judge, E. D. Arkansas.....Little Rock, Ark.
Hon. FRANK A. YOUMANS, District Judge, W. D. Arkansas.....Ft. Smith, Ark.
Hon. ROBERT E. LEWIS, District Judge, Colorado.....Denver, Colo.
Hon. HENRY T. REED, District Judge, N. D. Iowa.....Cresco, Iowa.
Hon. MARTIN J. WADE, District Judge, S. D. Iowa.....Davenport, Iowa.
Hon. JOHN C. POLLOCK, District Judge, Kansas.....Kansas City, Kan.
Hon. PAGE MORRIS, District Judge, Minnesota.....Duluth, Minn.
Hon. WILBUR F. BOOTH, District Judge, Minnesota.....Minneapolis, Minn.
Hon. CHARLES B. FARIS, District Judge, E. D. Missouri.....St. Louis, Mo.
Hon. ARBA S. VAN VALKENBURGH, District Judge, W. D. Missouri...Kansas City, Mo.
Hon. THOMAS C. MUNGER, District Judge, Nebraska.....Lincoln, Neb.
Hon. JOSEPH W. WOODROUGH, District Judge, Nebraska.....Omaha, Neb.
Hon. COLIN NEBLETT, District Judge, New Mexico.....Santa Fé, N. M.
Hon. CHARLES F. AMIDON, District Judge, North Dakota.....Fargo, N. D.
Hon. ROBERT L. WILLIAMS, District Judge, E. D. Oklahoma.....Muskogee, Okl.
Hon. JOHN H. COTTERAL, District Judge, W. D. Oklahoma.....Guthrie, Okl.
Hon. JAMES D. ELLIOTT, District Judge, South Dakota.....Sioux Falls, S. D.
Hon. TILLMAN D. JOHNSON, District Judge, Utah.....Salt Lake City, Utah.
Hon. JOHN A. RINER, District Judge, Wyoming.....Cheyenne, Wyo.

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Hon. WILLIAM B. GILBERT, Circuit Judge.....Portland, Or.
Hon. ERSKINE M. ROSS, Circuit Judge.....Los Angeles, Cal.
Hon. WILLIAM W. MORROW, Circuit Judge.....San Francisco, Cal.
Hon. WILLIAM H. HUNT, Circuit Judge.....San Francisco, Cal.
Hon. WILLIAM H. SAWTELLE, District Judge, Arizona.....Tucson, Ariz.
Hon. BENJAMIN F. BLEDSOE, District Judge, S. D. California.....Los Angeles, Cal.
Hon. OSCAR A. TRIPPET, District Judge, S. D. California.....Los Angeles, Cal.
Hon. WILLIAM C. VAN FLEET, District Judge, N. D. California.....San Francisco, Cal.
Hon. MAURICE T. DOOLING, District Judge, N. D. California.....San Francisco, Cal.
Hon. FRANK S. DIETRICH, District Judge, Idaho.....Boise, Idaho.
Hon. GEORGE M. BOURQUIN, District Judge, Montana.....Butte, Mont.
Hon. EDWARD S. FARRINGTON, District Judge, Nevada.....Carson City, Nev.
Hon. CHARLES E. WOLVERTON, District Judge, Oregon.....Portland, Or.
Hon. ROBERT S. BEAN, District Judge, Oregon.....Portland, Or.
Hon. FRANK H. RUDKIN, District Judge, E. D. Washington.....Spokane, Wash.
Hon. EDWARD E. CUSHMAN, District Judge, W. D. Washington.....Tacoma, Wash.
Hon. JEREMIAH NETERER, District Judge, W. D. Washington.....Seattle, Wash.

COURT OF APPEALS OF DISTRICT OF COLUMBIA

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

[1] Died August 11, 1921.

CASES REPORTED

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CASES REPORTED

ARRANGED UNDER THEIR RESPECTIVE CIRCUITS

FIRST CIRCUIT.

SECOND CIRCUIT.

THIRD CIRCUIT.

FOURTH CIRCUIT.

FIFTH CIRCUIT.

SIXTH CIRCUIT.

SEVENTH CIRCUIT.

EIGHTH CIRCUIT.

NINTH CIRCUIT.

DISTRICT OF COLUMBIA.

CASES

ARGUED AND DETERMINED

IN THE

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

COMMONWEALTH TRUST CO. OF PITTSBURGH v. SMITH et al.*

(Circuit Court of Appeals, Ninth Circuit. May 16, 1921.)

No. 3625.

1. **Cancellation of instruments ⟸35(1)—Equity ⟸94—"Indispensable parties" are those necessary to final determination; all parties to contract are indispensable in suit to cancel.**

"Indispensable parties" are persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience; as, for example, in a bill to rescind, all parties to the contract are indispensable.

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

2. **Waters and water courses ⟸222—In suit to foreclose contractor's lien on water rights and land segregated under Carey Act, all contract holders necessary parties.**

Where, on application of the state of Idaho, through its board of land commissioners, desert lands were segregated from the public domain under the Carey Act (Comp. St. § 4685), and the state entered into a contract for the construction of irrigation works, the contractor, as compensation, to have the lien given by the acts of Congress, all contract holders within the limits of the project should be made parties to a suit to foreclose the lien on water rights and privileges and the land appurtenant of particular purchasers, where as a result of later developments it appeared that less land could be irrigated than was first expected, and the limits of the district were several times reduced, for that would result, not only in increasing the amount to be paid by particular purchasers for water, but might compel purchasers to accept a reduction in the amount of water received, so that, notwithstanding provisions of C. S. Idaho 1919, §§ 3004, 3019, 3021, and 3045, relating to foreclosure, it would be necessary, as the rights of all contract holders would be affected by the rights of others, that all be made parties.

3. **Waters and water courses ⟸222—Lien of construction company extends only to acreage for which it furnishes adequate water supply.**

Where, on application of the state of Idaho, desert lands were segregated from the public domain, and a construction company undertook to construct irrigation works, receiving as compensation the lien provided

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

*Rehearing denied August 1, 1921.

for by act of Congress, etc., the lien of the construction company can extend only to the acreage for which it furnishes an adequate supply of water.

Appeal from District Court of the United States for the Southern Division of the District of Idaho; Frank S. Dietrich, Judge.

Suit by the Commonwealth Trust Company of Pittsburgh, as trustee, against Max Smith and Margaret Smith. From a decree dismissing the suit for failure to make other parties defendants, plaintiff appeals. Affirmed.

This is a suit to foreclose a lien upon certain water rights and privileges and the real property to which they are appurtenant. It is necessary to understand the controlling issues presented by the pleadings for an intelligent solution of the problem involved. The bill of complaint proceeds upon facts which will be as briefly epitomized as is consistent with clarity:

About August, 1907, the state of Idaho, through its state board of land commissioners, made application to the Secretary of the Interior, under what is known as the Carey Act (Comp. St. § 4685) and acts amendatory thereof, for a segregation from the public domain of approximately 127,707.29 acres of desert land situated in Twin Falls county, Idaho, which lands and other lands in the vicinity to the amount of about 150,000 acres the state represented could be irrigated and reclaimed from the surplus and unappropriated waters of Salmon river, by means of a storage reservoir with an available capacity of 180,000 acre feet, and requisite canals, ditches, laterals, etc. Prior to the making of such application, the state engineer and the state board determined and adjudged, in pursuance of state laws and regulations, that there was sufficient surplus and unappropriated water in Salmon river available for reclamation of said lands to the extent and degree required by the acts of Congress; and the Secretary of the Interior, having also determined that the supply of water was sufficient for the purposes desired, did, on the 10th day of April, 1908, segregate from the public domain and agree to donate, grant, and patent to the state the desert lands described in the application, in the aggregate mentioned and for the purposes as prayed, as contemplated by the acts of Congress and the laws of the state relating to such matters.

About April 30, 1908, the Twin Falls-Salmon River Land & Water Company, herein to be called the construction company, entered into a contract with the state of Idaho, through its board of land commissioners, for the construction of the reservoir, and the necessary tunnels, ditches, etc., to complete the project. In entering into such contract, the construction company, upon the determination of the state and of the Secretary of the Interior that the flood and unappropriated waters of Salmon river available for the project were ample to reclaim the lands to the extent and degree required by the acts of Congress and the laws of the state, agreed to accept as its compensation for constructing the system the lien authorized by the acts of Congress to be created by the state on and against the Carey Act lands, and the lien authorized to be created by the laws of the state, and the consideration that should or ought to be paid under said acts and laws of the state by entrymen and owners of lands for an interest in the irrigation system and water rights. Under the contract it was determined and agreed that the actual cost of the irrigation works and structures would be the sum of $40 per acre when apportioned and distributed equally over the whole 150,000 acres proposed to be reclaimed, and a lien was created by the state in favor of the construction company for actual costs and necessary expenses of reclamation and reasonable interest thereon, estimated at $40 per acre, against each and every legal subdivision segregated from the public domain under the Carey Act pursuant to the state's application. It was further provided in the contract that upon payment of $40 per acre or share in the irrigation system, together with interest thereon, the lien should be satisfied.

It was further provided that a corporation to be known as the Salmon River Canal Company, Limited, herein to be called the operating company, should

be organized to take over the management and operation of the irrigation system, which should be capitalized on the basis of one share of stock to each acre of land to be irrigated under the system, namely, 150,000 shares, and that there should be issued to entrymen or purchasers of the lands, as evidence of their respective shares or interests in the irrigation system, one share of stock for each acre entered or filed upon and susceptible of irrigation from the system, and that the water available therefrom and for distribution should be distributed in accordance with the number of shares of stock held in the operating company by entrymen or owners under the system. Relying upon the correctness of the determinations of the state and the Secretary of the Interior as to the sufficiency of the water supply available, and believing that they were final and binding, the construction company entered upon the work of construction, and thereafter built and constructed the irrigation works theretofore approved by the state, at an expense believed to be $3,500,000. Such works, it is alleged, have been accepted and approved by the state as completed, and water has been available from the system for the irrigation of the lands described since April 12, 1911, at a point within one-half mile of the lands and premises.

After the construction company had commenced the work of construction, the state demanded that the transfer of shares be limited, so as not to exceed 100,000 acres, and later 80,000 acres, and that the water supply be distributed over and made appurtenant to not more than that number of acres. Immediately after the execution of the contract, the state board of land commissioners gave public notice that the lands so segregated were open to settlement, and of the terms upon which land could be entered or title acquired, that the construction company was authorized to transfer and issue water rights, shares, or interests in the system to qualified entrymen, and that the lands could not be entered until the entryman had entered into a contract with the construction company for the transfer to him for use upon such lands of shares or interests in the works as contemplated by the contract between the construction company and the state.

The state board adopted and approved a form of contract to be used by the construction company for the transfer of shares or interests in the irrigation system to entrymen and owners of lands thereunder, and it was provided therein how the $40 consideration and interest thereon to be paid for each share should be paid, with a further provision that if the purchaser made default in the payment of any installment of principal or interest, the construction company might declare the entire amount of the purchase price at once due and collectible, and proceed either at law or in equity to enforce any lien it might have upon the water rights, shares, or interests to be transferred under such contracts, and upon the land to which the same were appurtenant, and to enforce any other remedy it might have; it being asserted that under the contract the purchaser granted, assigned, and set over, by way of mortgage or pledge to the construction company to secure the amounts due and to become due, the lands to which the water rights, shares, and interests were dedicated, and that the company was given a first and prior lien upon such lands, water rights, shares, and interests, and as additional security that the entryman agreed that shares of stock issued to him should be and were by the terms of the contract assigned to the construction company. The construction company used the form of contract approved by the state board, and all contracts, after execution, were submitted to and approved by such state board.

It is further asserted that, by virtue of the acts of Congress, the laws of the state, the contract between the construction company and the state, and the settlers' contracts, the construction company became entitled to and possessed of a lien against the lands segregated from the public domain for the actual costs of constructing the irrigation system, and the necessary expenses of reclamation, and reasonable interest thereon, also of the lien created by the laws of the state in favor of companies constructing irrigation works, and that the settlers' contracts were intended to render more specific the lien created under the acts of Congress and the laws of the state, and

the lien created thereby was intended to be supplementary to and not in lieu of the lien created by the federal and state laws.

After the state had given notice, as previously stated, the construction company accepted applications for entry, and entered into settlers' contracts and contracts with owners of other desert lands situated under the system, covering approximately 73,000 shares, all of which were approved by the state board; but thereafter, in the year 1916, the state board, in the exercise of its supervisory power over such matters, canceled and annulled entries aggregating approximately 13,000 acres, and thereafter reduced the acreage entitled to water and the number of outstanding shares or interests in the system to approximately 60,070.8, and declined to approve any further contracts, and the defendants in the suit and other owners of land under and shares of stock in the system have combined to reduce the acreage for which water shall be supplied, and have obtained an injunction in the case of A. E. Caldwell and others against the construction company and others, prohibiting the company from selling or transferring any further shares in the irrigation system, and decreeing that the water supply available be distributed over not to exceed 60,070.8 acres; and plaintiff is advised that the state board, about March 13th, made an order that the water available for distribution should be made appurtenant to approximately 35,000 net irrigable acres, and no more, and that the outstanding shares in the system in excess of that should be canceled or reduced accordingly, though no action for reduction has been taken or had. It is asserted that, by reason of the action of the state board and the injunction as aforesaid, the construction company is prevented from supplying water to or obtaining a lien upon more than 60,070.8 acres, and if the later order of the state board, made March 13, 1918. be legal and valid, the money expended by the construction company in the construction of the irrigation system can only be recovered through or by the enforcement of its lien against 35,000 acres; that, if the irrigable acreage is limited to 60,070.8 acres, the actual cost and necessary expense of reclamation and reasonable interest thereon will amount to not less than $60 per acre, and in the event the acreage be further reduced the cost per acre will be further increased.

In pursuance of the notice published, as alleged, persons having the required qualifications made application to the construction company for the purchase of shares in the irrigation system, under the form of contract prescribed by the state board, and the construction company accordingly entered into contracts with such persons, which were approved by the state board. The entries were so made, and the entrymen, after having reclaimed and made settlement upon the lands so entered, made final proof of reclamation and settlement in the manner required by statute and the rules and regulations of the board, which was also accepted, allowed, and approved by the board.

Plaintiff alleges that the entrymen, their successors and assigns, have failed to pay and discharge the liens thus created in favor of the construction company, and that because of such default plaintiff has elected to declare the whole amount, both principal and interest, remaining due and unpaid on such liens, as immediately due and payable, and claims a first and prior lien against the lands and water rights, shares, and interests appurtenant thereto for the actual costs and necessary expenses of reclamation and reasonable interest thereon.

The complaint sets forth the specific demands against the defendants Max Smith and Margaret Smith, the subdivision of land against which the liens are claimed, and the amount thereof. Then it is further alleged that the amount due against each of said legal subdivisions should be increased by $20 per share for the number of shares dedicated or made appurtenant to said land, and in case it be determined that the number of shares or interests outstanding against the system should be restricted to less than 60,070.8 acres, then that the amount due on each of the shares and the amount of the lien should be increased proportionately, to the end that each acre of land entitled to water shall pay its proportionate part of the actual cost of said works and the necessary expenses of reclamation as provided by the acts of Congress and

the laws of the state of Idaho. The prayer proceeds as in the ordinary foreclosure.

The answer of defendants admits in large measure the allegations of the complaint, but in many things enters denial, and in others puts the complainant upon proof. Some of the demands are of matter that would appear to be vital to the controversy. For instance, the defendants deny that the irrigation works were accepted and approved by the state as completed prior to the commencement of this suit; deny that the entrymen, their successors, grantees, or assigns, have failed to discharge any liens created in favor of the construction company against said lands, or have failed to pay any installments of principal or interest as the same became due, or at all, and in that connection allege that the construction company has failed to comply with the laws of the United States by furnishing an ample supply of water in a substantial ditch or canal to reclaim the particular tract or those particular tracts of land as required by the statute and involved in this action, or as required by the contract between the general government and the state of Idaho and the contract between the state and the company; and deny that plaintiff is entitled to a first lien, or any lien at all, against the lands in the complaint described, or against the water rights, shares, or interests appurtenant thereto, under the acts of Congress, or the laws of the state, or the settlers' contracts, or any lien at all for the actual costs and necessary expenses of reclamation, or reasonable interest thereon, or for any sum of money, or at all, until the construction company shall have actually furnished an ample supply of water in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim the lands, and then only a lien for the security of the payment of $40 per share per acre of land.

By affirmative allegations, the answer reiterates the history of the construction of the irrigation works, and asserts that a fraud was practiced by the construction company and its promoters in acquiring the right to the construction of the works, and that the settlers were induced to enter into their contracts by misrepresentation and fraud, and in short challenges any recovery in behalf of the company or its assigns on account of the so-called liens.

The pleadings being thus formulated, the court on motion of defendants directed that all contract holders or persons, claiming water rights or interests in lands under the segregation be brought in and made parties to the action; and, plaintiff having failed to comply with the order, the cause was dismissed, from which decree the plaintiff appeals.

Richards & Haga, of Boise, Idaho, and A. N. Edwards, of St. Louis, Mo., for appellant.

Turner K. Hackman, of Twin Falls, Idaho, for appellees.

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

WOLVERTON, District Judge. The single question presented by the appeal is whether the contract holders or the persons claiming water rights or interests in the lands comprised by the project or irrigation system are indispensable parties to the suit, so that the court is unable to proceed in their absence without injuriously affecting them in their rights and privileges. If this is merely a proceeding for the foreclosure of a mortgage lien, and nothing more, then it may confidently be premised that the other contract holders within the project should not be required to be brought in, because they are neither necessary nor indispensable parties, nor is it competent in the ordinary bill of foreclosure to litigate the title of parties claiming adversely to the mortgagor. Dial v. Reynolds, 96 U. S. 340, 24 L. Ed. 644; Peters v. Bowman, 98 U. S. 56, 25 L. Ed. 91.

[1] Indispensable parties are defined as—

"persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." Shields v. Barrow, 17 How. 129, 139, 15 L. Ed. 158.

So it is said in Williams v. Bankhead, 19 Wall. 563, 571, 22 L. Ed. 184:

"Where a person will be directly affected by a decree, he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule."

A bill to rescind affords an apt example of the kind. All parties to the contract sought to be annulled must needs be indispensable parties.

[2] The right of the construction company, or its successor, the applicant here, to foreclose its liens, is controverted on the ground that the company has not performed its part of the contract with the settlers whereby its liens were acquired; in other words, that its right to enforce the lien depends upon certain conditions to be performed upon its part, which are conditions precedent to any right of action against the settler to compel him to perform.

It is stipulated between the parties in the settlers' contract for the purchase of shares or interests in the irrigation system that the agreement is made in accordance with the provisions of the contract between the state of Idaho and the company, which, together with the laws of the state of Idaho under which the agreement is made, shall be regarded as defining the rights of the respective parties, and shall regulate the provisions of the shares of stock to be issued to the purchaser by the operating company.

This renders it essential, in order to arrive at the correlative obligations of the parties, to read the settlers' contract in connection with the contract between the construction company and the state, and the state laws relative to the subject, and not only this, but in connection with the statutes of Congress rendering such a project possible. Twin Falls Salmon River Land & W. Co. v. Caldwell, 242 Fed. 177, 190, 155 C. C. A. 17.

Under the contract between the state and the construction company, the company agrees to build the irrigation works and to sell shares or water rights as provided to the person or persons filing upon the lands; also to the owners of other lands not described which are susceptible of irrigation from the system, the shares or water rights to be sold on terms provided, and the management and control of the canal system to be transferred to the purchasers of such shares or water rights.

The construction company represents that it is the owner of 1,500 cubic feet per second of the waters of Salmon river, and agrees that the dam to be constructed shall provide a reservoir for impounding 180,000 acre feet of water, and that it will construct the canal and lateral system of sufficient capacity to deliver water to the users at the rate

of one-hundredth of a second foot per acre for each acre of land to be irrigated.

The construction company further agrees that, to the extent of the irrigation works and to the extent of the water rights to which it is entitled, as rapidly as lands are opened for entry and settlement, it will sell or contract to sell water rights or shares for land to be filed upon by qualified entrymen or purchasers, without preference or partiality other than that based upon priority of application; it being understood, however, that priority of application or priority of entry or settlement shall not give any priority of right to the use of water flowing through the canal against subsequent purchasers, but shall entitle the purchaser to a proportionate interest only therein—the water rights having been taken for the benefit of the entire tract of land to be irrigated by the system.

After further agreement on the part of the construction company to sell or cause to be sold a water right or share in the canal for each and every acre filed upon or purchased from the state or acquired from the United States, it is stipulated that each of said shares or water rights shall represent a carrying capacity in the canal sufficient to deliver water at the rate of one-hundredth of a cubic foot of water per acre per second—each share to represent a proportionate interest in the canal or irrigation works, together with all rights and franchises therein, based upon the number of shares finally sold in said canal; said shares or interests to be sold to persons filing upon the lands at a price not exceeding $40 per share, to be paid in installments as specifically set forth. It is stipulated that in no case shall water rights or shares be dedicated to any lands before mentioned or sold beyond the carrying capacity of the canal or in excess of the appropriation of water therefor. It is further stipulated that the sale of water rights to the purchasers shall be a dedication of the water to the lands to which the same is to be applied.

This recital comprehends sufficiently for the present inquiry the material stipulations on the part of the construction company. Under the act of Congress of June 11, 1896 (29 Stat. 434), a state is authorized to create a lien or liens upon lands granted under the Carey Act to the state, which liens, when created, are declared to be valid on and against the legal subdivisions of land reclaimed for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers. The state of Idaho has provided by law that any company furnishing water for any tract of land shall have a first and prior lien on the water right and land upon which the water is used for all deferred payments for said water right, the lien to remain effective until the last deferred payment for the water right is paid and satisfied according to the terms of the contract. Section 3019, St. Idaho 1919.

By the contract with the settler, the purchaser agrees that, upon default in payment of installments, interest, etc., the company may declare the entire purchase price for the water due, and may proceed to collect the same and to enforce any lien it may have upon the water

rights or the land. He also covenants to set over by way of mortgage to the company, to secure the payment of the amounts due or to become due on the purchase price for the water right, any and all interest and all rights which he now has or which may hereafter accrue to him under his contract with the state for the purchase of the lands to which the water rights are dedicated, and, for further assurance, to execute a mortgage to the company to secure the performance by him of the provisions of the contract. The contract sets forth specifically the payments made and to be made, the time of payment, and the interest agreed upon.

Provision is made by state law authorizing the owner or holder of these liens to foreclose the same on account of default in discharging any of the deferred payments. Section 3021, St. Idaho 1919. And it is further provided that, in the event the owner or holder or occupant of the premises upon which the water has been purchased or contracted for has not at the time of the filing of the claim of lien received title to the premises so occupied or held by him, the proceeding to foreclose shall relate only to the water or water rights. Section 3045. It is also provided, by section 3004, that, should it appear to the department of reclamation that the water supply of the construction company is inadequate to irrigate properly and sufficiently the lands so proposed to be irrigated, or that water rights have been sold to the full carrying capacity of the ditch or canal, or in excess of the actual appropriation or of the supply of water made actually available, the department of reclamation shall have the right to enter an order forbidding the parties from making any further or additional sales of water rights or of shares of stock in any company representing or evidencing water rights, etc.

It appears from the bill of complaint that the construction company entered into settlers' contracts covering approximately 73,000 shares, representing a supply of water to that number of acres under the project; that the state board thereafter, in the exercise of its supervisory control, canceled and annulled entries of approximately 13,000 acres, and accordingly reduced the acreage entitled to water and the number of outstanding shares in the system to approximately 60,070.8, and declined to approve other contracts; that it later made an order that the water available should be made appurtenant to approximately 35,000 net irrigable acres, and no more. By a stipulation of the parties to this suit, it appears that the general government has issued patents to the state for lands under the project covering 35,000 acres, and declines to issue patent for additional acreage.

By reference to the opinion recently rendered by this court in the case of Twin Falls Salmon River Land & Water Co. et al. v. A. E. Caldwell et al., No. 3502, 272 Fed. 356, it will be seen that the learned trial judge found as a conclusion of fact that the system would not in an average year furnish water to the farmers in excess of 56,500 acre feet on a fair estimate, and that this estimate, distributed on a basis of 2⅓ acre feet per acre, would reduce the irrigable area to 24,214 acres, instead of 35,000, as found by the state board upon the ad-

vice of the Commissioner of the General Land Office, and accordingly entered a decree which recites in effect, among other things, that the rate of 2⅓ acre feet per acre per season, the amount that is and will continue to be required for the reasonably successful production of crops, is less than one-hundredth of a second foot per acre flowing continuously during the irrigating season, and, as a deduction from still other recitals, that the system can be relied upon to furnish 40 per cent., and no more, of the water which the defendant company by its outstanding contracts agrees to sell and deliver, namely, 140,396 acre feet per season.

So here it will be seen that, by the order of the state board, there has been a constant and continuous reduction of the irrigable area that can be supplied with water from the project in quantity sufficient to meet the demands of practicable husbandry; and it may be remarked that the plaintiff by its complaint seems not to challenge specifically the power of the state board to make such delimitations from time to time, governed by the water supply which the company is able to make available for irrigation purposes under the project. In addition, the findings of the learned trial judge indicate that the water supply available is adequate to irrigate properly but 24,214 acres.

It is obvious that many persons—that is, contract holders—are and will necessarily be affected by the inadequacy of the water supply considered in relation to the amount that it was at first supposed could be made available. They are affected in several ways. Some will and can get no water at all, as their holdings are entirely outside of the reduced delimitations. Others, and a major portion of them, perhaps all, will be required to take and accept fewer acre feet per acre of water than they have contracted for, and some are bound to be affected in ways not now apparent by the readjustment of the water supply to the delimited area. Then there is the contention of the plaintiff that all the water users who will finally be entitled to water must be required to pay, not $40 per share for each share or interest in the system, but $60 and a greater sum according as the acreage subject to irrigation from the system is reduced by delimitations made, or that will of necessity be required to be made, to meet the inadequacy of the supply of water available for irrigation purposes.

It is the very theory and purpose of the bill of complaint, as becomes apparent from a reading of it, to enforce the alleged lien for the larger amount, so as to require the diminished area to bear the burden of the entire cost of construction. It is obvious, therefore, that in a comprehensive, equitable, and fair readjustment of the matters pertaining to the unfortunate situation, all the contract holders will be affected in a greater or less degree, and that the rights of each shareholder are more or less dependent upon the rights of every other shareholder. This manifestly and necessarily will affect in greater or less degree the extent and dignity of the rights and holdings of a very great number, if not all, of the contract holders of shares under the project. So it would appear that a final decree cannot be made or entered in the case at bar without affecting materially perhaps all the contract holders

in the project, or at least without leaving the controversy in such condition that its final determination may be wholly inconsistent with equity and good conscience. The suit, considered in respect to the correlative rights involved, is not one for foreclosure merely, but by nature resembles more nearly one for specific performance, the termination of which will perforce of its very consequences affect in some measure all the contract holders by reason of the inability of the construction company fully to perform on its part.

This result has been practically reached by the decision of this court in Twin Falls Salmon River Land & Water Co. et al. v. Caldwell, supra. True it is that the state statute has made provision whereby the construction company is entitled to foreclose its liens, but it does not comprehend a situation such as is presented in the present controversy. It is also true that the case of Twin Falls Oakley Land & Water Co. v. Martens et al. (No. 3478) 271 Fed. 428, recently decided by this court, was one for the foreclosure of like liens. The question here presented was not there suggested, but an expression of the court in the opinion rendered indicates by clear enunciation one difficulty attending the litigation. Referring to unpatented lands included in the scheme, the court says:

"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."

[3] It is settled that the lien of the construction company can only extend to the acreage for which it furnishes an adequate quantity of water. Twin Falls Salmon River Land & Water Co. v. Davis et al. (C. C. A.) 267 Fed. 382. Considering the confusion and complexity of the situation and the interdependent relations of the shareholders, and the difficulty of rendering the fair and exact justice that equity and good conscience rightfully demand, we are of the opinion that the learned trial judge properly directed that all shareholders be made parties to the proceeding. The requirement not having been complied with, there was no error in dismissing the bill.

Affirmed.

HEE FUK YUEN et al. v. WHITE, Commissioner of Immigration.

(Circuit Court of Appeals, Ninth Circuit. May 16, 1921.)

No. 3652.

1. Aliens ⇐28—Return certificates to Chinese merchants are not conclusive adjudication of right to return.

Readmission certificates, issued to Chinese merchants on their leaving the country temporarily, are for the purpose of avoiding detention and to facilitate readmission of those who are entitled to return, but have no binding effect as adjudications of the right to return, either under the Chinese Exclusion Laws or under Immigration Act Feb. 5, 1917.

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

2. Aliens ⟸27—Domiciled Chinese merchant has no status entitling him to return after an absence.
The fact that a Chinese merchant has acquired a lawful domicile in the United States does not give him a status which entitles him as a matter of right to return after a temporary absence from this country, or which bars his deportation under Immigration Act Feb. 5, 1917.

3. Aliens ⟸23(1)—Immigration Act applies to Chinese persons.
Immigration Act Feb. 5, 1917, prescribing conditions for the entry of aliens into the United States, is applicable to Chinese aliens entitled to enter under the Chinese Exclusion Laws.

4. Aliens ⟸27, 40—Rule limiting temporary absence to six months is not unreasonable.
Department of Labor rule 16, which provides that an absence not exceeding six months shall be deemed a temporary absence, within the meaning of Immigration Act Feb. 5, 1917, § 3, proviso 7 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼b), permitting aliens returning after a temporary absence to be admitted in the discretion of the Secretary of Labor, is not unreasonable or unfair, and its application to the hearing of a Chinese merchant seeking to return after an absence of more than six months does not make such hearing unfair.

5. Aliens ⟸32(9)—Examination by only one physician does not make proceedings unfair, where his finding was not questioned.
Proceedings for the deportation of returning Chinese merchants are not unfair, because the medical examinations were conducted by only one physician, instead of two, as required by Immigration Act Feb. 5, 1917, § 16 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼i), where there was no showing that the rights of the aliens had been in any way prejudiced thereby, and no attempt was made to dispute the medical examiner's finding that the aliens were afflicted with a disease which had been classified as contagious.

6. Aliens ⟸32(9)—Decision by Surgeon General that disease is dangerous and contagious is conclusive.
Under Immigration Act Feb. 5, 1917, § 3 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼b), excluding aliens afflicted with contagious diseases, and providing that the decision of the board of special inquiry adverse to the admission of the alien shall be final, the classification by the Surgeon General, in pursuance of the authority conferred upon him by section 16 of the act (section 4289¼i), of clonorchiasis as a dangerous contagious disease, is conclusive.

7. Aliens ⟸32(9)—Failure to examine first-class passenger does not make medical examination of second-class passenger unfair.
Since the immigration officers presumably performed only their duty in subjecting second-class Oriental passengers to a medical examination, the failure to subject first-class passengers on the same vessel to a similar examination does not make the proceedings against the second-class passengers unfair, or deny them the equal privileges to which they were entitled under Treaty with China Nov. 17, 1880, art. 2, especially where the disease with which such passengers were afflicted was one most likely to be found among Orientals.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Habeas corpus proceedings by Hee Fuk Yuen and Pang Hing against Edward White, as Commissioner of Immigration for the Port of San Francisco. From judgments sustaining demurrers to the petitions, and denying the writs, petitioners appeal. Affirmed.

Geo. A. McGowan, of San Francisco, Cal., for appellants.

Frank M. Silva, U. S. Atty., and Ben F. Geis, Asst. U. S. Atty., both of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. Two appeals of Chinese merchants are here presented. Hee Fuk Yuen, a domiciled Chinese merchant, was granted a merchant's return certificate prior to his departure on August 1, 1916, from San Francisco to China. He returned to the United States September 28, 1918, when he was certified by the medical examiner of aliens at San Francisco to be afflicted with clonorchiasis, a dangerous contagious disease, and was deported to China. He again returned to the United States on November 30, 1919, was again certified by the medical examiner of aliens to be afflicted with clonorchiasis, and was denied admission by the board of special inquiry. On December 29, 1919, the records in his case were forwarded to the Secretary of Labor for his consideration and the exercise of the discretion vested in him under the seventh proviso of section 3 of the Immigration Act of February 5, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼b). The matter of the advisability from a medical standpoint of admitting the appellant was submitted to the Surgeon General of the Public Health Service, at Washington. He submitted the matter to the medical officer at Angel Island, who, in his report, advised against the admission of the alien. That report was concurred in by the Surgeon General.

Pang Hing, a domiciled Chinese merchant, was granted a merchant's return certificate when he departed for China February 12, 1917. He returned to the United States September 4, 1918, and was certified by the medical examiner of aliens at San Francisco to be afflicted with clonorchiasis, a dangerous contagious disease, was denied admission by the board of special inquiry, and was deported to China. He again returned to the United States on March 2, 1920, was again certified by the medical examiner to be afflicted with clonorchiasis, and was again denied admission and ordered to be deported by a board of special inquiry. His request that the entire record be forwarded to the Secretary of Labor for consideration was denied.

Both of these applicants for admission applied for writs of habeas corpus in the court below. Demurrers to the petitions were sustained, and the writs were denied. The appeals present two principal questions: First, whether the appellants, who were formerly domiciled in the United States as Chinese merchants, are subject to the excluding provisions of the Immigration Act of February 5, 1917; second, whether the hearings which resulted in their exclusion by the immigration officers were fair.

[1] It is contended that the merchant's return certificates which the appellants presented at the time when they sought readmission to the United States were conclusive findings establishing their right to readmission, whether their rights were determinable under the Chinese

Exclusion Laws, or under the Immigration Act of February 5, 1917. The purpose of readmission certificates is to avoid detention and to facilitate the readmission of Chinese aliens who are entitled to return to the United States under the Chinese Exclusion Laws. They have no binding effect as adjudications of the right to return. Ex parte Stancampiano (C. C.) 161 Fed. 164; Lew Quen Wo v. United States, 184 Fed. 685, 106 C. C. A. 639; Ex parte Wong Yee Toon (D. C.) 227 Fed. 247; Ex parte Chin Own (D. C.) 239 Fed. 391.

[2] Nor is the contention sustainable that a Chinese merchant once lawfully domiciled in the United States acquires thereby a status which entitles him to readmission. In Lem Moon Sing v. United States, 158 U. S. 538, 547, 15 Sup. Ct. 967, 971 (39 L. Ed. 1082), the court said:

"He is none the less an alien because of his having a commercial domicil in this country. * * * His personal rights when he is in this country, and such of his property as is here during his absence, are as fully protected by the supreme law of the land as if he were a native or naturalized citizen of the United States. But when he has voluntarily gone from the country, and is beyond its jurisdiction, being an alien, he cannot re-enter the United States in violation of the will of the government as expressed in enactments of the law-making power."

[3] Nor is such status as a former domiciled merchant a bar to deportation under the act of 1917. In Lapina v. Williams, 232 U. S. 78, 34 Sup. Ct. 196, 58 L. Ed. 515, it was held that the provisions of the Immigration Act of 1907, respecting admission and deportation, apply to an alien who, having remained in this country for more than three years after his entry, and having gone abroad for a temporary purpose with the intention of returning, again seeks admittance to the United States. That the Act of February 5, 1917, is applicable to the situation of Chinese aliens presented by the present cases is decided by this court in Ng Fung Ho v. White (C. C. A.) 266 Fed. 765, and it is unnecessary to add to the discussion there contained.

[4] It is contended that the hearings were unfair. Reference is made to the seventh proviso of section 3 of the Act of 1917, which provides that aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe; and it is contended that the hearing in Pang Hing's Case was unfair in that submission to the Secretary of Labor of his application for admission was denied. It was denied because of rule 16 of the Department which provides that an absence not exceeding six months shall be deemed a temporary absence within the meaning of the law. In these cases the absences were for a much longer period than six months, and we find no ground for holding that rule 16 is unreasonable, or that the hearings were unfair for the reason that it was applied to the case of one of appellants.

[5] It is contended further that the hearing was unfair, for the reason that the appellants were not examined by two physicians

under section 16 of the act of 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼i), which provides that—

"All aliens arriving at ports of the United States shall be examined by not less than two such medical officers at the discretion of the Secretary of Labor, and under such administrative regulations as he may prescribe and under medical regulations prepared by the Surgeon General of the United States Public Health Service."

On August 1, 1917, in pursuance of that regulation, the Surgeon General issued regulations for the guidance of medical officers of the Public Health Service, one of which was that the medical examination may be made by one medical officer. Whether that rule was an abuse of the discretion vested in the Secretary under section 16, or that the observance thereof rendered the hearings unfair, we need not determine, for there is no showing that the rights of the appellants have been in any way prejudiced by the fact that they were examined by one medical officer instead of by two, nor is mention made of the fact in the petitions for habeas corpus, and there is no attempt to dispute the truth of the medical officer's findings that each of the appellants was afflicted with clonorchiasis.

[6] The petitions attempt to put in issue the character of clonorchiasis, and they allege that it is not a dangerous contagious disease. With that issue the courts have nothing to do. Section 3 of the Act of February 5, 1917, excludes from admission into the United States persons afflicted with tuberculosis, or with a loathsome or contagious disease, and the statute provides that the decision of the board of special inquiry adverse to the admission of the alien shall be final, where it is based upon a medical certificate showing that the alien is afflicted with a dangerous contagious disease. The Surgeon General, in pursuance of the authority conferred upon him by section 16 of the act, has classified clonorchiasis as a dangerous contagious disease.

[7] It is alleged in the petitions that by the action of the immigration officials at San Francisco the appellants have been denied their rights under article 2 of the Treaty with China of November 17, 1880 (22 Stat. 826), which guarantees to Chinese subjects the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation. They allege that on their return to the United States by steamer discrimination was made between the petitioners and the first cabin passengers, in that the former were compelled to go to the Angel Island Immigration Station, and to the Immigration Hospital for the purpose of having particular examination made of their physical condition, and that this test was imposed upon them simply and solely because they were Chinese aliens, whereas first cabin passengers were submitted to no such test. To this it is to be said that, if special examination was made of second-class Oriental passengers only, it should be assumed that it was done for the reason that the disease of clonorchiasis was most likely to be found among such passengers, the source of the disease being supposed to be a diet of raw fish, and it should be assumed that in failing to subject first-class passengers to like test there was no discrimination

against Chinese persons, or withholding of their rights. The officers presumably did their duty in subjecting the petitioners to the test. If they failed to do their duty as to other passengers, it is not a ground for disturbing the conclusions of the board of special inquiry as to the appellants.

The judgments are affirmed.

FOWLER et al. v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. May 16, 1921.)

No. 3597.

1. **Conspiracy ⟸33—Larceny ⟸7—Government, in control of railroads, had special property in equipment sufficient to sustain conviction for stealing government property.**
   The federal government, while in control and management of the railroads in pursuance of law, was a bailee for hire thereof, and as such had a special ownership of the railroad property sufficient to sustain a conviction for purloining such property, under Penal Code, § 35, as amended by Act Oct. 23, 1918 (Comp. St. Ann. Supp. 1919, § 10199), or for conspiracy to defraud the government by taking such property, under Penal Code, § 37 (Comp. St. § 10201).

2. **Larceny ⟸32(1)—Ownership can be alleged in lawful possessor, regardless of owner of title.**
   In an indictment for larceny, it is sufficient to allege the ownership in the lawful possessor of the goods, whether such owner has legal title or not.

3. **Conspiracy ⟸24—Formal agreement between parties is unnecessary.**
   A formal agreement between the parties concerned is not essential to the formation of a conspiracy, but it is sufficient if there is concert of action, all the parties working together understandingly, with a single design, for the accomplishment of a common purpose.

4. **Criminal law ⟸678(1)—Evidence held to show general plan for looting railroad cars, so that election between conspiracies was unnecessary.**
   In a prosecution against a large number of defendants for conspiracy to steal property in interstate shipment, and to steal railroad property under control of the government, evidence *held* to sustain an inference that the various acts shown by the government's evidence were part of one general plan by railroad employés and others to loot the railroad cars during transit, though the defendant who pleaded guilty had dealt with only three of the other defendants in one transaction, so that it was not error for the trial court to refuse to compel the government to elect on which particular transaction it would rely.

5. **Witnesses ⟸352—Evidence defendant's witness knew defendant had been convicted of crime held admissible as to credibility of witness.**
   Where witness for defendants testified she had known one defendant for several years, and that he had been a guest at her hotel, it was not error to permit cross-examination to show that she knew he had previously been convicted of a crime, which had some bearing on her credibility.

6. **Conspiracy ⟸45—Evidence as to method of opening freight cars without breaking seal held competent.**
   In a prosecution for conspiracy to steal goods from interstate shipments, testimony by a witness that he was acquainted with a method of opening doors of a freight car to permit entrance without breaking the seal, and a description of the method was competent.

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

*Rehearing denied August 1, 1921.

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

Lemuel S. Fowler, Thomas Singer, and others were convicted of conspiracy, and the named defendants bring error. Affirmed.

The plaintiffs in error, Lemuel S. Fowler and Thomas Singer, with 15 others, were indicted under three counts:

Under count 1, for having conspired to commit an offense against the United States—that is, to violate section 1 of the Act of Congress approved February 13, 1913 (Comp. St. § 8603); the purposes and objects being to break the seals of railroad cars containing interstate and foreign shipments of freight and express, with intent to commit larceny therein, to enter such cars with intent to commit larceny therein, to steal, take, carry away, and conceal, and by fraud and deception obtain from certain railroad cars, station houses, and platforms, with intent to convert to their own use, certain goods and chattels of value, then and there moving in interstate commerce and constituting interstate shipment, and to buy, receive, conceal, and have in their possession certain goods and chattels of value, which were to the conspirators known to have been stolen, taken, and carried away from such railroad cars, station houses, platforms, and depots, with intent on the part of those engaged in the theft to convert the same to their own use, such goods constituting a part of interstate shipment, etc.

Under count 2, for having conspired to violate section 35 of the Penal Code, as amended by Act of Congress approved October 23, 1918 (Comp. St. Ann. Supp. 1919, § 10199); the purpose and object being to take, steal, and carry away for their own use, with intent to purloin, certain personal property of value of the United States, from certain railroad cars, station houses, platforms, and depots then and there in federal possession and control.

Under count 3, for having conspired to defraud the United States by stealing, carrying away, purloining, and embezzling, and converting to their own use, goods and chattels then and there moving in and constituting interstate shipment under federal control, and then and there being in the possession of the United States as a common carrier of goods for hire; also certain tools, equipment, and property then and there used in the maintenance and operation of certain railroad routes and transportation systems then and there under federal control.

Certain of the defendants, including Fowler, but not Singer, interposed a demurrer to each count of the indictment, which was overruled. After trial, Fowler and Singer were, with others of the defendants, but not all of them, convicted. From the judgment following conviction, Fowler and Singer prosecute a writ of error.

John F. Dore, of Seattle, Wash., for plaintiffs 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.

WOLVERTON, District Judge (after stating the facts as above). [1] By their third assignment of error, plaintiffs in error challenge the sufficiency of each count of the indictment. Counsel in his brief here admits the sufficiency of the first count, but insists that the second and third counts are not good, because the property that it was charged to be the purpose of the conspirators to purloin was not the property of the United States, and could not be so considered, within

the purview of section 35 of the Penal Code as amended, or of section 37 of such Code (Comp. St. § 10201).

We think it a sufficient answer to this contention to say that the general government was at the time in the actual control and management of the railroads of the country in pursuance of law, and was acting in that capacity as a bailee for hire. As such common carrier, it had a special property in the goods, chattels, and merchandise carried, and by virtue of such ownership it was entitled to maintain as against third parties an action for damages to the property, or to recover possession thereof, if wrongfully taken from it. 6 Cyc. 435.

[2] So it is that in an indictment for larceny it is sufficient to allege ownership in the lawful possessor of the goods, whether such owner has the legal title or not. 25 Cyc. 89. We are of the opinion, therefore, that such special ownership in the government, in view of the indictment, meets the purposes of section 35 of the Penal Code as amended, and of section 37 of such Code, and that counts 2 and 3 of the indictment are sufficient.

Assignments of error 1, 2, and 4 may be considered together. They relate to certain motions addressed to the court to require the government to elect upon which of several supposed conspiracies it would proceed to trial. For instance, at the conclusion of the testimony given by William Ratcliff, a witness for the government, who was jointly indicted with the other defendants and entered a plea of guilty, and when it was attempted to examine Roy Ayers, also a witness for the government, the defendants moved that the government be required to elect as to which of the several conspiracies that might appear to have been entered into by the several alleged conspirators it would pursue on the trial. The statement of counsel at the time indicates the purpose of the motion. He says:

"Now, to narrow this case, we demand at this time, or at least to save time, the government state to the court what conspiracy they are trying here, and who they intend to prove the conspirators are, and they be permitted to introduce no testimony against any defendant, except such as they may state to the court their proof will show to be members of the conspiracy that Ratcliff has already testified to."

The court overruled the motion, on the ground that he could not say in advance what the evidence would be. This ruling counsel now admits was not error. At the conclusion of the government's testimony, the defendants again moved:

"That the government be compelled to elect upon which of the number of separate and distinct and unrelated and disconnected criminal agreements the proof as framed shows to have been established the government seeks a conviction."

This was based upon the contention that the testimony of Ratcliff disclosed that he had an agreement with Dave Jones and Hanson to steal certain shoes and matting, and that he never had any further criminal agreement with any of the other defendants, or any person, except the arrangement he had with the decoy salesman, Ayers.

Ratcliff did say, on cross-examination, that Hanson and Jones were the only defendants with whom he had an agreement to commit a

crime against the railroad. This relates to an express understanding he had with these two defendants. Ratcliff was a conductor on a freight train of the railroad. C. H. Goldman, Dave Jones, and H. W. Hanson were brakemen on the same train. Ratcliff testified that he overheard a conversation between Jones and Hanson relative to getting some cases of shoes from a freight car; that after the conversation they carried the shoes off the train and put them in the salal brush; that Hanson said he had a sale for the shoes, and that the money would be divided among the three of them (Ratcliff, Jones, and Hanson); that Hanson gave samples of the shoes to a man by the name of Ayers, to be sold at Renton; that later, on the evening of March 27th, the witness, Hanson and his wife, and Ayers went to the place of deposit and got two cases of the shoes, put them into Ayers' car, and took them to Auburn. On arriving there Hanson, claiming to be tired, prevailed upon Ratcliff to go to Renton and collect the money for the shoes. Witness and Ayers went to the St. Elmo Hotel in Auburn to find Fowler, one of the plaintiffs in error. Not finding him there, they went to the foot of Cemetery Hill and worked a signal a few times, in response to which Fowler came, with another man, in a car containing 12 automobile tires. After some conversation between Ayers and Fowler, Ayers, accompanied by witness, drove his car to Renton, followed by Fowler. Ayers drove into a garage at Renton, and after unloading the shoes backed out. Fowler and Mellison—the latter being the man first seen with Fowler—drove their car into the garage. At this time the officers came and arrested Ratcliff, Fowler, and Mellison. Ratcliff further testified to the fact that Hanson and Jones took two rolls of matting off Hanson's train on March 2d, which were afterwards hauled to Covington and put off in the brush. He also testified to some tire transactions he had with Hanson.

Roy Ayers, who was really a decoy, corroborates Ratcliff in almost every material detail as to their relations with Fowler and with each other, and it was he who had arranged to dispose of the shoes for Ratcliff and the tires for Fowler. Ayers testified, on cross-examination, that he learned that Fowler had tires to sell through a conversation with one Scott, and that Fowler came to him and told him he had 13 tires, and witness told him he had a buyer at Renton; that "Fowler was just an addition to the party." To the question, "You picked him up accidentally?" he answered, "Just accidentally."

Clifford W. Scott testified that he had a conversation with Fowler, in which he asked him if he had some tires he wanted to get rid of, to which Fowler answered in the affirmative, and that afterwards they met Ayers.

As to the defendant Thomas Singer, an overcoat and two suits of clothes were found in his possession. There is much detail about this. Singer was associated, in relation to the overcoat, with defendant Edward Bourdell, who, after he had changed his plea to guilty, committed suicide. It was also in testimony that Singer at one time was endeavoring to sell some shoes cheaply. Bourdell and Singer were operating together in that transaction.

It was further shown in evidence that 294 tires were shipped by railroad in interstate commerce from Seattle to Portland; that when checked up at Auburn 58 were found to be missing, and that 13 of these tires were found in the possession of Fowler at Renton; that a shipment of overcoats was made by railroad from Chicago to Seattle, which upon arrival was found to be short; 5 of these were found in the house of defendant Creed Lane, 2 in the possession of defendant Bellamy, and 1 in the store of Singer. The train crew that handled the car containing the goods in transit from Ellensburg to Auburn consisted of Conductor Thomas Jones, Creed Lane, and Ed Bourdell.

The theory of the government is plain, namely, that there was manifestly an organized group of evil-disposed persons who had for their purpose the looting of freight and express trains and cars, and the disposition of the spoils to avail themselves of the profits of their engagement. So it was that many persons were charged with conspiring to engage in the unlawful enterprise.

The contention of plaintiffs in error that the court should have directed the government to elect as to which of several conspiracies it should pursue is based upon the postulate or assumption that there were several groups of persons engaged in several distinct conspiracies, and that all were combined in the so-called dragnet of the government's indictment. This, counsel argues, is shown by the testimony of Ratcliff that the agreement to do the wrong in which he was implicated was between himself and two other persons only, namely, Jones and Hanson.

[3] However, when we come to understand of what a conspiracy consists and how it may be accomplished, if it be found that the postulate is without basis in fact, so far as the plaintiffs in error are concerned, it would follow that the contention is faulty. It is well settled that a formal agreement of the parties concerned is not essential to the formation of a conspiracy. It is sufficient if there be concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose. 8 Cyc. 621. As is said in Reilley v. United States, 106 Fed. 896, 905, 46 C. C. A. 25, 34:

"If the evidence of the separate details of the transaction as it was carried out indicates with the requisite certainty the existence of a preconcerted plan and purpose, that is sufficient."

See, also, Davis v. United States, 107 Fed. 753, 46 C. C. A. 619, and Doyle v. United States, 169 Fed. 625, 95 C. C. A. 153.

[4] It will be seen by reference to the testimony that, while Ratcliff says his agreement was with Jones and Hanson only, he is found by his own statement to be acting with Fowler in the attempt to dispose of property that came off the freight cars operated by the railroad, and the testimony of Ayres is strongly corroborative of the circumstance. Further comment is unnecessary, as it is at once apparent that the strong tendency of the testimony is to the effect that Fowler was engaged in the same unlawful enterprise with Ratcliff, Jones, and Hanson.

As it relates to Singer, the testimony tends to show that he was acting in concert with Bourdell, who was at one time a brakeman on

the railroad, in dealing with goods that were manifestly a part of the loot that came from the cars used in interstate shipment. The proximity of time adds force to the idea that all, including Ratcliff, Jones, Hanson, Bourdell, and Singer, were engaged in the common enterprise of looting the trains and disposing of the spoils. It follows that the contention is not well founded and that there was no error in the action of the court in declining to require the government to elect as to which of the supposed conspiracies it should prosecute.

A reference to the testimony herein noted disposes also of the fifth assignment of plaintiffs in error, as it is at once apparent that the testimony was sufficient to carry the case to the jury for their consideration.

[5] The sixth assignment of error relates to a question propounded on cross-examination to Sarah Lewis, a witness for the defendants, as follows:

"You knew he [Fowler] was arrested and charged and convicted of stealing during that time?"

To which she was permitted to answer, and did answer:

"Yes; I did."

It appeared from her testimony that she had known Fowler for 9 or 10 years, and that he had been a guest at her hotel since 1913. In view of the association of the parties, and as the question had some bearing on witness' credibility, the objection was properly overruled.

Assignments of error numbered 7 and 8 have no exceptions to support them.

[6] The ninth assignment relates to testimony adduced and allowed to the effect that one Winquist, a witness under examination, was acquainted with the method of opening the doors of a freight car, so as to permit entrance without breaking the seal; the method being also described. The testimony was competent.

The remaining assignments—10, 11, and 12—have been examined, and we find them to be without merit.

Judgment affirmed.

ANDERSON et al. v. UNITED STATES.*

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

Nos. 5670–5695.

1. Conspiracy ⇐34—Elements of conspiracy to forcibly prevent execution of laws.

The offense of conspiracy "by force to prevent, hinder or delay the execution of any law of the United States" is not committed by concert in setting the law itself at defiance, but the purpose of the conspiracy must be forcible resistance to the authority of the United States while endeavoring to carry the law into execution.

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

*Rehearing denied June 16, 1921.

2. **Conspiracy ⟸43(5)—Allegations of overt acts in indictment may be considered as explanatory of charge.**
While a charge of conspiracy cannot be aided by averments of acts done in furtherance of it, averments of overt acts in an indictment for conspiracy, not elements of the offense under the statute, may be looked to as explanatory of the charge.

3. **Conspiracy ⟸43(11)—Indictment for conspiracy by force to prevent execution of laws of United States held insufficient.**
An indictment under Criminal Code § 6 (Comp. St. § 10170), for conspiracy by force to prevent, hinder, or delay the execution of laws of the United States, *held* insufficient to charge the offense defined by the statute.

4. **Indictment and information ⟸130—Counts in indictment for conspiracy under different statutes held properly joined.**
Counts charging conspiracies under Criminal Code, § 37 (Comp. St. § 10201), under Espionage Act June 15, 1917, tit. 1, § 4 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212d), and under Lever Act Aug. 10, 1917, § 9 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½i), being for the same class of offenses, *held* properly joined in one indictment, under Rev. St. 1024 (Comp. St. § 1690).

5. **Indictment and information ⟸125(5½)—Count not duplicitous for charging conspiracy to commit different offenses.**
A count in an indictment for conspiracy is not duplicitous because it charges the object of the conspiracy to have been to commit more than one offense against the United States.

6. **Indictment and information ⟸10—That improper evidence was presented to grand jury not ground for setting aside.**
An indictment cannot be set aside on the ground that evidence unlawfully obtained was used before the grand jury unless it affirmatively appears that there was no lawful evidence presented on which it could have been based.

7. **Criminal law ⟸395—Documents of association may be used as evidence against member.**
The constitutional protection of a defendant from the use as evidence against him of papers or documents unlawfully seized from his person or possession does not apply to papers or documents of an association of which he is a member, used in the perpetration of criminal offenses with which he is charged, and which were not taken from his possession, but from that of the association.

8. **Criminal law ⟸1149—Ruling on demurrer not assignable as error.**
It is the general rule that the action of a trial court in overruling a motion to quash or demurrer to an indictment is not assignable as error.

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

Criminal prosecution by the United States against C. W. Anderson and 25 others. Judgment of conviction, and defendants separately bring error. Reversed in part, and affirmed in part.

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

S. B. Amidon, Sp. Asst. Atty. Gen., of Wichita, Kan., and L. S. Harvey, Asst. U. S. Atty., of Kansas City, Kan. (Fred Robertson, U. S. Atty., of Kansas City, Kan., on the brief), for the United States.

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

LEWIS, District Judge. The twenty-six plaintiffs in error were tried convicted and sentenced on four counts of an indictment charging them with criminal conspiracies. The proceedings at the trial are not in the record, and the only action of the trial court which we are asked to consider is its orders overruling a demurrer and motion to quash, which challenged the sufficiency of each count. The indictment covers thirty-two pages of the record; the motion to quash, with attached exhibits and affidavits in support, the answer thereto, traversing the facts set up, with exhibits attached and affidavits in support of the answer, cover forty pages of the record; and the demurrer twenty pages. The demurrer embodies every conceivable criticism, duplicity, repugnancy and surplusage as to each count, that the counts could not properly be joined in one bill, that none of them charges the commission of a crime in violation of the laws of the United States, that as to each count the court was without jurisdiction, that each count is too vague, indefinite and uncertain to advise the defendants of the offenses for which they are to be put on trial. It descends to particulars in criticism of words, phrases and sentences in each count, for instance, that it cannot be ascertained in what sense the word "unlawful" is used, whether unlawful under municipal, state, federal or international law. It embodies more than one hundred grounds of alleged insufficiency of each and all of the counts. The motion to quash attacks the validity of the proceedings before the grand jury which returned the bill, and includes also some of the broader grounds of objection set up in the demurrer.

A full consideration of the first count will not only enable us to determine whether the court erred in sustaining it as good, but will also go far in solving the same inquiry as to the other three counts. We proceed, then, to set out the substance of the first charge. It is based on that part of Section 6 of the Criminal Code which reads: "If two or more persons conspire by force to prevent, hinder or delay the execution of any law of the United States" (Comp. St. § 10170) they shall be punished as in the section stated. It charges that the twenty-six plaintiffs in error entered into a conspiracy with twelve other named persons, and with divers others to the grand jurors unknown, "by force to prevent, hinder and delay, in violation of Section 6 of the Penal Code of the United States, the execution of certain laws of the United States, to wit." The laws of the United States, execution of which the conspiracy was formed to prevent, hinder and delay by force, are set out by appropriate references, and are these:

1. The Resolution of April 6, 1917, declaring a state of war between the United States and the Imperial German Government (40 Stat. 1).

2. The Proclamation and Regulations of the President of the same date, governing the conduct, treatment and disposition of alien enemies, made pursuant to Sections 4067, 4068, 4069, 4070, R. S. U. S. (40 Stat. Vol. 2, 1650).

3. Act of Congress May 18, 1917, entitled: "An Act to Authorize the President to increase temporarily the military establishment of the United States," the Proclamation of the President of May 18,

1917, fixing time for registration under the Act, the registration regulations prescribed by the President, and the rules and regulations for local and district boards prescribed by the President June 30, 1917, under the Act (40 Stat. 76).

4. Act of Congress July 24, 1917, entitled: "An Act to authorize the President to increase temporarily the Signal Corps of the army," etc. (40 Stat. 243 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 1867f–1867*o*]).

5. Act of Congress August 10, 1917, entitled, "An Act to provide further for the national security and defense," etc. (40 Stat. 276 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115⅛e–3115⅛v]).

6. And Sections 4, 37, 42, 43, 135 and 136 of the Criminal Code (35 Stat. 1088 [Comp. St. §§ 10168, 10201, 10206, 10207, 10305, 10306]).

Although Section 6 does not require an overt act as an element of the crime which it denounces, the first count sets forth twenty alleged overt acts committed by the defendants and their co-conspirators "in and for executing said unlawful and felonious conspiracy." These overt acts cover twenty-two pages of the printed record, and are followed by the usual formal conclusion that the grand jurors "do say that said defendants, and their said co-conspirators, during said period of time, at the place and in the manner and form aforesaid, unlawfully and feloniously have conspired by force to prevent, hinder and delay the execution of the laws of the United States," etc. It is charged that the conspiracy was formed and continued from April 6, 1917, to November 25, 1917, in Butler County, Kansas. Before summarizing the overt acts we direct attention to the opening charge, which covers three printed pages and precedes the charge proper by way of inducement or aggravation. It alleges that prior to April 6, 1917, and continuing thereafter, there existed in the United States, and within the jurisdiction of the court, an organization of persons under the name of Industrial Workers of the World, commonly called "I. W. W." and "O. B. U.," that a portion of said organization was also known as "Agricultural Workers Industrial Union Number 400," "Agricultural Workers Organization of the I. W. W. Number 400," "Oil Workers Industrial Union Number 450", and "O. W. I. U. Number 450," that there were several thousand persons in said organization distributed in various parts of the United States, including Kansas and Oklahoma, many of them being laborers in different branches of industry necessary to the existence and welfare of the people and of the government, among others the transportation, oil, fuel, natural gas and farming industries, that defendants were members of said organization and were known as "militant members of the working class" and "rebels," holding various offices, employments and agencies therein, and that the special purpose of defendants within said organization was to prevent, hinder and delay the execution of the laws of the United States, that defendants were actively engaged in conducting the association and carrying out and propagating its principles by written, printed and verbal exhortations, and were and had been engaged in attempting to accomplish, and in part had accomplished, the

objects of the unlawful and felonious purposes of said Industrial Workers of the World. It is further alleged that said organization was for the assumed purpose of advancing the interests of laborers as a class; that they sought the complete ownership and control of all property and the means of producing and distributing property, through the abolition of all other classes of society; that they call all who are not members of their organization "capitalists," "the master class," "the ruling class," "exploiters of the workers," "bourgeois," and "parasites"; that their purpose was to abolish all other classes by the continual and persistent use and employment of unlawful, criminal and forcible means and methods, involving threats, assaults, injuries, intimidations, arson, murders, and injury to and destruction of property by the practice of "sabotage," "direct action," "working on the job," "wearing the wooden shoe," "working the scab-cat," and "slowing-down tactics," also forcible resistance to the execution of all laws of the United States, and finally forcible revolutionary overthrow of all existing governmental authority in the United States; that these means and methods were to be resorted to in local industrial and general strikes of laborers, and in disregard of the right of the United States to execute its laws, and with the especial and particular design of seizing the opportunity presented due to the necessity of the United States expeditiously and successfully carrying on its war with the Imperial German Government, well knowing that in so doing the necessary effect would be to hinder and delay, and in part prevent the execution of the laws of the United States, and thereby they proposed to limit the facilities for transporting, producing, manufacturing, storing and dealing in necessaries, especially fuel, oil, natural gas, food and farm products, to restrict the supply of such necessaries and to restrict their distribution, all of which were required and necessary for the successful prosecution of the war and the support and maintenance of the army and navy; that one of the purposes of said organization was to discourage, obstruct and prevent the prosecution of said war by the United States and the execution of its laws for so doing, by advising, counselling and procuring members of said organization available for duty in the military and naval forces to fail to register, to fail and refuse to enlist for military service, and by inciting other persons not members of the organization so to do,—and this was to be accomplished by use of all of the methods aforesaid, and as a forcible means of preventing, hindering and delaying the execution of said laws of the United States, and to forcibly conceal and rescue members from said military and naval forces.

Referring now to the overt acts,—the first charges some of the conspirators, naming them, with causing to be printed in a newspaper called "Solidarity," of date September 1, 1917, at Chicago, what is entitled, "Preamble Industrial Workers of the World." The preamble is set out. It recites a conflict between the working class and the employing class, it urges the abolition of the wage system and that the working class take possession of the earth and the machinery of production, it advocates strikes to accomplish the end, and that the la-

boring class organize to overthrow capitalism, and it is then alleged that some of the conspirators circulated the paper containing the preamble in the district of Kansas.

The second overt act charges that one of the conspirators distributed and gave out this paper within the district.

The third charges that the defendants, from April 6 to November 20, 1917, distributed, circulated and read within the district a book by Emile Pouget, entitled "Sabotage," and then quotes a number of extracts from the book which advocate the temporary disabling, but not destruction, of machinery, denominating such action as "the chloroforming of the organism of production, the 'knockout drops,'" that a little sand or emery powder in the gear of machinery will render it palsied and useless.

The fourth overt act charges that the defendants, between April 6 and November 20, 1917, distributed, circulated and caused to be read within the district a book entitled "I. W. W. Songs to Fan the Flames of Discontent," which book contained the preamble set out in the first overt act, and it then sets forth the words of the songs, the first being a glorification of the red flag, the second advocates destruction or putting out of operation farm machinery, unless a demand for higher wages and shorter hours is conceded, the third is of like import, and the fourth portrays the horrors of war.

The fifth overt act charges the distribution during the time named, within the district, of a book or pamphlet entitled "Sabotage, its History, Philosophy and Function, Walter C. Smith," followed by many quoted passages of the character already noted.

The sixth charges the distribution and circulation in Butler County during the time stated of a newspaper, "Solidarity," of issue July 28, 1917, containing an article condemning the war and giving notice that any member of the organization who joined the military forces would be expelled.

The seventh charges the publication of a song, the words of which are set out, and the sentiment of which is not to enlist for military or naval service, published in a newspaper, "Industrial Worker," of April 14, 1917, at Seattle, Washington, and circulated in Butler County within the time stated.

The thirteen remaining overt acts are either like those already mentioned or else correspondence between the conspirators in reference to the organization to which they belong and its activities, and the efforts being made to increase its membership in the Kansas and Oklahoma oil-producing territory. They need not be noticed in detail.

[1] With this general statement, but complete enough in detail for a correct determination of the issues raised by the motion and demurrer to the first count, we are brought to a consideration of the question as to whether that count charges a commission of the offense denounced by Section 6. The elements of that offense are definitely stated in Baldwin v. Franks, 120 U. S. 678, 7 Sup. Ct. 656, 32 L. Ed. 766; in which the part of Section 6 above quoted was under consideration, and it was said:

"The offense consists in preventing, hindering, or delaying the government of the United States in the execution of its laws. This, as well as the other (other parts of Section 6), means something more than setting the laws themselves at defiance. There must be a forcible resistance of the authority of the United States while endeavoring to carry the laws into execution. The United States are bound by their treaty with China to exert their power to devise measures to guard the subjects of that government lawfully residing within the territory of the United States against ill treatment, and if in their efforts to carry the treaty into effect they had been forcibly opposed by persons who had conspired for that purpose, a state of things contemplated by the statute would have arisen."

[2, 3] There must, therefore, be found in the first count a charge that the purpose of the conspiracy was the exertion of force against those charged with the duty of executing the laws of the United States, or the language used in the count must be such that from it the inference reasonably follows that that was the purpose and object of the conspiracy; and unless the count can be so construed it is bad and fails to charge the offense. Inasmuch as overt acts are not elements of the offense, are not required to be plead, and the crime defined does not stand in abeyance or suspense until an overt act has been committed, we may look to them as explanatory of the charge against the defendants. In doing so we do not mean to in any way qualify the rule laid down in U. S. v. Britton, 108 U. S. 199, 2 Sup. Ct. 531, 27 L. Ed. 698, and the cases following it in the Supreme Court and this Court, that a charge of conspiracy cannot be aided by averments of acts done in furtherance of it. This Court has held that they may be viewed in that aspect. Smith v. U. S., 157 Fed. 721, 725, 85 C. C. A. 353. And in determining the scope and meaning of the statement of the charge, we are of opinion that the inducement bears directly upon the inquiry as to whether the charge includes the force required by the statute as an element of the offense. This rule prevails here as to overt acts under statutes which require them to be pleaded and proved. Stearns v. U. S., 152 Fed. 900, 904, 82 C. C. A. 48. And for like reasons facts plead in aggravation should be looked to in determining the meaning and effect to be given to the charge proper when it be at all in doubt. The necessity for this arises from the fact that we have searched the count for a charge of the requisite force to prevent, hinder or delay the execution of a law of the United States as an element of the conspiracy and have failed to find it. It goes no further in that direction than to use the general words found in the section. If matters plead in aggravation and as overt acts were put out of view, and the remainder of the charge in the short words of the statute were alone considered, the inquiry would be whether that constitutes a good charge, but it cannot be brought down to that basis for consideration. Because, viewing the count as a whole, including inducement and alleged overt acts, we find that it specifically charges the intended employment of force. That force was to be exerted, not against those whose duty it should be to execute the laws, and while attempting to do so, but its application was to be made against industrial and commercial activities and interests by lawless acts during strikes for the purpose of accomplishing alleged socialistic ends in the

overthrow and destruction of the present civil compact. Inasmuch as this count not only fails to charge the intended use of the requisite force as an element of the conspiracy, but specifically charges that a force was to be exerted in a manner and for a purpose not within the statute, it negatives any inference that might be indulged from the use of the bare statutory words that the prohibited force inheres in the charge. Furthermore, there is extreme doubt and perplexity in the conception that the force contemplated under Section 6 could be at all used to prevent or delay the execution of many of the laws pointed out in the charge and named as the laws the execution of which the conspiracy was formed to prevent. We are, therefore, of opinion that when the entire count is considered, the only reasonable conclusion that can be reached is that it wholly fails to charge an offense under Section 6, and that the objections to it were good and should have been sustained.

The second count is based on Section 37 of the Criminal Code, and charges that the defendants entered into a conspiracy which continued to exist in Butler County, Kansas, from May 18 to November 25, 1917, to commit divers and various offenses against the United States, in aiding, abetting, counselling, commanding, inducing and procuring many male persons who were subject to duty in the military and naval service under the Act of May 18, 1917 (40 Stat. 76), to fail and refuse to present themselves for registration for such duties as required by the Act, and to induce others who were in the service to desert. The alleged overt acts stated in the first count are by reference made overt acts in this count.

The third count is based on Sections 3 and 4 of Title 1, Act of June 15, 1917 (40 Stat. 217 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10212c, 10212d]). It charges that the defendants entered into a conspiracy which continued from June 15 to November 25, 1917, in Butler County, Kansas, to commit an offense against the United States, that is, to cause or attempt to cause insubordination, disloyalty and refusal of duty in the military and naval forces of the United States when the United States was at war; and that this was to be done by means of personal solicitation, by speeches, and by articles printed in newspapers and pamphlets and distributed throughout the district. It was further charged in this count that another object and purpose of the conspiracy was to use the same means to obstruct recruiting and enlistment in the service of the United States when it was at war, to the injury of the service and of the United States; and by reference the alleged overt acts in the first count are made overt acts in this count.

The fourth count is based on Sections 4 and 9 of the Act of August 10, 1917 (40 Stat. 276). It charges that the defendants entered into a conspiracy which continued from August 10 to November 25, 1917, in Butler County, to limit the facilities for transporting, producing, manufacturing, supplying, storing and dealing in necessaries, including fuel, oil, natural gas, food and farm products, and to restrict the supply and distribution of those necessaries; that this conspiracy was to be carried out by causing and inducing local and general in-

dustrial strikes of laborers engaged in those industries and by the practice of "sabotage," "direct action," "working on the job," "wearing the wooden shoe," and by various other means advocated and employed by the organization known as the Industrial Workers of the World. The overt acts set up in the first count are by reference made overt acts under this count.

[4] It is objected that these three counts cannot be joined in one indictment. Each count charges a conspiracy to commit one or more offenses against the United States. They all belong to the same class of crimes, and under the clear terms of the statute may be joined. R. S. U. S. § 1024 (Comp. St. § 1690); Pointer v. U. S., 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208; Gardes v. U. S., 87 Fed. 172, 30 C. C. A. 596; Chadwick v. U. S., 141 Fed. 225, 72 C. C. A. 343; Hartman v. U. S., 168 Fed. 30, 94 C. C. A. 124.

[5] It is also claimed that each count is duplicitous because the object and purpose of the conspiracy charged in each was the commission of more than one offense against the United States. This is also without merit. Frohwerk v. U. S., 249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. 561; Brewing Co. v. U. S., 206 Fed. 386, 124 C. C. A. 268; Knauer v. U. S., 237 Fed. 8, 150 C. C. A. 210; Knoell v. U. S., 239 Fed. 16, 152 C. C. A. 66.

The motion to quash embodies some of the objections raised by the demurrer, but its principal ground, which is relied upon here, relates to matters that do not appear upon the face of the indictment and should have been brought forward by plea in abatement rather than by motion; nevertheless, we will consider the objection which it raises without regard to form. It sets out:

"That there was submitted to and considered by the grand jury, which returned said indictment, and said indictment as against these defendants is largely founded upon letters and papers and documents unlawfully taken from either the person of the various defendants * * * or from the places of residence of said defendants * * * and constituted a part, if not all, of the testimony submitted to said grand jury, and was a part of, if not the entire, evidence upon which the grand jury returned the indictment herein."

Before the motion was filed the defendants had presented to the court a petition for the return of the papers referred to in the motion, and that petition is attached to the motion as an exhibit. And in support there are a large number of affidavits setting forth that the papers in controversy were taken from the custody of some of the defendants under search warrants alleged to have been void, that some were taken from the persons of some of the defendants at the time they were put under arrest, and that some perhaps were taken from premises which some of them occupied, without any warrant therefor. The district attorney filed a verified answer to the motion to quash, in which it is alleged that none of the defendants or their counsel who made affidavits in support of the petition for the return of the papers appeared before the grand jury, or at any time had access to the facts which were considered by the grand jury, that the indictment was not founded in any manner upon personal and private letters, papers and documents unlawfully taken from the defendants

and no such papers were used as evidence before the grand jury, that on hearing the petition for return of the papers the court ordered that all of the private papers taken from the defendants should be returned to them and that they were returned, and that none of the papers so returned were introduced before the grand jury. The answer to the petition for the return of the papers, filed by the district attorney, was attached to the motion to quash as an exhibit, and likewise the affidavits which had been made in support of that answer. From these it appears that a very large amount of papers, pamphlets and letters deposited, some in a large tent and some in a building nearby, were seized under search warrants which appear to be regular on their face. The tent and building nearby are said to have been the headquarters of the I. W. W., that these papers, letters, etc., were not personal to any of the defendants but in a sense of an official character, relating to the purpose and activities of the I. W. W., and were criminal instruments to be used for the purpose of accomplishing the crimes charged in the indictment. It was also disclosed in the affidavits presented by the district attorney that he had in hand papers and documents that had been used on the trial of a similar case at Chicago, later taken to the Court of Appeals in that circuit (Haywood v. U. S., 268 Fed. 795), and which had been transmitted to him under an order of the latter court for use in the trial of this cause.

[6] It is not directly admitted that any of the papers referred to were used before the grand jury in obtaining this indictment, but that fact is inferable. But after an examination and careful reading of the showing made pro and con it cannot be said that the papers referred to in the motion and those received from the court in the seventh circuit constituted all of the evidence presented to the grand jury. The motion does not so claim. There may have been other sufficient and competent evidence supporting the action of the grand jury in finding the indictment. It therefore becomes, as we think, unnecessary to decide the question as to whether the seized papers could appropriately be used at the inquest. We understand the rule to be that an indictment cannot be set aside or avoided on such an objection unless it affirmatively appear that there was no evidence of the commission of the offenses presented to the grand jury, or unless all of the evidence which it heard on the inquiry was unlawfully procured in violation of some fundamental right of the party indicted, and which would be barred on the trial as incompetent and inadmissible against him. This court has so decided in McKinney v. U. S., 199 Fed. 25, 117 C. C. A. 403. The Supreme Court also. Holt v. U. S., 218 U. S. 245, 248, 31 Sup. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138. And that is the general rule. Chadwick v. U. S., 141 Fed. 225, 72 C. C. A. 343; McGregor v. U. S., 134 Fed. 187. 69 C. C. A. 477; Radford v. U. S., 129 Fed. 49, 63 C. C. A. 491; Hillman v. U. S., 192 Fed. 264, 112 C. C. A. 522. See, also, State v. Shreve, 137 Mo. 1, 38 S. W. 548; People v. Lauder, 82 Mich. 109, 46 N. W. 956; State v. Dayton, 23 N. J. Law, 49, 53 Am. Dec. 270; Stewart v. State, 24 Ind. 142; State v. Fasset, 16 Conn. 457; Agee v. State, 117 Ala. 169, 23 South. 486.

[7] But on the merits of the application for return of the papers and documents which the court by its order permitted the district attorney to hold, we are not convinced there was error. The court may have been of the opinion that they were not the property of any of the defendants, and they belonged to the organization of which defendants were members, that they were criminal instruments prepared for the sole purpose of being used to perpetrate the crimes with which defendants were charged, that they were lawfully seized and that they could be lawfully used before both grand and petit juries without violating any rights of the defendants. There is proof that would sustain such a conclusion, and authority in support. Wheeler v. U. S., 226 U. S. 478, 490, 33 Sup. Ct. 158, 57 L. Ed. 309; Schenck v. U. S., 249 U. S. 47, 49, 39 Sup. Ct. 247, 63 L. Ed. 470; Welsh v. U. S. (C. C. A.) 267 Fed. 819; Haywood v. U. S., supra.

[8] We have given this consideration to the merits of the questions raised by the motion and demurrer notwithstanding it is the general rule that the action of the trial court in overruling them is not assignable as error. Durland v. U. S., 161 U. S. 306, 314, 16 Sup. Ct. 508, 40 L. Ed. 709; Hillegas v. U. S., 183 Fed. 199, 105 C. C. A. 631; Chadwick v. U. S., supra; McGregor v. U. S., supra; Steigman v. U. S., 220 Fed. 63, 135 C. C. A. 131; Endleman v. U. S., 86 Fed. 456, 30 C. C. A. 186; Carlisle v. U. S., 194 Fed. 827, 114 C. C. A. 531.

Other objections raised to the three counts have also been examined and considered, but we think them without merit. We are of opinion that the first count is bad and that the court erred in holding it good; and that the court did not err in overruling the motion and demurrer to the second, third and fourth counts. The judgments entered against all of the plaintiffs in error on the first count are reversed, with direction to set aside the verdicts, judgments and sentences on that count, and the judgments and sentences on the three remaining counts are affirmed.

YOUNG v. CALIFORNIA STATE BOARD OF PHARMACY et al.

(Circuit Court of Appeals, Ninth Circuit. May 9, 1921.)

No. 3550.

1. **Limitation of actions ⟸180(5)—Demurrer that cause of action is barred by statute of limitations is sufficient.**
   A demurrer to a complaint for the stated reason that the cause of action was barred by the statute of limitations, without specifying the particular statute which was meant, is sufficient.

2. **Limitation of actions ⟸180(5)—Demurrer for insufficient facts is sufficient, where complaint shows bar of statute.**
   A demurrer to a complaint for failure to state sufficient facts to constitute a cause of action is sufficient to raise the objection that the complaint shows on its face that no cause of action arose within the period of the statute of limitations.

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3. **Pleading ⟸417—Amended complaint, alleging subsequent cause of action, waived objection to ruling on demurrer that first cause was barred.**
Where, after demurrer to the original complaint was sustained on the ground that the cause of action therein stated was barred by limitations, plaintiff filed an amended complaint, alleging a cause of action which arose on a subsequent date, he thereby admitted that his original cause of action was barred, and waived his right to contend that the demurrer was insufficient.

4. **Pleading ⟸236(1)—Second amended complaint, first alleging diversity of the citizenship, held properly rejected.**
Where plaintiff tendered a second amended complaint after the original complaint and the first amended complaint had been held bad on demurrer, and for the first time alleged diversity of citizenship between the parties as a ground of federal jurisdiction, which was contrary to the recital of plaintiff's residence in verification of the original complaint, it was not an abuse of the trial court's discretion to refuse leave to file the second amended complaint.

5. **Evidence ⟸10(4)—Court takes judicial notice of location of Mexican boundary line.**
The court takes judicial notice that Calexico, in the United States, and Mexicala, in Mexico, are really but one town; the international boundary line being at that point a street of the town.

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

Action by E. E. Young against the California State Board of Pharmacy and others to recover damages in the sum of $25,000 for the alleged conversion of certain quantities of morphine, cocaine, and opium alleged to have been owned by said Young and his predecessors in interest. From a judgment dismissing the action, after refusing leave to plaintiff to file a second amended complaint, plaintiff brings error. Affirmed.

William Sea, Jr., of San Francisco, Cal., for plaintiff in error.

U. S. Webb, Atty. Gen., of California, and Robert W. Harrison, Chief Deputy Atty. Gen., for defendants in error.

John F. Davis, of South San Francisco, Cal., for defendant in error Off.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge. This action arises out of the seizure by defendants on April 16, 1915, of certain quantities of poisonous drugs described as morphine, cocaine, and opium, alleged to have been found in the possession of the plaintiff and his assignor. The seizure was made under the claimed authority of the State Board to seize drugs of that character under the provisions of the state Poison Act. Act of March 6, 1907; Stats. Cal. 1907, p. 124.

In the original and amended complaints the defendants were the California State Board of Pharmacy and the members of that board individually and as members constituting said board. The defendant E. T. Off is the only one of the defendants who has been served as an individual, as well as a member of the California State Board of

Pharmacy, and it is for that reason that he appears and is represented individually.

The original complaint, filed June 21, 1919, alleged that the defendants, on the 16th day of April, 1915, seized certain drugs belonging to the plaintiff, consisting of gum opium, cocaine, and morphine sulphate. It is charged by the plaintiff that said seizure, made as claimed by the defendants under a law of the state, was unlawful, in that said goods were at the time of such seizure in transit in interstate and foreign commerce. Diversity of citizenship was not alleged in the original complaint, and jurisdiction of the court was predicated upon the allegation that a federal question was involved through the seizure of these drugs while in transitu in interstate and foreign commerce.

The defendants, in an amended demurrer filed by leave of the court, raised the objection, among others, that the cause of action was barred by the statute of limitations contained in section 338, subdivision 3, of the Code of Civil Procedure of the state of California. Counsel for the defendant Off individually demurred to the complaint on the ground, among others, that the cause of action stated in the complaint was barred by the statute of limitations. The statute of limitations of the state provides that the period for the commencement of "an action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property," must be within three years. The court sustained the demurrers. Thereupon plaintiff, by leave of court, filed an amended complaint, in which it was alleged that on May 1, 1919, the plaintiff was the owner of certain quantities of morphine, cocaine, and opium, which were in transitu in interstate and foreign commerce to plaintiff and one F. McGinnis, the consignees in Mexicala, in the republic of Mexico; that on said May 1, 1919, the defendants were in possession of said drugs, and plaintiff made demand upon defendants for the same. The defendants failed to deliver said drugs to the plaintiff, whereby plaintiff sustained damages in the sum of $25,000.

The defendants demurred to the amended complaint upon the ground that it did not appear that the court had jurisdiction of the persons of the defendants or the cause of action, and did not state facts sufficient to constitute a cause of action against the defendants or any of them. The demurrer pointed out numerous uncertainties and ambiguities in the allegations of the complaint, among others that the allegation that on the 1st day of May, 1919, the drugs mentioned therein were in transit in interstate and foreign commerce, while by another allegation it is stated that on the same day they were in the possession of the defendants, without any charge or allegation that the possession of the defendants had anything whatever to do with their transportation, and it did not appear anywhere in the complaint that defendants were in any way concerned in the transportation of the drugs, or that the drugs were illegally in the possession of the defendants. The court held that the complaint did not state a federal question, and, as there was no diversity of citizenship alleged in the complaint, the court was without jurisdiction of the subject-matter. The demurrers of the defendants

were sustained. The plaintiff then moved the court for permission to file a second amended complaint, which motion was denied. Thereupon judgment was entered dismissing the action. It is from this judgment of dismissal that the plaintiff has sued out his writ of error to this court.

[1] It is assigned as error that the court sustained the demurrers to the original complaint; that the demurrer of Off was that the complaint and cause of action was barred by the statute of limitations; that such a demurrer was insufficient, for the reason that it did not specify what statute was meant. In Spreckels v. Spreckels, 172 Cal. 775–783, 158 Pac. 537, the Supreme Court of California held that such a demurrer was sufficient, citing previous cases in that court to the same effect.

[2] It is contended that the demurrer of the other defendants was insufficient, because it set up the bar of the statute as an insufficient statement of facts to constitute a cause of action. Why was the demurrer not sufficient? The insufficiency of the statement in the complaint clearly consisted of the failure of the plaintiff to allege facts showing that the cause of action arose within three years. This was a defect apparent on the face of the complaint. The court was unquestionably right in sustaining the demurrers.

[3] But technically this question is not an open one now. After the demurrers to the original complaint were sustained, the plaintiff filed an amended complaint on January 9, 1920, in which he attempted to state a cause of action arising on the 1st day of May, 1919. This was in effect an admission by him that he had then no cause of action as of the date of April 16, 1915, as set forth in the original complaint. How, then, can he now question the correctness of the court's judgment in sustaining the demurrers to the original complaint? Plainly under a technical rule of pleading that right had passed.

When plaintiff applied to the court for leave to file a second amended complaint alleging a cause of action arising on the 1st day of May, 1919, the defendants met the application with the affidavit of one Louis Zeh, who declared:

> That he was then, on the 15th day of March, 1920, and had been since July 15, 1909, the secretary of the California State Board of Pharmacy; that he was familiar with and knew the circumstances surrounding and connected with the alleged possession by said defendants of the personal property described in said proposed second amended complaint; "that on or about the 16th day of April, 1915, one Roy Jones, who was at said time a duly appointed and acting inspector of said defendant California State Board of Pharmacy, seized and took possession of said personal property at the city of Calexico, county of Imperial, in the state of California, as property then in possession of said plaintiff, E. E. Young, and one C. F. McGinnis; that said property seized, and of which possession was then so taken, was the same property as that described in said complaint, in said amended complaint, and in said second amended complaint; and that after said Roy Jones seized and took possession of said property as aforesaid, said property was never afterwards in the possession of said plaintiff nor any of his agents."

The facts stated in this affidavit were not denied by the plaintiff, and, if admissible at this stage of the proceedings, it appears that whatever cause of action the plaintiff had arose on April 16, 1915, as stated in

the original complaint, and not at any time thereafter, or at any time within the statute of limitations, and that the date alleged in the original complaint was not an inadvertent or erroneous statement, but set forth correctly the time of the transaction which is the basis of this suit.

[4] In the proposed amended complaint plaintiff abandons his claim set forth in his original complaint that on April 16, 1915, the drugs in controversy were in transitu in interstate and foreign commerce from the United States to Mexicala, in Mexico. He also abandons a similar claim in his amended complaint that on May 1, 1919, the drugs were in transitu in interstate and foreign commerce from the same point of shipment to the same destination, and for the first time seeks to invoke the jurisdiction of the District Court on the ground of diversity of citizenship of the parties, alleging that plaintiff is a citizen of the state of Arizona; but he does not allege that he was a citizen of the state of Arizona at the time of the commencement of the action. The only statement on this subject in the original complaint is in the verification by counsel "that plaintiff resides in the city of Calexico, county of Imperial, state of California." In the amended complaint the verification is also by counsel "that plaintiff is a citizen of the state of Arizona and resides in said state of Arizona." It is not alleged in the body of the amended complaint that plaintiff is a citizen of the state of Arizona. In the proposed second amended complaint it is alleged that the plaintiff is a citizen of the state of Arizona, and in the verification of the complaint by counsel it is also so stated.

[5] Returning to the verification of the original complaint that plaintiff is a resident of the city of Calexico, in the state of California, and the averment in the original complaint and in the amended complaint that the drugs were in transitu from the United States to Mexicala in Mexico, we take judicial notice of the fact that Calexico, in the United States, and Mexicala, in Mexico, are really but one town—the international boundary line being at that point a street of the town, on the south side of which is Mexicala, in Mexico, and on the north side is Calexico, in the United States. What relation plaintiff's residence in Calexico in April, 1915, had to the alleged destination of the drugs consigned to plaintiff in Mexicala we do not stop to inquire. All we are concerned about now is the fact that in the proposed second amended complaint it is not alleged that plaintiff was a citizen of Arizona at the time of the commencement of the action, nor is it alleged as in the original and amended complaint that the drugs were in transitu from the United States to Mexicala, Mexico. In Anderson v. Watt, 138 U. S. 694–701, 11 Sup. Ct. 449, 450 (34 L. Ed. 1078), Chief Justice Fuller, speaking for the Supreme Court, said:

"Although the averment as to citizenship may be sufficient, yet, if it appear that that averment is untrue, it is the duty of the Circuit Court to dismiss the suit; and this court, on appeal or writ of error, must see to it that the jurisdiction of the Circuit Court has in no respect been imposed upon. * * * As the jurisdiction of the Circuit Court is limited in the sense that it has none except that conferred by the Constitution and laws of the United States, and the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears, it is essential that, in cases where jurisdiction de-

pends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, should be distinctly and positively averred in the pleadings, or should appear affirmatively with equal distinctness in other parts of the record. It is not sufficient that jurisdiction may be inferred argumentatively from the averments."

After citing authorities in support of this doctrine and reference to the act of 1875, the court proceeds:

"And the inquiry is determined by the condition of the parties at the commencement of the suit."

It may be that the accidental omission to allege diversity of citizenship in an original complaint may be remedied by an amended complaint when the circumstances justify it, as intimated by the court in the case of Montana Mining Co. v. St. Louis Mining Co., 204 U. S. 213, 27 Sup. Ct. 254, 51 L. Ed. 444; but do the circumstances justify such a procedure, when the fact remains, as in this case, that the original and amended complaint and proposed amended complaint, taken together, tend to show that there was no actual diversity of citizenship in the parties at any time during the proceedings? We are of the opinion that the circumstances in this case do not justify an amended complaint.

We think the court was right in sustaining the demurrers to the original and amended complaints, and that it did not abuse its discretion in refusing plaintiff leave to file the proposed second amended complaint.

The judgment of the lower court, dismissing the action, is accordingly affirmed.

BUTTS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. May 4, 1921.)

No. 5700.

1. **Criminal law ⇐37—Entrapment held a defense.**
   Where a defendant, charged with unlawful sale of morphine, was not and had never been a dealer in the drug, had none, and had never before sold any, nor conceived an intention to do so, but was induced by an acquaintance, who knew he had become addicted to its use when in pain caused by a long-standing disease, to procure a quantity for him from a third person, which he did, promising to pay over the money he received to such person, the whole transaction being a device of internal revenue agents, who furnished the money, to entrap, arrest, and prosecute him, these facts were fatal to the prosecution.

2. **Criminal law ⇐37—Duty of officers to prevent, not to incite, crime.**
   The first duties of officers of the law are to prevent, not to punish, crime, and it is not their duty to incite to and create crime, for the sole purpose of prosecuting and punishing it.

In Error to the District Court of the United States for the District of Nebraska; Joseph W. Woodrough, Judge.

Criminal prosecution by the United States against C. O. Butts. Judgment of conviction, and defendant brings error. Reversed.

John H. Hopkins, of Omaha, Neb. (E. D. O'Sullivan, of Omaha, Neb., on the brief), for plaintiff in error.

Frank A. Peterson, Asst. U. S. Atty., of Omaha, Neb. (Thomas S. Allen, U. S. Atty., of Lincoln, Neb., on the brief), for the United States.

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

SANBORN, Circuit Judge. Clarence O. Butts, the defendant below, was indicted, convicted, and sentenced for a violation of the Anti-Narcotic Act (6 Comp. Stat. §§ 6287g, 6287h; 1 Supp. 1919, § 6287g), in that he, being a person who dealt in, sold, and dispensed narcotic drugs, without registering with the collector of internal revenue or paying the special tax imposed upon such dealers by this act, sold to H. Rudolph three-fourths of an ounce of morphine sulphate, of the value of $190, about April 7, 1920.

Counsel for the defendant below have specified many alleged errors in the trial of this cause, one of the most serious of which is that the trial court denied a request of counsel for the defendant to instruct the jury that the defendant claimed that he was entrapped into delivering to Rudolph the morphine in question by the instigation of the government agents; that, had it not been for the importunities and false statements made by Rudolph pursuant to the directions of the government agents, who started out admittedly for the purpose of entrapping the defendant into the commission of the offense charged against him, he would not have conceived or committed it; and that if the jury believed from the evidence that the defendant was induced by the importunities of Rudolph, acting under the orders and in conjunction with the government agents, to violate the law, and that through the instigation of these men the defendant was induced to sell or deliver to Rudolph the morphine, and that he would not otherwise have violated the law, they ought to return a verdict of not guilty. At the close of the trial when this request was made, these facts had been established by the evidence:

[1] The defendant, during 14 years prior to April 6, 1920, had suffered 18 operations for tuberculosis of the bones, and he had been and was addicted to the use of morphine when he was in pain. He had never sold or dealt in the article prior to the transaction of about the 7th of April, 1920, which was the basis of his prosecution in this case. H. Rudolph was addicted to the use of morphine, and these two men were acquainted each with the other, and each knew that the other was addicted to this use. Rudolph had never obtained any morphine from the defendant prior to this transaction. Rudolph had been arrested about two weeks prior to the 2d of April for the violation of this Narcotic Act. Previous to that arrest he had been convicted of a prior violation of the act, and had served a year and a day at Leavenworth. Clyde Lake was a narcotic inspector in the Internal Revenue Service of the United States. He had arrested Rudolph about two weeks before April 7, 1920. Rudolph testified that while he was thus under arrest Mr. Lake sent for him to meet him at Green Davenport's house; that

they met there; that Lake told him that he would let him go, if he would help him catch some of the law violators; that after they had talked this proposition over, and made an agreement between him and Lake and other officers of the government to catch Butts, he called the latter up on the telephone, told him he wanted some morphine, and Butts answered that he had none, and then Rudolph asked him if he could get an ounce, and how much it would be, and the defendant told him to call him the next day. He testified that he did not intend to use this ounce of morphine, but intended to get it so that the officers could arrest Butts, and he could be a friend of the officers; that the next day he called Butts again, and Butts told him he could get the morphine for $190; that Lake furnished Rudolph with the $190, and sent him to get the morphine, and as it was delivered by Butts to Rudolph the officers arrested Butts. Lake testified that the telephone calls and conversations of Rudolph with Butts were had when he was present with Rudolph; that he furnished the $190 and directed all the proceedings in which Rudolph took part. Butts testified that Rudolph called him on the telephone and asked him if he could get him some morphine; that Rudolph told him that he was sick and that his wife was sick (Rudolph denied that he told Butts of this sickness); and he (Butts) told Rudolph he could not get any, and he did not have any himself, and Rudolph replied that he would call again the next day; that Rudolph called him again the next day, and he told him he had no morphine; that Rudolph then asked him if he could not get him some off of somebody, and thereupon he did get a box of it of Joe Green, and arranged to meet Rudolph and deliver it to him; that he did not buy the morphine from Green, but was to give to Green just what he got from Rudolph for it. There was some other evidence in the case, but it was not material to the question under consideration.

When the entire evidence in this record is considered, it conclusively proved (1) that the defendant was not and never had been engaged in dealing in morphine, and that he never sold any of it to any one before the transaction here in issue; and (2) that the conception of and the intention to do the acts which the defendant did in this matter did not originate in his mind or with him, but were the products of the fertile brains of the officers of the government, which they instilled into the mind of the defendant, and by deceitful representations and importunities lured him to put into effect.

It is not denied that, in cases where the criminal intent originates in the mind of the defendant, the fact that the officers of the government used decoys or truthful statements to furnish opportunity for or to aid the accused in the commission of a crime, in order successfully to prosecute him therefor, constitutes no defense to such a prosecution. Price v. United States, 165 U. S. 311, 315, 17 Sup. Ct. 366, 41 L. Ed. 727; Grimm v. United States, 156 U. S. 604, 610, 15 Sup. Ct. 470, 39 L. Ed. 550; Goode v. United States, 159 U. S. 663, 669, 16 Sup. Ct. 136, 40 L. Ed. 297; Andrews v. United States, 162 U. S. 420, 423, 16 Sup. Ct. 798, 40 L. Ed. 1023; Fiunkin v. United States (C. C. A.) 265 Fed. 1.

But when the accused has never committed such an offense as that charged against him prior to the time when he is charged with the offense prosecuted, and never conceived any intention of committing the offense prosecuted, or any such offense, and had not the means to do so, the fact that the officers of the government incited and by persuasion and representation lured him to commit the offense charged, in order to entrap, arrest, and prosecute him therefor, is and ought to be fatal to the prosecution, and to entitle the accused to a verdict of not guilty. Peterson v. United States, 255 Fed. 433, 166 C. C. A. 509; United States v. Echols (D. C.) 253 Fed. 862; Sam Yick v. United States, 240 Fed. 60, 65, 67, 153 C. C. A. 96; Voves v. United States, 249 Fed. 191, 192, 161 C. C. A. 227; Peoples v. McCord, 76 Mich. 200, 42 N. W. 1106, 1108; Woo Wai et al. v. United States, 223 Fed. 412, 414, 137 C. C. A. 604. There was ample, if not conclusive, evidence in this case to sustain a finding of the jury that this case fell under the latter rule. The defendant had never committed any such offense as the officers of the government arrested and prosecuted him for prior to the time when they induced him to do the acts disclosed by this testimony. There is no evidence that he had ever contemplated, much less intended to sell any morphine. He had never done so—he had none to sell. The officers, through their agent, Rudolph, incited, lured, and persuaded him by false representations to go to a third person and get the morphine for his acquaintance, the officer's agent, and to consent either to sell it or to act as the agent of the party from whom he received it in the sale the officers betrayed him into.

[2] The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it. Here the evidence strongly tends to prove, if it does not conclusively do so, that their first and chief endeavor was to cause, to create, crime in order to punish it, and it is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it. It was fatal error to refuse to instruct the jury as requested, and it is unnecessary to discuss the other alleged errors at the trial, because, if they existed, they will probably not be committed again.

Let the judgment below be reversed, and let the case be remanded to the court below, with directions to grant a new trial.

In re CROSS.

Appeal of CITY BANK TRUST CO.

(Circuit Court of Appeals, Second Circuit. April 13, 1921.)

No. 175.

1. **Banks and banking ⊂=134(1)—Bank can set off deposit against notes due from depositor.**
   Deposits received by a bank in the regular course of business, which are subject to withdrawals by check, can, in the absence of collusion or fraud, be set off by the bank against the amount due to the bank from the bankrupt depositor on notes discounted by the bank, though the depositor was insolvent when the notes became due, and such insolvency is known to the bank.
2. **Bankruptcy ⊂=326—Trustee must set off deposit in bank against note due to bank.**
   Where the parties have not voluntarily made, before bankruptcy, the set-off of the amount of the bank deposits against the amount due from the bankrupt depositor, the trustee in bankruptcy must make such set-off.
3. **Banks and banking ⊂=134(2)—Accepting check and note from bank held not to defeat bank's right of set-off.**
   The fact that a bank, on the day the petition in bankruptcy was filed, accepted from the bankrupt a check for the amount of his deposits, to be applied on his note to the bank, and took a new note for the balance still due, does not defeat the bank's right to set off the amount of the deposit against the amount due it from the bankrupt.
4. **Banks and banking ⊂=134(4)—Agreement substituting new accounts for those paid held not to defeat right to set-off.**
   Where accounts receivable had been assigned as collateral security for a note given to a bank, an agreement that the amounts paid on the accounts assigned should be deposited to the debtor's account, to be used in the transaction of the business, and that new accounts should be assigned in place of those paid, does not defeat the bank's right to set off the debtor's deposit against the amount due on the notes after the bankruptcy of the debtor.
5. **Banks and banking ⊂=134(7)—Evidence held not to show deposit was trust fund for creditors.**
   Evidence that it was understood that the amounts paid on accounts assigned to a bank to secure a note were to be deposited to the debtor's credit, and were to be used for the transaction of his business, but that there was no express agreement limiting the purpose for which checks could be drawn on such deposit, does not show that the deposit was a trust fund for the creditors of the debtor, against which the bank could not set off the amount of the note.
6. **Bankruptcy ⊂=154—Bank held entitled to set off surplus from sale of security for other indebtedness.**
   A bank can set off against a demand note of the bankrupt, secured by assignment of accounts receivable, the surplus received by the sale of warehouse receipts for flour assigned to it as a collateral security for another note, given for money advanced by the bank to enable the bank to purchase the flour covered by the receipts, at a time when the bank had no knowledge that the maker of the notes was insolvent.

Petition to Revise and Appeal from Order of the District Court of the United States for the Northern District of New York.

In the matter of John M. Cross, bankrupt. From a decree awarding judgment against the City Bank of Syracuse, now the City Bank

Trust Company, for the total sums of money on deposit in the name of the bankrupt (265 Fed. 769), the Bank appeals. Decree reversed.

Chapman, Newell & Crane and Harry Newell, all of Syracuse, N. Y., for appellant.

Costello, Burden, Cooney & Fearon and David F. Costello, all of Syracuse, N. Y., for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. John M. Cross was adjudicated a bankrupt on the 14th of October, 1916, and a trustee of his estate was appointed. He filed a petition in the District Court, praying for an order or decree directing the City Bank of Syracuse to pay over to the trustee certain moneys alleged to have been received and retained by the bank under circumstances which he claimed amounted to an unlawful preference. An answer was filed by the bank and the issues were referred to a special master. He reported that the trustee was entitled to recover from the bank the sum of $2,755.24, being the amount on deposit to the credit of the bankrupt on the books of the bank on the 25th of October, 1916; also the sum of $622.61, being the amount of surplus arising from the sale of 205 barrels of flour pledged by the bankrupt to the bank as collateral security for the payment of a note of $1,261.39, made on the 26th of September, 1916. The master's conclusions were approved by the District Judge, and it is from a decree entered thereon that this appeal is taken.

On April 15, 1916, the bankrupt, with one partner, was engaged in the wholesale grocery business in the city of Syracuse, and borrowed money from the City Bank of Syracuse to the extent of $18,000, giving their promissory note therefor, payable on demand, and as collateral security therefor gave an assignment of all their accounts receivable. By agreement between the copartnership and the bank it was agreed that the copartnership would collect the assigned accounts and deposit the proceeds in the bank to the credit of the partnership, and be privileged to draw against the same by check, but for purposes of the business only. Daily assignments to the bank of all new accounts receivable were made in place of those collected and deposited, and thus the borrower kept the security for the loan unimpaired. In April, 1916, the firm was dissolved, and the bankrupt continued in business alone and in his own name. The agreement referred to between the bank and the copartnership continued. Between the period of April, 1916, when the bankrupt continued in business alone, and October 25, 1916, daily assignments to the bank of the new accounts receivable were made, and old accounts were collected, and moneys were paid from the bank account in the regular course of business. The demand note of $18,000 had not been paid. The bank held assigned accounts to an amount aggregating $24,000, and on the day of his adjudication in bankruptcy, there was on deposit $2,755.24. The District Judge upheld the validity of the original agreement between the copartnership and the bank, and it was directed that $13,555.63 collected from the accounts receivable of the bankrupt, which were assigned as collateral for the payment of said note, was the property of the bank.

But as to the $2,755.24 standing to the credit of Cross on the books of the bank on the date of the filing of the petition in bankruptcy, which moneys appear to have been deposited in the usual course of business, it was decreed belonged to the trustee. By a special finding of the master, which was approved by the court, it was found there was no purpose or intent of preferring the bank in the transaction.

One week before the filing of the petition, the bank, after an examination of the bankrupt's books, gave notice to the debtors of the bankrupt that it was the owner of the accounts and that the same should be paid to the bank and not to Cross. On the day the petition in bankruptcy was filed, the bank credited up on the bankrupt's $18,000 demand note the amount of the balance of $2,755.24, and charged the same to Cross' account. Later on the same day the bankrupt gave a check for the amount and delivered it to the bank, together with a new demand note for the difference between this sum and the amount of the demand note, to wit, $15,226.76. This was done for the purpose of obtaining the benefit of the bank's right of a set-off of mutual debts and credits under section 68 of the Bankruptcy Act. It was held below that, even though such right to a set-off existed between the bank and the bankrupt, and it was conceded that such set-off was permissible under the Bankruptcy Act, still, because of what took place by giving the new note, and because of the agreement existing between the bank and the bankrupt, no such right of set-off existed as against the general creditors of the bankrupt or against the trustee.

Another transaction is the subject of review on this appeal. The bankrupt borrowed from the bank $1,261.31 on a demand note on September 25, 1916, and pledged as collateral security a warehouse receipt for 205 barrels of flour. The proceeds of this loan were remitted to a milling company in Minneapolis, which shipped the flour to the bankrupt with a sight draft attached to the bill of lading, and sent it to the City Bank of Syracuse for collection. The bank sold the flour on October 16, 1916, and after paying the note had a surplus of $621.61, which it applied to the bankrupt's demand note of $15,226.76. It contends that it was entitled so to do by virtue of section 68 of the Bankruptcy Act. The court below held against this contention, and said that such sum must be paid to the trustee. Section 68 of the Bankruptcy Act (Comp. St. § 9652) provides as follows:

"a. In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

"b. A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy."

[1, 2] The cases are in accord in holding that where a bank receives deposits in the regular course of business, which are subject to withdrawals by check, and there is no collusion or fraud, and where notes have been discounted by the depositor at the bank, it has the right, when notes are due, to set off the amount due to the bank on the notes

against the amount due from it on the deposit account. This right exists, even though the depositor is insolvent when the notes become due, and such insolvency is known to the bank. Continental Trust Co. v. Chicago Title Co., 229 U. S. 435, 33 Sup. Ct. 829, 57 L. Ed. 1268; N. Y. County National Bank v. Massey, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380. And where the set-off exists, and the parties themselves have not voluntarily made such set-off or adjustment before bankruptcy, the trustee must do so. Studley v. Boylston Natl. Bank, 229 U. S. 523, 33 Sup. Ct. 806, 57 L. Ed. 1313.

[3, 4] We find nothing in the agreement between the parties which militates against the view that the relation of debtor and creditor existed between the bankrupt and the appellant. The fact that a check was drawn and payment made, and a demand note given for the difference, does not alter the case. That transaction, occurring on the day the petition was filed, was invalid. The money against which the check was drawn was at all times with the bank, and remained with the bank, and there has been no changing of the relations between the depositor and the bank. If the transaction by which the check was drawn and new note given for the difference was invalid, as a preference, it left the parties in the position they were in prior to such giving of the check and of the note. The purpose of the agreement, by which the accounts were assigned as collateral, was to keep the bank secured as a creditor during all the times money was owing from the bankrupt. The daily substitution of new accounts for old accounts paid and deposited in the bank did not change the relationship, even though the bank lost title or its lien upon the deposit, which it had by virtue of the assignment of accounts. This did not and could not deprive it of the banker's right of set-off.

[5] There were no limitations placed upon the bankrupt's right to check against this account. The bankrupt testified as follows:

"Q. Was there any limitation agreed upon or understood between you and the bank upon your checking power on that account? Were you confined in other words to checks in payment for business indebtedness or were you at liberty to give any checks you pleased? A. There was no definition made at the time. We assumed it was for business checks, or checks to pay bills of business requirements.

"Q. That is, if you wanted to meet a pay roll connected with the business? A. We always issued a check for the pay roll; our salary was agreed upon, and we had our check for our salary, the same as the other help.

"Q. As a business expenditure? A. Yes.

"Q. There was nothing said, however, imposing any other limitation upon the use of that account? A. No.

"Q. What, in fact, was your practice did you draw for other purposes? A. For business purposes only."

There is no evidence which would permit a construction that the deposit was a special deposit, or a trust fund for the benefit of creditors. The relationship thus created, made in good faith and in the ordinary course of business, is no obstacle to the bank's right to insist upon its lien and right of set-off as provided in the bankruptcy statute. In Continental Trust Co. v. Chicago Title Co., 229 U. S. 435, 33 Sup. Ct. 829, 57 L. Ed. 1268, the bank agreed with its depositor, after knowledge of his insolvency, that if he would make deposits for such pur-

poses, it would pay the salaries of clerks, and checks were drawn and paid on various days. The deposits exceeded the withdrawals by check in the sum of $575.79, and the bank claimed the right of set-off of such balance against the depositor's due note. The court, sustaining the claim of the bank, said:

"As to the $575.79, we think the right to set off this deposit is established by the principles laid down in New York County National Bank v. Massey, supra. Here there was a deposit subject to be checked out by the bankrupt for specific purposes. The money was not placed in the bank with a view to giving it a benefit, except indirectly, because of the deposit. It was subject to Prince's check, and all of it might have been checked out for the purposes intended."

We think the same principle has application to the facts disclosed by this record.

[6] When on October 25, 1916, the bank set off against the amount owed the sum of $661.61, the surplus received from the sale of the flour, it had no reasonable grounds or cause to be charged with the belief that it was obtaining security for its antecedent indebtedness from an insolvent creditor. While the bank had from time to time examined the books of the bankrupt for the purpose of obtaining a list of the outstanding accounts, there is nothing to show that, at the time the bank availed itself of this undoubted right, it had knowledge of insolvency. The bankrupt continued to do business, and no evidence was offered indicating that the bank should have made inquiry as to Cross' insolvency. He was not declared insolvent until the 25th of October, 1916, and it was the bank that then found him to be insolvent. The loan for the flour transaction was made in good faith, and was not taken as a preference for a pre-existing loan. The principle of set-off of mutual debts and credits therefore applied. Under the terms of the note given, the right so to do is expressly conferred upon the bank.

The decree is reversed.

AMERICAN EXCH. NAT. BANK v. GARVAN, Alien Property Custodian, et al.

(Circuit Court of Appeals, Second Circuit. April 6, 1921.)

No. 240.

1. **War ⟸12—Alien Property custodian can seize property, notwithstanding error in determining it was enemy owned.**
   Under Trading with the Enemy Act, § 7, as amended by Act Nov. 4, 1918, § 1 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½d), requiring any property, including choses in action, which the President determines belongs or is owing to an enemy not holding a license, to be delivered to the Alien Property Custodian, and section 9 (section 3115½e), providing for claims to property so delivered to the Custodian, which was a war measure intended for an emergency, the Custodian is authorized to seize property which he determines is alien owned, though it may ultimately appear that in fact it belonged to a citizen.

2. **War ⟸12—Bank, paying deposit to Alien Property Custodian, is not liable to depositor.**
   A bank, which pays a deposit to the Alien Property Custodian on the latter's demand, is protected against liability to the depositor by Trading

with the Enemy Act, § 7(e), being Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½d, providing against liability for anything done in pursuance of any order under the authority of the act, so that the bank is not entitled to maintain a bill to require the Alien Property Custodian and the depositor to interplead to determine the rights to the deposit.

3. War ⊂=12—**Alien Property Custodian can seize debts owing to enemy.**
Under Trading with the Enemy Act, § 7 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½d), authorizing seizure of enemy property by the Alien Property Custodian, especially since its amendment on November 4, 1918, so as expressly to include choses in action, the Custodian has authority to seize a debt owing to an alien enemy not possessing a license from the President.

4. Courts ⊂=405(5)—**Appeal to Circuit Court of Appeals is proper, where District Court maintained jurisdiction.**
Where the District Court maintained its jurisdiction against attack, an appeal from a final decree for complainant to the Circuit Court of Appeals was proper.

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

Interpleader by the American Exchange National Bank against Francis P. Garvan as Alien Property Custodian and John Simon. From a decree directing the payment of the fund in controversy to defendant Simon, the Alien Property Custodian appeals. Reversed, with directions to dismiss the bill.

See, also, 256 Fed. 680.

Francis G. Caffey, U. S. Atty., of New York City (Earl B. Barnes, of New York City, of counsel), for appellant.

White & Case, of New York City, for appellee bank.

Henry A. Wise, Cola G. Parker, and Ernest A. Bigelow, all of New York City, for appellee Simon.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. December 13, 1918, A. Mitchell Palmer, Alien Property Custodian, made demand upon the American Exchange National Bank to pay over to him a deposit in the name of Simon of some $360,000, on the ground that he had determined it to be owing and belonging to one Albert, an alien enemy not holding a license granted by the President. January 6, 1919, he served another demand, and March 31, 1919, his successor, Francis P. Garvan served still another, differing in no substantial way from the original. Whether described as cash, or as a special deposit, or an indebtedness, or as a chose in action, every one concerned knew exactly what the Alien Property Custodian was demanding possession of.

December 23, the Bank filed this bill, alleging that the Alien Property Custodian had made demand upon it to pay over the deposit to him; that Simon had threatened to hold it liable if it did so pay over the deposit; that it could not determine which owned it; and praying that the court should order the Alien Property Custodian and Simon to interplead and settle their rights to the deposit account, the amount of which it offered to pay into court. January 14, 1919, Simon filed an answer, admitting the allegations of the bill, and asserting his own

title. Subsequently the Alien Property Custodian moved to dismiss the bill for lack of jurisdiction in the court to entertain it.

April 8, the District Judge held that the Alien Property Custodian had no power to seize the bank account or indebtedness, because it was a chose in action, denied the motion to dismiss the bill, ordered the plaintiff to pay the amount of its indebtedness into court, and Simon and the Alien Property Custodian to interplead. May 12, 1919, Judge Augustus N. Hand entered an order substituting Francis P. Garvan as Alien Property Custodian in place of A. Mitchell Palmer, and giving Simon five days within which to amend his answer, so as to allege that the various demands of the Alien Property Custodian were supported by no evidence whatever; in default of such amendment the clerk of the court was directed to pay over to the Alien Property Custodian the sum deposited in court and giving the Alien Property Custodian 20 days from the date of filing the amended answer to plead or move in respect thereto.

May 15, Simon filed an amended answer. June 3, the Alien Property Custodian filed his answer, praying that the court order the clerk to pay over to him as Alien Property Custodian the moneys paid into court, and that Simon be required to assert any right, title, or interest in the same which he may have according to and in compliance with the provisions of section 9 of the Trading with the Enemy Act, and for general relief.

January 7, 1921, the District Judge entered a final decree adjudging that Simon was the owner of the moneys on deposit in court and directing the clerk to pay the same to him less any sum deductible by law. Section 7 of the Trading with the Enemy Act, as amended November 4, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½d), provides:

"If the President shall so require any money or other property including (but not thereby limiting the generality of the above), patents, copyrights, applications therefor, and rights to apply for the same, trade-marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this act. * * *"

October 12, 1917, the President by executive order vested the power of determining what property belonged to alien enemies in the Alien Property Custodian:

"Executive Order.

"October 12, 1917.

* * * * * * * * * *

"Alien Property Custodian.

"XXIX. I hereby vest in an Alien Property Custodian to be hereafter appointed, the executive administration of all the provisions of section 7 (a), section 7 (c), and section 7 (d) of the Trading with the Enemy Act, including all power and authority to require lists and reports, and to extend the time for filing the same, conferred upon the President by the provisions of said

section 7 (a), and including the power and authority conferred upon the President by the provisions of said section 7 (c), to require the conveyance, transfer, assignment, delivery or payment to himself, at such time and in such manner as he shall prescribe, of any money or other properties owing to or belonging to or held for, by or on account of, or on behalf of, or for the benefit of any enemy or ally of an enemy, not holding a license granted under the provisions of the trading with the enemy act, which, after investigation, said Alien Property Custodian shall determine is so owing, or so belongs, or is so held."

Section 7 (c) also provides:

"The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States."

The relief referred to is that provided in section 9 (section 3115½e).

[1] The argument of counsel for Simon that the act gives no power to the Alien Property Custodian to seize property which may ultimately turn out to be property of a citizen of the United States and that it gives him no right to make determinations as to such property is wholly inconsistent with its language and its purpose. The act is a war measure, intended in emergency to give the Alien Property Custodian immediate possession of all property which he determines to be property of an alien enemy without license from the President.

In the case of Garvan v. $20,000 Bonds, 265 Fed. 477, we considered the authority of the Alien Property Custodian with respect to seizures of property determined by him to be the property of alien enemies without license from the President, holding that his determination was conclusive and that while he might seize the property determined by him to belong to such an alien enemy with the strong hand he might also apply to the court under section 17 of the act (section 3115½i) for an order compelling the delivery of such property to the marshal to be by the marshal delivered to him. Judge Learned Hand followed this opinion in Kahn v. Garvan (D. C.) 263 Fed. 909, holding that a bill of interpleader in such case could not be maintained, and the Supreme Court affirmed our opinion on January 24, 1921. 254 U. S. 554, 41 Sup. Ct. 214, 65 L. Ed. ——. Mr. Justice Holmes throughout this opinion recognized the right of the Alien Property Custodian to immediate possession of property which he has determined to belong to alien enemies having no license from the President, whether his determination be right or wrong:

"If we look no further than section 7 (c), it is plain that obedience to the statute requires an immediate transfer in any case within its terms without awaiting a resort to the courts. The occasion of the duty is a demand after a determination by the President and it is hard to give much meaning to the words 'which the President after investigation shall determine is so * * * held,' unless the determination and demand call the duty into being. The condition 'after investigation' additionally points to the intent to make his act decisive upon the point, as it is in other cases mentioned in section 7 (a). But it is said that the subject of the section is enemy property only, and therefore

that the determination cannot be final in its effect. Day v. Micou, 18 Wall. 156, 21 L. Ed. 860. And it is true that it is not final against the claimant's rights. Upon surrender the claimant may at once file a claim under section 9, if he satisfies the representative of the President, may obtain a return, and, if he does not obtain it in sixty days after filing the application, may bring a suit to establish his rights in the District Court, in which case the property is to be retained by the Custodian until final decree. These provisions explain the initial words of section 7 (c) as saving the ultimate rights of the claimant while the determination of the President still may be given effect to carry out immediate seizure for the security of the government until the final decision upon the right. The reservation implies that mistakes may be made and assumes that the transfer will take place whether right or wrong.

"The argument on the original words of the act in view of the manifest purpose, seems to us to be strong, but it appears to us to be much strengthened by the amendments of later date. By the act of November 4, 1918, c. 201, 40 Stat. 1020, section 7 (c) was amended among other things by adding after the requirements of transfer 'or the same may be seized by the Alien Property Custodian, and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this act.' This shows clearly enough the peremptory character of this first step. It cannot be supposed that a resort to the courts is to be less immediately effective than a taking with the strong hand."

[2] The amount of the plaintiff's indebtedness was admitted and the plaintiff in complying with the demand of the Alien Property Custodian would be in no danger whatever because section 7 (e) provides:

"(e) No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this act.

"Any payment, conveyance, transfer, assignment, or delivery of money or property made to the Alien Property Custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same. * * *"

[3] But the District Judge thought that the power of the Alien Property Custodian did not extend to seizing choses in action such as debts. In our opinion debts owing to an enemy were covered by the words of section 7 (c) of the Act as originally passed, viz. "any money or other property * * * owing or belonging to * * * an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs * * * shall be * * * paid over to the Alien Property Custodian," but all doubt is removed by the language of the section as amended November 4, 1918, supra, in force at the time the first demand was made by the Alien Property Custodian, which expressly covers choses in action.

[4] As the District Judge maintained the jurisdiction, the appeal to this court was proper, under United States v. Jahn, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87.

We will not go into any inquiry as to whether Simon or the Alien Property Custodian is entitled to the indebtedness of the plaintiff. Simon's remedy would be upon payment of that indebtedness to the Alien Property Custodian, if it were not returned on notice and demand within 60 days, to bring a suit in equity against him under section 9 of the act, the moneys being held to await the result of suit.

As the plaintiff had no standing whatever to file a bill of inter-

pleader, and the District Court had no jurisdiction to entertain it, the decree is reversed, and the court below directed to enter a decree dismissing the bill.

HOUGH, Circuit Judge (concurring). In the result of the foregoing opinion I concur; that is, I agree that neither the lower court nor any other tribunal in or of the United States had jurisdiction to compel the Custodian to come into court and either litigate or forego his demand against the bank or Simon or both. Therefore the bill of interpleader should have been dismissed.

The statute creating the Custodian enables him to capture enemy property with a sergeant and file, or otherwise vi et armis. He may also file a libel of possession, or he may sue in other ways; but he cannot be sued except in respect of that which he has already obtained. He can use his own method of procedure; courts cannot coerce him in limine.

But with all expressions in the majority opinion, indicating or suggesting a belief that the Custodian should have prevailed, had he elected to sue in any form in any court administering justice under the forms of law, I disagree.

PANDOLFO v. BANK OF BENSON et al.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1921.)

No. 3589.

1. Libel and slander ⇐81—Complaint held to show publication was within authority of unincorporated association.

A complaint which alleged that the defendants were members of an unincorporated association of bankers, and that they were engaged in printing a book and pamphlet of their proceedings, and that in the tenth volume of such book was printed a defamatory letter concerning plaintiff, which was read by the secretary at a meeting of the association, sufficiently shows that the publication was within the scope and purpose of the association, so as to state a good cause of action against the members thereof for libel.

2. Associations ⇐16—Members liable for libel by agent within scope of authority.

The members of an unincorporated association are liable in their collective capacity for tort, and are answerable for damages for libel published by their agent with their authority, while the agent is acting within the scope of his employment.

3. Associations ⇐16—Libel by agent need be only within general scope of employment.

To hold the members of an unincorporated association liable for a defamatory article published by their agent, it is not necessary to show authority, expressed or implied, to the agent to publish the libel; but there must be some evidence from which authority might be implied on the part of the agent to publish the article within the general scope of his employment.

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

4. Libel and slander ⊜86(2)—Pleading ⊜364(6)—Innuendo unnecessary, when words are libelous per se.
If the defamatory words alleged are actionable per se, no innuendo is necessary, and the allegation by way of innuendo may be stricken from the complaint.

5. Libel and slander ⊜86(2)—Innuendo proper, where words have both innocent and defamatory meaning.
Where the words used have two meanings, one of them harmless and the other defamatory, the innuendo may properly point out injurious meaning.

6. Libel and slander ⊜6(2)—"Crook" applied to person is always defamatory.
Though the words "crook" and "crooked" have two meanings, one of which is harmless, they have no harmless meaning when they are applied to an individual or to human conduct, but where so applied they charge dishonesty, and are defamatory, within the common understanding of mankind.

In Error to the District Court of the United States for the District of Arizona; David P. Dyer, Judge.

Action for libel by Samuel C. Pandolfo against the Bank of Benson and others. From a judgment for defendants after demurrer to the complaint was sustained, plaintiff brings error. Reversed and remanded, with instructions to overrule the demurrer.

The court below sustained a demurrer to a complaint which alleged in substance that the defendants, consisting of a large number of banks under the style of Arizona Bankers' Association, together with their secretary, were engaged in the business of printing and publishing a certain book and pamphlet called "Proceedings of the Arizona Bankers' Association," and that the secretary of the association acted with it in printing and publishing and distributing the said book; that said book was published yearly, and was largely circulated by the defendants and was widely read by bankers and business men generally; that the defendants, intending to injure the plaintiff in his good name, fame, and credit, etc., did in May, 1918, in volume 10 of the book or pamphlet known as "Proceedings of the Arizona Bankers' Association," publish, and cause and procure to be published, of and concerning plaintiff a certain false and defamatory and libelous article, as follows: "The Secretary: Mr. President, before you take up any other matters, I have a letter here that I want to read. This is a letter addressed to the Secretary of the Arizona Bankers' Association, and also to the Secretary of the New Mexico Association. It says: * * * 'You have operating in Arizona and New Mexico one Mr. S. C. Pandolfo, who recently moved from San Antonio. I am writing you, gentlemen, with reference to this man Pandolfo, as he is a double-barreled crook. The Commissioner of Insurance of Texas revoked his license outright and refused him the privilege of writing insurance in Texas on account of him continuously violating the law. Our Banking Commissioner forbade state banks from buying paper from this fellow, or in any manner taking obligations in which he was interested. He has crooked more people and in more ways than most any fellow we have ever had in this part of the country in a long time. I believe that it is only just to the bankers in your state that you tip them off to this fellow. If you do not, he is certainly going to hang a lot of them before he is found out. He is one of the crookedest white men I have ever seen.' It is such a letter that I did not care to put it in print and send it out as a warning, as I did not know but what I might be held up and libeled for something, so I thought I would read it here to you all." The complaint further alleged that the defendants well knew that the said statements so published of and concerning the plaintiff were false, and that the same were published with the malicious and express intent of defaming and injuring the plaintiff.

Jones, Hocker, Sullivan & Angert, of St. Louis, Mo., and Alexander, Christy & Baxter, of Phœnix, Ariz., for plaintiff in error.

Thos. Armstrong, Jr., Ernest W. Lewis, and R. Wm. Kramer, all of Phœnix, Ariz., for defendants in error.

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

GILBERT, Circuit Judge (after stating the facts as above). [1] The defendants rely upon the proposition that the limit of liability of members of an unincorporated association is that the members are responsible for tortious acts committed by the society, where it can fairly be assumed that they were within the scope of the purpose for which the organization was formed, citing 5 C. J. 1364, and they contend that no such allegations of fact appear in the complaint. It is argued that the title of the book published by the association shows that it merely sets out an account of the proceedings of the association, and that the publication of such an account is not a matter within the scope of the purpose of the organization upon which all the members can fairly be said to be responsible. To this we cannot assent. We do not find that it appears from the complaint that the publication of the account of the annual proceedings of the association is not a matter within the scope of the purpose of the organization. The complaint distinctly alleges the contrary. It alleges that the association was engaged in publishing the book and distributing the same, that it published one such book every year, and that the book in question was the tenth of the series, and even if there were no allegation that the publication of the proceedings was within the scope of the purpose of the organization, it would be but reasonable to hold that the publication of such a volume, issued as it was annually, giving an account of proceedings of the association, was distinctly within the scope of the purpose of such an association. It appears from the complaint that the letter was read by the secretary to the association as part of the proceedings of the association, and the secretary's subsequent remarks indicated his purpose, unless otherwise directed by the association, to publish the letter in the report of the proceedings. The fact that the association approved his action in so doing is clearly deducible from the fact that the letter was embodied in the report, and that the defendant caused the report to be published and circulated. If it was true that the plaintiff had newly arrived and was "operating in the states of Arizona and New Mexico," and was such a man as in the letter he was said to be, the action of an association of bankers of one of those states in giving public warning against him was both appropriate and commendable.

[2] The members of an unincorporated association are liable in their collective capacity for tort (5 C. J. 1369; 25 R. C. L. 67), and they are answerable for damages for libel published by their agent with their authority while the agent is acting within the scope of his employment, just as a corporation is liable under like circumstances (United Mine Workers of America v. Coronado Coal Co., 258 Fed. 829, 837, 169 C. C. A. 549; Buckeye Cotton Oil Co. v. Sloan, 250 Fed. 712, 719, 163

C. C. A. 44; Grand Union Tea Co. v. Lord, 231 Fed. 390, 145 C. C. A. 384, Ann. Cas. 1918C, 1118; Muetze v. Tuteur, 77 Wis. 236, 46 N. W. 123, 9 L. R. A. 86, 20 Am. St. Rep. 115; Cotton v. Fisheries Products Co., 177 N. C. 56, 97 S. E. 712; Morse v. Modern Woodmen, 166 Wis. 194, 164 N. W. 829, Ann. Cas. 1918D, 480).

[3] In Washington Gaslight Co. v. Lansden, 172 U. S. 534, 545, 19 Sup. Ct. 296, 300, 43 L. Ed. 543, where a corporation was sued for libel, the court said:

"We do not mean that in order to render the company liable there must be some evidence of authority, express or implied, given to the manager to publish or to authorize the publishing of a libel, but there must be some evidence from which an authority might be implied on the part of the manager to represent the company as within the general scope of his employment."

The allegations of the complaint in the case at bar bring the action of the secretary within the rule so announced. We think that the demurrer should have been overruled.

We find no error in the rulings of the court below in striking from the complaint as surplusage certain allegations inserted by way of innuendo to explain the meaning of the word "crooked," as used both as an adjective and a verb, and the word "crook"; the allegations being to the effect that those words implied "criminal conduct," "embezzlement," "theft," "larceny," and "violation of criminal laws."

[4] If libelous words are actionable per se, no innuendo is necessary. It is only where the words are not actionable upon their face that the plaintiff must allege by way of innuendo the defamatory sense in which they were used. 25 Cyc. 451; Bourreseau v. Evening Journal Co., 63 Mich. 425, 30 N. W. 376, 6 Am. St. Rep. 320; Broad v. Deuster, 8 Biss. 265, Fed. Cas. No. 1,908; Fredrickson v. Johnson, 60 Minn. 337, 62 N. W. 388; Scofield v. Milwaukee Free Press Co., 126 Wis. 81, 105 N. W. 227, 2 L. R. A. (N. S.) 691; Gosling v. Morgan, 32 Pa. 273; Courtois v. King Paper Co., 172 Mich. 311, 137 N. W. 699.

[5, 6] It is true that where words have two meanings, one of them harmless and the other injurious, the innuendo may properly point out the injurious meaning, and although the words "crook" and "crooked" have two meanings, one of which is harmless, there is no harmless meaning when they are applied to an individual or to human conduct. Where so applied, the common understanding of mankind imputes defamatory meaning to them. Said the court in Midland Pub. Co. v. Trade Journal Co., 108 Mo. App. 220, 233, 83 S. W. 298, 301:

"There is no covert meaning in any of the words used in the headline. They are not ambiguous, and do not require an innuendo to explain the meaning of any of them, or to apply them. Any ordinary reader can understand them. They charge Reifsnider with being 'crooked'; that is, dishonest."

The judgment is reversed, and the cause is remanded, with instruction to overrule the demurrer and for further proceedings.

MEDEMA v. HINES, Director General of Railroads, et al.

(Circuit Court of Appeals, Eighth Circuit. April 14, 1921.)

No. 5660.

1. **Railroads ⟸303(4)—Bridge reasonably safe sufficient.**
The law only requires that a highway bridge, with its approaches, over a railroad, should be constructed and maintained so as to be reasonably safe for the ordinary needs of travel.

2. **Railroads ⟸303(4)—Bridge with curve and grade held sufficient.**
The fact that a highway bridge over a railroad track was constructed with a curve approximately a 60-foot arc of a circle having a circumference of 290 feet, and that it had a grade downward from the center approximately 3 per cent., does not authorize an inference that bridge was negligently constructed.

3. **Negligence ⟸136(5)—Court determines whether facts from which negligence may be inferred have been established.**
A trial court has the duty to say whether any facts have been established by sufficient evidence from which negligence can be reasonably and legitimately inferred.

4. **Railroads ⟸303(4)—Railing on approach to bridge need not be strong enough to resist weight of automobile.**
A railroad is not required to construct and maintain a railing on an approach to a highway bridge over its tracks sufficiently strong to resist and hold back the pressing power of an automobile striking against it, so that negligence cannot be inferred from the fact that the railing gave way when struck by plaintiff's automobile.

In Error to the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

Action by D. Medema against Walker D. Hines, Director General of Railroads, and another. Judgment for defendants on directed verdict, and plaintiff brings error. Affirmed.

E. E. Wagner, of Sioux City, Iowa (C. A. Plank, of Hawarden, Iowa, on the brief), for plaintiff in error.

Henry L. Adams, of Des Moines, Iowa (Jepson & Struble, of Sioux City, Iowa, and G. E. Hise, of Des Moines, Iowa, on the brief), for defendants in error.

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

LEWIS, District Judge. The plaintiff Medema brought this action against the Director General of Railroads and the Chicago & Northwestern Railway Company, and there was judgment against him on a directed verdict after the evidence for both sides was in. He received the personal injuries complained of just as he passed off of the west end of a country road bridge while on the way to the town of Hawarden in his Ford automobile. The bridge is a part of the highway where it crosses overhead the tracks of the Chicago & Northwestern Railway Co., and is 155 feet long, exclusive of dirt embankments thrown up as approaches. He alleged in his complaint as grounds of liability that the defendants were negligent in these respects: (1) That the

bridge was not constructed on a straight line with the highway, and was constructed with unusual, dangerous and unsafe curves in it, (2) that the approach to the west end of the bridge was so narrow that it was insufficient, unsafe, and dangerous to travelers on the highway, (3) that the bridge, with its approaches and dangerous curves, was so narrow that it was unsafe and dangerous, (4) that the west approach to the bridge was unsafe and dangerous in that there was a precipice of 40 feet on each side, and it was dangerously narrow and steep, (5) that there was not a sufficient and safe guard-rail on the sides of the approach to reasonably prevent going over said precipices in event of accident, and (6) that the southwesterly corner of the bridge is about four inches higher than the wagon track in the approach at the northwesterly corner.

As he left the bridge his auto went through the rail on the side of the wagon road on top of the embankment, down the embankment head end first and upright until it reached the foot of the embankment, where it turned over and Medema was injured. He lived about half a mile east of the bridge and had frequently crossed it in his automobile, in a wagon, and in driving stock across it. The bridge was constructed on a curve near its westerly end, though straight with the dirt roadway where the two join. The curve is not regular, but would constitute approximately a 60-foot arc of a circle having a circumference of 290 feet. The floor of the bridge is 17 feet wide and has been replanked to a width of 12 feet in the center, so as to raise that space three inches above a strip 2½ feet wide on either side. From the center of the bridge west, including the curve, there is a uniform drop of approximately 3%. The top of the dirt embankment at the west end is narrower than the floor of the bridge but has a clear space for travel of 13½ feet in width, and it continues the drop to the west on a grade of about 5½%. There is a railing on either side of the bridge and embankment, that on the embankment consisting of three planks, each one by six inches, fastened to 6-inch posts set in the ground 6 to 8 feet apart. It was a damp, misty, foggy, rainy day in December, 1918. Medema had chains, which are put on the rear wheels of an auto to prevent its skidding when the roads are muddy, but he did not put them on this day. When he reached a point about 40 feet from the west end of the bridge, which is in the curve, his car skidded to the left with the curve and struck the railing of the bridge on that side. Both wheels on the left-hand side got off of the center planking. The floor of the bridge was wet, muddy and slippery. He kept going and brought the two left-hand wheels back on to the 12-foot planking 5 or 6 feet from the end of the bridge, and in doing so turned the head end of his auto so far to his right that it was crosswise the road when it reached the dirt embankment. The power being still on he was unable to right his auto before it ran into and went through the railing on the right-hand side and down the embankment.

Medema testified that when his auto skidded he was going about 5 miles an hour. A lady who was riding with him testified that the auto skidded and hit the south side of the bridge 12 or 14 feet from the west end, that they were going 7 or 8 miles an hour when he hit the bridge.

She admitted that she told an agent of the Railway Company shortly after the accident that Medema "was driving pretty fast, I couldn't estimate his speed, but he was going pretty fast over the bridge." The bridge was constructed in 1912.

The directed verdict was on two grounds, first, there was no proof that either defendant had constructed or was maintaining the bridge, and second, there was no evidence in the case from which negligence on the part of either defendant might reasonably be inferred. There was another question of fact left in serious doubt, which it was intimated might also support the action of the court, that is, the proof did not disclose which defendant was operating the railroad at the time of the accident.

[1, 2] Considering the question of negligence, we observe that there is not and cannot be any disagreement between the parties as to the measure of care required in the construction and maintenance of the bridge and approaches. The law only required that they should be reasonably safe for the ordinary needs of travel. Monson v. Railway Co., 181 Iowa, 1354, 159 N. W. 680; Peterson v. Railway Co., 185 Iowa, 378, 170 N. W. 452. While it may be said that most bridges are straight and in direct line with the roadway at either end, and that the floors are usually level from end to end, yet it is a matter of common knowledge that they are not all straight, nor are they all in direct line with the road at either end, nor are the floors of all of them level. Common knowledge and experience teaches that some bridges on country roads and some on streets in cities are constructed on a curve and with a drop or grade in the traveled way on them, and some are not in direct line with the approach at either end. The curve in this bridge was not sharp nor was the grade more than slight, and the trial court could not find that the curve and the grade had any tendency to establish the negligence charged in that respect. We are not convinced that its view was wrong.

[3] A trial court is under the duty "to say whether any facts have been established by sufficient evidence, from which negligence can be reasonably and legitimately inferred." Randall v. Railroad Co., 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003. From the evidence we think it clearly appeared that the bridge and approach were reasonably safe for a traveler who used them with ordinary care, and that there was no evidence tending to establish the contrary.

In Peterson v. Ry. Co., supra, the Supreme Court of Iowa said:

"An elevation of from two to three inches between the road surface and the top of the planks [at a grade crossing] does not tend to show negligence either in the construction or maintenance of the crossing. If we should so hold, then there is scarcely a public highway in the state of Iowa that is in a reasonably safe condition for travel. The company owes only the duty to keep the highway in a reasonably safe condition; to put it in as safe condition as highways usually and ordinarily are kept for travel. It is not bound to make the highway more safe than highways usually and ordinarily are made and kept for travel."

[4] As to the railing on the approach, McClain v. Town of Garden Grove, 83 Iowa, 235, 48 N. W. 1031, 12 L. R. A. 482, Swain v. Spokane, 94 Wash. 616, 162 Pac. 991, L. R. A. 1917D, 754, and Wasser v.

Northampton County, 249 Pa. 25, 94 Atl. 444, L. R. A. 1915F, 973, convince us that the law did not require that the defendants construct and maintain a railing that would resist and hold back the pressing power and force of an automobile. That is not its purpose, and while the requirement may embody more than a warning, it cannot be said to include the strength required to withstand the exertion of such unexpected power. In McClain v. Town of Garden Grove, supra, the Supreme Court of Iowa said:

"It was its [defendant's] duty to provide for the use of the bridge in the usual manner, and to guard against ordinary contingencies, or those which might be reasonably apprehended. It was its duty to provide railings of sufficient height and strength to prevent horses and other animals from walking off at the side, and to resist any weight and pressure which would be applied under ordinary circumstances; but it was not its duty to provide a railing which would successfully resist the weight of a horse of ordinary size precipitated suddenly against it."

In Wasser v. Northampton, supra, the Supreme Court of Pennsylvania said:

"There is no hard and fast rule as to the kind and character of a guard rail or barrier to be erected so that the highway may be deemed reasonably safe for the ordinary needs of travel. Public roads are intended for ordinary travel; if they meet the requirements which their ordinary uses demand, the authorities in charge of them have performed their duty under the law, and cannot be made answerable in damages for extraordinary accidents occurring on them."

We agree with the learned trial judge that there were no facts from which the negligence charged could be reasonably inferred.

Affirmed.

ÆTNA INS. CO. et al. v. SACRAMENTO-STOCKTON S. S. CO. *

(Circuit Court of Appeals, Ninth Circuit. May 6, 1921.)

No. 3601.

1. **Insurance ⊜146(1)—All portions of policy to be harmonized and given effect.**
   All parts of an insurance policy must, if possible, be harmonized and given effect.
2. **Insurance ⊜150—Effect of rider on printed clause stated.**
   Unless the rider on an insurance policy is irreconcilable with the printed clause, such clause must stand; but, if it is inconsistent and irreconcilable, the rider will control.
3. **Insurance ⊜150—Undeleted portions of policy held in force, unless irreconcilable with rider.**
   Where an insurer, attaching a rider to a policy, deleted portions of the body of the policy and marked them "void," it thereby expressed its intention that the undeleted portions should remain in force and constitute portions of its obligation, unless the rider was irreconcilable with them.
4. **Insurance ⊜150—Provision as to insurance against perils of the sea held not abrogated by rider.**
   A rider on a policy of marine insurance, providing that "this policy is to cover only as follows: Loss or damage caused by fire in accordance with * * * the regular California standard form of fire policy. * * *

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

*Rehearing denied October 10, 1921.

Loss or damage * * * through collision * * *"—*held* not to abrogate provisions in the body of the policy which included perils of the sea in the risks insured against.

5. **Insurance ⇐146(3)—Policy to be construed against company.**
An insurance policy is the language of the company, and it is both reasonable and just that its own words should be construed most strongly against it.

6. **Customs and usages ⇐17—General understanding in particular business as to construction of unambiguous contract properly excluded.**
Where an insurance contract was neither ambiguous nor obscure, it spoke for itself, and evidence of the general understanding among those engaged in the marine insurance business and the shipping business that a rider superseded the terms of the policy and alone defined the risk was properly excluded.

7. **Evidence ⇐441(13)—Intention of parties as to risks insured against cannot be proved.**
Where a provision in the body of marine insurance policies bearing riders included perils of the sea in the risks insured against, evidence that the agents of the insured and insurer agreed at the time of the application for insurance that the only risks intended to be insured against were fire and collision, specified in the rider, was properly excluded, since, if the contract failed to express the intention of the parties, the remedy was by suit to reform.

8. **Insurance ⇐273—Warranty of seaworthiness not implied in time policy under English law.**
By the English law and practice, no warranty that a vessel is seaworthy will be implied in a time policy of marine insurance.

9. **Insurance ⇐403—"Perils of the sea" need not be catastrophic under English law.**
By the English law and practice, a "peril of the sea," within the meaning of a marine insurance policy, need not be extraordinary, in the sense of being catastrophic or necessarily the result of uncommon causes; and severe storms, rough seas, and even fogs may be comprised in the perils of the sea.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Perils of the Sea.]

Hunt, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Second Division of the Northern District of California; William C. Van Fleet, Judge.

Action by the Sacramento-Stockton Steamship Company against the Ætna Insurance Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

The defendant in error brought an action against three insurance companies to recover on three several policies, whereby they insured the steamer Monarch against the perils enumerated therein, and alleged that on about April 15, 1915, the steamer was wrecked and totally lost by perils insured against, and that on June 3, 1915, the plaintiff gave notice of abandonment to each of said insurance companies, to which each replied, refusing to accept abandonment of the plaintiff's interest in the steamer, and stating that their policies were "rescinded and voided by the unseaworthiness of the said vessel, which caused her loss." The complaint further alleged that by the terms of each of said policies it was provided that claims, including claim for total loss, were to be adjusted according to English law and practice, and that it is the English law and practice that in a time policy of insurance there is no implied warranty that the ship shall be seaworthy at any stage of

the adventure. The defendants in their answer denied that the vessel was lost by any perils in the policies insured against, and denied that under the terms of the policies the claims were to be adjusted under the English law, and they alleged that under the English law, where with the privity of the assured the ship is sent to sea in an unseaworthy condition, the insurer is not liable for any loss attributable to unseaworthiness. They alleged that the vessel was unseaworthy with the privity of the plaintiff, that by reason of said unseaworthiness the vessel was wrecked and lost, and that on June 3 they rescinded said policies because of the unseaworthiness of the vessel, and notified the plaintiff of such rescission. At the conclusion of the evidence the court instructed the jury to return a verdict for the plaintiff.

McCutchen, Willard, Mannon & Greene, Edward J. McCutchen, and Farnham P. Griffiths, all of San Francisco, Cal., for plaintiffs in error.

Nathan H. Frank and Irving H. Frank, both of San Francisco, Cal., for defendant in error.

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

GILBERT, Circuit Judge (after stating the facts as above). One of the questions involved on the writ of error is whether or not the vessel was lost through a peril covered by the policies. The defendants contend that each policy limited the perils insured against to fire and collision, as expressed in the rider which was attached to each. The riders were printed forms, and are identical, but there is some difference in the marginal indorsements on the policies and in the portions of the bodies of the policies which were deleted. The riders begin thus:

"This policy is to cover only as follows: Loss or damage caused by fire in accordance with the terms and conditions of the regular California standard form of fire policy as issued by the Ætna Insurance Company, of Hartford, Conn."

"Loss or damage done to another ship or vessel through collision in accordance with the terms and conditions of the following collision clause."

Then follows a printed collision clause, and special provisions therein limiting liability to damage in the amount of $750 or more. On the margin of the Ætna and the Union Marine policies, impressed by a rubber stamp, are the words:

"It is agreed that clauses on slip attached hereto form part of this policy."

Also the words:

"Subject to limitations of trade as specified in slip attached to this policy."

At the foot of each rider is the following:

"The foregoing clauses are to be regarded as substituted for the terms of the policy to which they are attached, the latter being hereby waived."

In the body of the Ætna policy a collision clause differing in terms from that contained in the rider was deleted, marked:

"Void. J. A. W."

Other portions of the body of the policy, which were deleted and similarly marked, were a provision in regard to general average and a provision excluding liability for any sum which the assured might

become liable to pay for removal of obstructions under statutory powers for injury to harbors consequent on collision, or for loss of life or personal injury resulting therefrom. There remained undeleted a provision concerning the perils which the insurers were to assume, including perils of the sea. In the other two policies there are no deletions. The Hartford Insurance Company's policy does not contain the marginal clauses of the other two policies, but in the body of the policy, and in that portion which contains insurance against the perils of the sea, the insurer has filled one blank by writing therein the figure "3," and has drawn a line through another blank, after the word "return" indicating the adoption of that clause of the body of the policy.

[1-3] It is well settled that all parts of an insurance policy must, if possible, be harmonized and given effect. Unless the rider is irreconcilable with the printed clause, such clause must stand. Merchants' Ins. Co. v. Allen, 121 U. S. 69, 7 Sup. Ct. 821, 30 L. Ed. 858. But if it is inconsistent and irreconcilable, the rider will control. Gunther v. Liverpool, L. & G. Ins. Co. (C. C.) 34 Fed. 501. In the Ætna Company's policy it distinctly appears that the company took pains to delete and mark with initials certain portions of the body of the policy. It thereby expressed its intention that the undeleted portions should remain in force and constitute portions of its obligation, unless the rider is irreconcilable with them.

[4, 5] It is contended that the rider was intended to express all the risk incurred by the insurer. We do not so construe it. It is true it begins with the words "This policy is to cover only as follows:" but we think the words mean no more than that the insurer intended to substitute the two provisions contained in the rider for corresponding provisions in the body of the policy, and that as to those two provisions the policy was "to cover only" as expressed in the rider. One of the substituted provisions is the collision clause, which differs in form from and takes the place of the collision clause which was deleted from the body of the Ætna policy. The provision in the riders as to loss or damage caused by fire appears to have been inserted for the purpose of limiting such loss to the "terms and conditions of the regular California standard form of fire policy as issued by the Ætna Insurance Company." In the body of the policy fire is simply mentioned as one of the risks insured against.

The same construction, we think, should be given to the other two policies, although there are no deletions therein. They each contain in the body of the policy a fire risk and a collision clause. It is the language of the insurance company that we are called upon to construe, "and it is both reasonable and just that its own words should be construed most strongly against itself." National Bank v. Insurance Co., 95 U. S. 673, 679, 24 L. Ed. 563; Thompson v. Phenix Ins. Co., 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408. Light is thrown upon the defendant's own understanding of the contract by the fact that, when notified of the abandonment of the vessel, they made no claim that loss occurred from a cause not insured against, but wrote to the plaintiff that their policies "were rescinded and voided by the unseaworthiness of said vessel which caused her loss."

[6, 7] Error is assigned to the exclusion of evidence offered to show the general understanding among those engaged in marine insurance business and in the shipping business "in San Francisco and thereabouts" that a rider, such as is attached to the policy in suit, supersedes the terms of the policy and alone defines the risk. If the offer had been to prove that a term or expression used in a contract of insurance had received a particular construction by the general consent of the mercantile world, a different question would be presented; but the offer was to prove a general understanding of the meaning of an insurance contract in San Francisco and thereabouts. The evidence was clearly incompetent. The contract speaks for itself. It is neither ambiguous nor obscure.

"Custom or usage which contradicts the express terms of a policy of insurance is not controlling." 12 Cyc. 1093, and cases there cited; 17 C. J. 506; Arnould, § 56.

Nor was it error to exclude testimony offered to show that, in applying for insurance, the plaintiff's agent agreed with the agent of the Union Marine Insurance Company that the only risks intended to be insured against were fire and collision. If the contract failed to express the intention of the contracting parties, the remedy was by a suit to reform the policy. Insurance Co. v. Mowry, 96 U. S. 544, 547, 24 L. Ed. 674.

The defendants rely on New York P. R. S. S. Co. v. Ætna Ins. Co. (D. C.) 192 Fed. 212, where Judge Hand held that the rider superseded the policy. In that case there was a printed rider pasted on the face of the policy immediately below the first general statement of the name of the steamship, the amount of the risk, and the period for which it ran, and it contained "all the provisions of the usual English marine policy." At the bottom were the words:

"The terms and conditions of this form are to be regarded as substituted for those of the policy to which it is attached, the latter being hereby waived."

The decision was affirmed in New York & P. R. S. S. Co. v. Ætna Ins. Co., 204 Fed. 255, 122 C. C. A. 523. The difference between that case and this is that in that case the rider contained all the provisions of the usual English marine policy, was dated and signed by the agent of the insurance company, and was attached in such a way as to indicate that it was substituted for everything in the policy except the name of the steamship, the amount of the risk, and the period thereof. In the present case the rider affected only two provisions of the policy, and the way in which each insurance company dealt with the body of the policy indicated to what extent it was to be affected by the rider, and to what extent it was intended to remain in force.

The defendants in their answer admitted that the vessel was wrecked, but they alleged that at the time of the wreck the vessel was unseaworthy with the privity of the plaintiff. A witness for the defendants testified that after leaving port, on her voyage from San Francisco to Sacramento, the vessel encountered stormy weather, with a high wind; that it was a "bad storm," and that an hour later 8 or 10 seams on the starboard side opened for a distance of 20 or 30 feet,

and water poured into the hold; that half an hour later the vessel reached her landing, at which time the water in the hold reached to the deck, and that 20 minutes later she turned over on her side. The policies included insurance against perils of the sea and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said ship. The defendants offered to prove by the second mate that in his opinion the filling and sinking of the vessel was caused by unseaworthiness. The exclusion of the proffered testimony is assigned as error. And in that connection the defendants contend that the proof was insufficient to show that the vessel was lost by the perils of the sea.

[8] The policies were time policies, and the vessel had been operating under them for a period of nine months. Each policy provided:

"Claims if any, including claim for constructive total loss to be adjusted according to the English law and practice."

By English law and practice the rule is conclusively established that in a time policy a warranty that the vessel is seaworthy will under no circumstances be implied. Arnould on Marine Insurance, § 697. Leading cases so holding are Gibson v. Small, 4 H. L. C. 353, and Dudgeon v. Pembroke, 2 App. Cas. 284. If we assume that the defense pleaded in the answer, that at the time of the wreck the vessel was unseaworthy "with the privity of the plaintiff," and that her unseaworthiness occasioned her loss, is equivalent to the plea which in Thompson v. Hopper, 6 El. & Bl. 937, and Dudgeon v. Pembroke, was sustained as an exception to the rule, a plea alleging that the shipowner himself knowingly and willfully sent the ship to sea in an unseaworthy state and that she was lost in consequence, the fact remains that the defendants here made no offer to prove such knowledge on the part of the plaintiff.

[9] As to the contention that the proof was insufficient to show that the loss occurred through a peril insured against, it is sufficient to point to the rulings of the English courts as to what are the perils of the sea insured against in such a policy. Said Lord Herschell in The Xantho, 12 App. Cas. 509:

"It is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against the events which must happen. It was contended that those losses only were losses by perils of the sea which were occasioned by extraordinary violence of the winds or waves, I think that is too narrow a construction of the words, and it is certainly not supported by the authorities or by common understanding."

In Dudgeon v. Pembroke, Lord Penzance said:

"The real question intended to be raised, therefore, is whether a vessel not strong enough to resist the perils of the sea (in another word, unseaworthy) can be properly said to be 'lost by perils of the sea,' when it is clear that by the force of the winds and waves it went ashore, and finally broke up and went to pieces. The question, therefore, is one of law, and not of fact, and

the learned judge was quite justified in entering the verdict as he did without asking the jury any further question as to the loss. * * * It was said by one of the learned judges in the Exchequer Chamber that 'the unseaworthiness of the ship at the commencement of the voyage, which really causes the loss, is a fact, the consequences of which are imputable to the assured, and were to be borne by him, and not the underwriters.' But the question, as it seems to me, is not what losses ought in the abstract to be borne by the assured as being 'imputable' to him or his agents, on the one hand, or by the underwriters as being caused by the elements, on the other hand, but what losses they have mutually agreed should be borne by the underwriters in return for the premium they have received. These losses are in the contract of insurance, amongst others, declared to be all 'losses by perils of the sea.' A long course of decisions in the courts of this country has established that 'causa proxima et non remota spectatur' is the maxim by which these contracts of insurance are to be construed, and that any loss caused immediately by the perils of the sea is within the policy, though it would not have occurred but for the concurrent action of some other cause which is not within it."

In Ajum Goolam Hossen v. Union Mar. Ins. Co., 17 T. L. R. 367, the court held that the assured could recover, although in that case the loss did not appear to be traceable to any violence of wind or wave, and it is the settled doctrine of the English courts that in case of foundering at sea, where there is no proof of the cause thereof, it will be presumed that the loss occurred through the peril of the sea. Arnould, § 813. Rule 7 of the First Schedule of the English Marine Insurance Act of 1906 provides:

"The term 'perils of the seas' refers only to fortuitous accidents or casualties of the seas. It does not involve the ordinary action of the winds and waves."

We reach the conclusion that by the English law and practice a peril of the sea need not be extraordinary, in the sense of being catastrophic or necessarily the result of uncommon causes, and that severe storms, rough seas, and even fogs may be comprised in the perils of the seas.

The judgment is affirmed.

HUNT, Circuit Judge, dissents, on the ground that the question whether the Monarch was lost by a peril of the sea was one of fact, and should have been submitted to the jury.

FORDHAM et al. v. MARRERO.

(Circuit Court of Appeals, First Circuit. May 12, 1921.)

No. 1468.

1. Bastards ⇐6—Evidence held to show recognition of plaintiff as natural child.

Evidence of decedent's actions toward plaintiff and of his bequest to her *held* sufficient to sustain a finding that decedent had acknowledged plaintiff as his natural child, within Civ. Code of Spain, art. 135, then in force in Porto Rico.

2. Courts ⇐406(1)—Concurrent findings on question of mixed law and fact by Porto Rico courts affirmed, unless plainly wrong.

The finding of the District Court and the Supreme Court of Porto Rico, which were learned in Spanish law, on the testimony and involving

findings of mixed law and fact, should not be disturbed by the Circuit Court of Appeals, unless plainly wrong.

3. **Divorce ⟸320—New York divorce decree prohibiting remarriage has no effect in Porto Rico.**
The provision in a decree of divorce granted by a New York court prohibiting remarriage by the husband had no extra-territorial force, and constituted no bar to the marriage of the husband in Porto Rico.

4. **Territories ⟸10—General order permitting remarriage of divorced persons superseded Code prohibition.**
The general order issued March 17, 1899, by Maj. Gen. Henry, authorizing marriage by divorced persons, had the force of law in Porto Rico, and superseded the old Spanish Code, under which a divorce did not release from the bonds of matrimony, and therefore did not permit remarriage.

5. **Bastards ⟸8—Proceeding to establish status as recognized natural child is quasi in rem, in which service by publication is permissible.**
A proceeding in the courts of Porto Rico to establish the status of plaintiff as the recognized natural child of decedent is one in which the judgment, if not strictly a judgment in rem, is one quasi in rem, as is a decree of divorce, so that service by publication and by mail, in the manner authorized by the Code of Porto Rico, of a nonresident defendant, who could not be personally served, was sufficient to give the court jurisdiction to enter the default of the nonresident.

6. **Bastards ⟸8—Contingent beneficiaries not necessary parties to establishment of rights of natural child, without proof condition had happened.**
The failure to make the sisters of testator parties to a suit by plaintiff to have her status and rights of inheritance as the acknowledged natural child of testator established was not error, where under the will the sisters could take only in event of the death of testator's mother, and her death was not proven, so that the sisters were not necessary parties.

7. **Evidence ⟸82—Appointment of judge assumed to have been confirmed, in absence of proof to the contrary.**
In the absence of proof that the appointment of the District Judge of Porto Rico who tried the case had not been confirmed by the Senate at the time of the trial, it must be assumed that he had been legally appointed and confirmed, though he stated at the beginning of the trial that he had been notified of his reappointment, but had not yet received notice that such appointment had been confirmed.

Appeal from the Supreme Court of Porto Rico.

Action by Amelia Marrero against Maria D. Fordham and another, to have plaintiff adjudged the acknowledged natural child of Charles M. Boerman, with the right to inherit a part of his estate. A judgment for plaintiff was affirmed by the Supreme Court of Porto Rico, and defendants appeal. Affirmed.

O. B. Frazer, of San Juan, P. R. (Rounds, Hatch, Dillingham & Debevoise, of New York, on the brief), for appellants.

Jose Tous Soto, of Ponce, P. R., for appellee.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

JOHNSON, Circuit Judge. This is an appeal from a final judgment of the Supreme Court of Porto Rico, affirming a judgment of the district court for the judicial district of Ponce. The action arose upon a complaint filed by the appellee in which she represented that she is the acknowledged natural child of Rafael Marrero, born in Ponce, Porto Rico, on September 16, 1901, as the offspring of illicit carnal

relations between the said Rafael Marrero and Charles M. Boerman, while both were unmarried and without any bar of any kind to contract marriage, not only at the time of the birth of the plaintiff, but also at the time of her conception; that Charles M. Boerman died on January 30, 1915, without leaving any legitimate descendants, but leaving a will which was probated and protocoled by judgment of the district court of Ponce, in which will the said Charles M. Boerman named as his sole and universal heirs in equal shares his wife, Maria D. Boerman, née Fordham, a resident of Porto Rico, and his mother, Ester Bessie Boerman, a resident of Ponewiesch, Russia, and bequeathed a legacy of $5,000 to the appellee, to be held in trust until she reached the age of 25 years, and upon which she was to receive interest at 6 per cent. annually until she reached that age; that from the time of her birth until the death of the said Charles M. Boerman the appellee was continuously in the possession of the status of a natural child of Boerman; that he always provided for her food, raiment, shelter, medical attention, and education; that he constantly looked after her education, personally enrolled her in the public schools under the surname of Boerman, and introduced and recommended her to the teachers as his daughter; that publicly and privately he treated her as his daughter, and called her daughter, and consented and requested that she call him father; that he took a constant interest in her welfare, made presents to her, and on many occasions said to different persons that she was his daughter; that he desired her to be considered and treated as such; that she was so considered and treated by all who knew her; that Charles M. Boerman, at his decease, was the owner of property of the value of more than $60,000, consisting largely of real estate situated in Porto Rico; and the appellee prayed that she be adjudged the acknowledged natural child of Charles M. Boerman, with the right to bear his surname and to inherit one-fourth part of all the estate left by her natural father, and that the $5,000 bequeathed her in his will be reckoned as a part of her share of his estate, but free from the restrictions imposed upon it in the will.

Service by publication and by notice through the mail was ordered upon Ester Bessie Boerman in accordance with sections 94 and 95 of the Code of Civil Procedure of Porto Rico. Notice was published as ordered, but the notice sent to her address in Russia never reached her and she was defaulted.

The other defendant, Maria D. Fordham, filed an answer, which contained a general denial of all the allegations in the bill of complaint, and also alleged that Charles M. Boerman married in the city of Chicago, Ill., on November 15, 1893, one Sophia Boerman; that she obtained a decree of divorce from Charles M. Boerman in the Supreme Court of the state of New York on May 25, 1900, on the ground of adultery; that in the decree granting the divorce there was a provision that it should not be lawful for the said Charles M. Boerman "to marry again until the said Sophia Boerman, the plaintiff, shall be actually dead"; that when the said decree of divorce was granted, and until 1903, Charles M. Boerman was a citizen of the state of New York, although domiciled in Porto Rico, and that according to the

laws of the state of New York, in force from 1900 to 1903, Charles M. Boerman was incapacitated to contract marriage, because the laws of the state of New York under which said decree of divorce was granted had extraterritorial effect by reason of the citizenship of Charles M. Boerman; that on September 16, 1901, the date of the birth of Amelia Marrero, the decree of divorce had no other force in Porto Rico than to suspend the community life of Charles M. Boerman and Sophia Boerman, according to the provisions of the Spanish Civil Code then in force in Porto Rico, and that therefore Charles M. Boerman was then incapacitated to contract marriage in Porto Rico; that Charles M. Boerman in his will alleged that he was married to Maria D. Fordham, and that he had had no child either by her or by any other woman, and that the said Rafael Marrero was a woman of libidinous habits and had carnal connection with various other men during the period between the years 1899 and 1902.

The trial was held in the district court for the judicial district of Ponce before Hon. Domingo Sepulveda, District Judge. Before commencing the trial on November 2, 1917, Judge Sepulveda announced that the term of four years for which he had been appointed expired on November 1, 1917; that he had been reappointed by the Governor as judge of the district court of Ponce, and his appointment had been transmitted to the Senate; but he had yet no knowledge that his appointment had been confirmed. The attorneys upon both sides stated that they made no objection to Judge Sepulveda's hearing the case and he proceeded with the trial. He ruled that the prohibition in the decree of divorce that Charles M. Boerman should not marry during the lifetime of Sophia Boerman, his former wife, had no extraterritorial effect and did not constitute a bar to his marriage in Porto Rico at the time of the birth of the appellee. He found as a fact that Charles M. Boerman resided in Porto Rico from the year 1899 until he died in 1914, and that under the law and the facts Amelia Marrero is his acknowledged natural child, with the right to bear his surname and inherit from him the part of the estate which the law allows her as such.

Upon the judgment entered upon his findings of fact and rulings of law there was an appeal to the Supreme Court of Porto Rico, which, in a very careful opinion by the Chief Justice, affirmed the judgment of the court below, after examination of all the testimony and the written and oral pleadings of all the parties.

There are 22 assignments of error, but only 5 are now relied upon by the appellant:

First. That the Supreme Court of Porto Rico erred in finding and holding that the evidence presented was sufficient to establish the status of the plaintiff, Amelia Marrero, as an acknowledged natural child of Charles M. Boerman.

Fifth. The Supreme Court of Porto Rico erred in finding and holding that Charles M. Boerman was capable of having a natural child at the time of the conception and birth of the plaintiff, Amelia Marrero.

Fifteenth. The Supreme Court of Porto Rico erred in not finding and holding that the district court for the judicial district of Ponce had no jurisdiction to try and render judgment in this case, inasmuch

as said district court never obtained jurisdiction over the defendant Ester Bessie Boerman.

Sixteenth. The Supreme Court of Porto Rico erred in not finding and holding that Charles M. Boerman's sisters, to wit, Rachel Krasnetsky, Glikka Kessler, Rebecca Kagan, Sara Beilinson, and Anna Gayman, were necessary parties to this suit.

Twenty-second. The Supreme Court of Porto Rico erred in finding and holding that Judge Sepulveda was legally qualified to try and decide the issues in and render judgment therein as judge of the district court for the judicial district of Ponce.

[1] Upon the first assignment of error it is sufficient to say that the acknowledgment by Charles M. Boerman of the appellee was sustained by the testimony of the mother of the appellee and several witnesses who were in a position to know the relations of Charles M. Boerman to the appellee and his acts toward her, tending with greater or less force to show an acknowledgment by him of her as his natural child. The will itself, in which he made a provision of $5,000 for her, showed his affection for her and concern for her future welfare, and his widow testified that her husband proposed at one time to adopt the girl, because he had heard that her mother had given the girl his surname and that he thought of adopting her, because he believed he should; but that she objected to it "because any one might believe the rumor that she was his daughter for the reason that she bore his surname."

She claimed that her husband did not carry out his purpose of adoption, because he was informed that if the appellee were adopted she would have the same rights as if she were his own daughter, and that he did not desire this.

We have carefully examined the transcript of testimony and concur in the finding of the Supreme Court that—

"It presents strong and convincing proof in support of the conclusion that plaintiff, Amelia Marrero, has been in the continued possession of the status of natural daughter of Charles M. Boerman by reason of the direct acts of the said Boerman with regard to the plaintiff, as required by section 135 of the Spanish Civil Code, cited by the appellate as applicable to the case because it was in force at the time of the birth of said plaintiff."

At the time of the birth of the appellee the Civil Code of Spain relating to the acknowledgment of children born out of wedlock was in force in Porto Rico (Mendez v. Martinez, 21 P. R. R. 238), and this provided as follows:

"Art. 135. The father is obliged to acknowledge the natural child in the following cases:

"1. When an indisputable paper written by him, expressly acknowledging his paternity, is in existence.

"2. When the child is in the uninterrupted enjoyment of the status of a natural child of the defendant father, justified by direct acts of the said father or of his family."

[2] There was no claim of acknowledgment by any written document, and the case was tried in the district court of Porto Rico upon the claim that the requirements of paragraph 2 of article 135 had been met. Both the district court and the Supreme Court, learned in Spanish law and familiar with the evidence required to determine what acts

of the father should constitute strong and convincing proof of the acknowledgment of a natural child by a father, have found that the testimony was sufficient. The district court said of it that it satisfactorily proved the cause of action, save only the allegation of the fourth count regarding the existence of properties; and the Supreme Court characterized it as "strong and convincing as required in cases of the acknowledgment of natural children." The finding of two courts familiar with the local law, upon the testimony and involving the findings of mixed law and fact, should not be disturbed by us unless plainly wrong.

We do not think that it is, but, on the other hand, that the evidence is plenary; that in many ways Charles M. Boerman publicly treated the appellee as his daughter, manifesting a deep interest in her education, and being willing that she should bear his surname. This disposes of the first assignment of error.

The fifth assignment of error, relied upon, is that the court erred in not ruling that the appellee could not be the natural child of Charles M. Boerman, for the reason that article 119 of the Civil Code, in force in Porto Rico in 1901, provides as follows:

"Art. 119. Only natural children can be legitimized. Natural children are those born out of wedlock of parents who, at the time of the conception of the child, could have married with or without dispensation."

[3, 4] Both the Porto Rican courts have held that the prohibition in the decree of divorce granted by the Supreme Court of New York in 1900 had no extraterritorial force and constituted no bar to the marriage of Boerman with the mother of Amelia at the time of her conception and birth. This ruling was clearly right and is not seriously attacked; but it is contended that, under the law in force in Porto Rico, Amelia was not the "natural child" of Boerman, because he could not then have married her mother, and therefore she could not be legitimized. While under the Code in force in Porto Rico at the time of the American occupation, in 1899, a divorce did not release from the bonds of matrimony, but only created a suspension of the marital relation, as did at common law a decree a mensa et thoro, and it also provided that those who were already bound in marriage could not contract marriage, this was materially changed by a general order issued March 17, 1899, by Maj. Gen. Guy V. Henry, which provided that marriage could be contracted by divorced persons, with certain exceptions, which do not include Boerman. This general order had the force of law in Porto Rico and superseded the old Spanish Code.

We find no error in the ruling of the Supreme Court of Porto Rico that the prohibition in the decree of divorce granted by the Supreme Court of New York had no extraterritorial force, and that, because of this general order, there was no bar to the marriage of Boerman with the mother of the appellee at the time of the conception and birth, and therefore no legal reason why she could not be the natural child of Boerman and legitimatized by him.

[5] The fifteenth assignment of error relates to the jurisdiction of the district court of Ponce to render judgment when there was only notice by publication to one of the defendants, Ester Bessie Boerman. While service by publication and by mail was ordered upon the mother

of Boerman, who was alleged to be a citizen and resident of Russia, a letter addressed to her was not delivered, because of the unsettled conditions in Russia owing to the war, and it does not appear that she had any notice of the pendency of the suit. The order of notice upon her was authorized by the statute in force in Porto Rico in the case of nonresident defendants, and this order was strictly complied with. As this was a proceeding to determine the status of the plaintiff in a suit of filiation, it was a proceeding in rem, and if her status was found to be that of an acknowledged natural child, then the law would determine her right in the estate of the acknowledging father.

Upon questions involving the status of its citizens every state is sovereign. Porto Rico has, with the sanction of the United States, enacted laws in regard to the acknowledgment of illegitimate children, and in the execution of these laws it exercises the powers of a sovereign state, and a judgment rendered by its courts in their execution can only incidentally affect nonresidents. Such a judgment, if not strictly a judgment in rem, is one quasi in rem, as is a decree of divorce, which only dissolves a marriage, and does not contain any provision for the payment of alimony. As there is no suggestion that the order of notice upon the absent defendant, Ester Bessie Boerman, was not strictly complied with, we think the district court of Porto Rico had jurisdiction to enter her default.

[6] The sixteenth assignment of error, relating to the failure to make the sisters of Charles M. Boerman parties, was not argued below. It was only in the event of the death of the mother of the testator that his sisters would take under his will. Her death was not proven, and they were not necessary parties.

[7] The last assignment of error is that Judge Sepulveda was without jurisdiction to try the case. The Supreme Court found that there was no evidence that the appointment of Judge Sepulveda had not been confirmed when he heard the case, and in this we concur. It is true that he announced that he had received notice of his appointment, but had not been notified that the appointment had been confirmed; but, if it had not been confirmed, this could have been easily proven. This was not done, and the presumption must stand that he had been legally appointed and confirmed.

The judgment of the Supreme Court of Porto Rico is affirmed, with costs to the appellee in this court.

AMERICAN SURETY CO. OF NEW YORK v. AMERICAN MILLS CO.

(Circuit Court of Appeals, Second Circuit. April 13, 1921.)

No. 169.

1. Principal and surety ⇐57—Surety bond held procured by fraud.

A transaction between defendant jobber and a debtor corporation, apparently insolvent, by which the debtor contracted to deliver a quantity of bags to defendant for payment, falsely recited as received, and procured complainant surety company to guarantee delivery, whereby, if

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

the bond was enforced, defendant would obtain payment of its debt, *held* fraudulent as to the surety company, and the bond subject to cancellation at its suit.

2. **Equity ⊂=43—Bill does not lie where adequate remedy at law exists.**
A bill in equity does not lie in any case where a plain, adequate, and complete remedy may be had at law.

3. **Equity ⊂=53(1)—Objection to jurisdiction because of adequate remedy at law may be waived.**
The right to object to the jurisdiction of a federal court of equity on the ground of adequate remedy at law may be waived.

4. **Equity ⊂=53(1)—Objection to jurisdiction waived by counterclaim.**
In suit for cancellation of surety bond on ground that it was obtained by fraud, an objection in the answer to the jurisdiction in equity on the ground that complainant had an adequate remedy at law was waived by a counterclaim asking recovery on the bond, defendant insisting upon the counterclaim at the trial and offering proof to sustain it, although defendant moved for dismissal on the ground that equity had no jurisdiction in opposition to a motion for judgment on the pleadings, but did not renew such motion during the trial until the court indicated its determination to decide in favor of the complainant.

5. **Courts ⊂=347—Jury ⊂=13(6)—Defendant, objecting to jurisdiction, need not plead counterclaim under equity rule.**
Under rule 30 of the new Equity Rules (201 Fed. v, 118 C. C. A. v), a defendant in an equity case is not obliged to plead a purely legal cause of action as a counterclaim and offer proof thereof in an action in equity, since any such requirement would be in conflict with Const. U. S. Amend. 7, preserving the right of trial by jury.

6. **Jury ⊂=28(11)—Defendant, asserting cause of action at law by way of counterclaim, elects to proceed without jury.**
Where defendant in an equity case asserts a cause of action at law by way of counterclaim, he elects to proceed without a jury.

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

Suit by the American Surety Company of New York against the American Mills Company for an injunction. Decree for plaintiff (262 Fed. 691), and defendant appeals. Affirmed.

Henry Uttal, of New York City (Herbert Haas, of Atlanta, Ga., of counsel), for appellant.

Henry C. Willcox, of New York City (Allan C. Rowe, of New York City, of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The appellant was a jobber and a dealer in secondhand bags and burlap at Atlanta, Ga. The Hartenfeld Bag Company was in business in Chicago, Ill., as a dealer in secondhand bags and burlap. Its business was collecting secondhand bags, cleaning and repairing them, and reselling them to the bag trade. The appellant had previously, during the course of several years, purchased bags in considerable amounts from the Bag Company. Very frequently the business was conducted as follows: The appellant would secure orders from its customers, and then buy the secondhand bags and burlap necessary to fill such orders from the Bag Company. Payment was

made to the Bag Company in advance as soon as the contract of purchase was made, by giving the appellant's notes, which the Bag Company discounted in Chicago, thus raising the money to finance its transactions. In 1918, owing to the war conditions, there was a shortage of burlap, and the appellant placed orders for large amounts of merchandise with the Bag Company, paying in advance in the manner described. However, when it came to delivery, the Bag Company failed to do so in several instances, and in some cases, where deliveries were made, the customers of the appellant to whom the bags were sent, made complaint both of shortage in quantity and inferiority in quality. In some instances it resulted in rejectment of shipments. The appellant, under contract to deliver the merchandise to its customers, for which it had already paid the Bag Company, was forced to unusual efforts in the summer of 1918 to secure from the Bag Company prompt deliveries of unfilled orders and to make good shortages and substitution of good bags and burlap for those which had been rejected. This resulted in a controversy, with extended correspondence and extensive promises, which apparently were not kept.

On August 29, 1918, while this condition of affairs existed, the Bag Company sold to the appellant a carload of bags and burlap for shipment to Atlanta for $9,225. The appellant did not pay in advance for these goods, but purchased on open account, payable in 90 days. The carload was shipped to Atlanta on August 30, 1918, and on the same day, the Bag Company assigned the 90-day account against the appellant for $9,225, the purchase price of this car, to the Commercial Credit Company of Baltimore. This company makes a business of loaning money on the purchase or discount of accounts receivable. The matter of this assignment was unknown to the appellant until September 24, 1918, following. The unsatisfactory deliveries and replacement of shortages and defective bags continued until September 24, 1918. On that date, the parties met in Chicago, and it was then stated by the president of the Bag Company that he could not make some of the deliveries or replacements to which the appellant was entitled, and it was finally agreed that for such nondeliveries, shortages, and defective deliveries the Bag Company owed the appellant $11,951.41. This adjustment did not take into consideration the open account, which was assigned as aforesaid. The Bag Company was unable to pay the $11,951.41 in cash, and it was finally agreed that the Bag Company should pay the appellant $2,726.41, and give notes for $9,225, making together the $11,951.41 debt, and that the appellant should give to the Bag Company its notes for $9,225 in payment of the car of August 29, 1918, which had been sold under 90 days credit, and which account had been assigned to the Commercial Credit Company. Notwithstanding such assignment, the appellant agreed to give notes for it.

The appellant disclaims knowledge of such assignment to the Commercial Credit Company. When the parties started to draw the notes, it was then recalled that there was another small debt from the Bag Company which had been overlooked. So this indebtedness was deducted from the appellant's notes, and on September 14, 1918, the appellant gave the Bag Company one note for $4,650 due December 18,

1918, and another note for $4,485.08, due January 5, 1919, in payment of the car shipped to Atlanta on August 29, 1918, which had been sold on open account. The Bag Company discounted the appellant's notes with a banking house in Chicago, and received credit therefor. When on September 24, 1918, the appellant was requested to pay by the Commercial Credit Company, it at once communicated with the Bag Company. At this time the Bag Company owed the appellant the $9,225 in notes and other matters aggregating about $12,000, for which the appellant had no security. The president of the appellant went to Chicago, without acknowledging or answering the demand of the Commercial Credit Company, for the purpose of discussing matters and arriving at a settlement with the Bag Company. The president of the Bag Company stated that the assignment of the account to the Commercial Credit Company was due to an error, and that in his absence a "bonehead" clerk had filled out one of the blank forms and assigned the account without his knowledge to the credit company; but it was apparent that the Bag Company was in bad financial condition and this was made known to the appellant. However, the president of the Bag Company stated that, while he had no ready cash, he had considerable volume of merchandise on hand which would permit him to pay in 60 days.

The following transaction then took place: A contract was drafted, by which it was made to appear that the Bag Company should sell and deliver to the appellant merchandise therein specifically amounting to $22,100, a little more than enough to pay the appellant in full, and provided as follows: "Which the American Mills Company agrees to pay cash upon the conditions that this contract is completed within 75 days after date." It provided that the Bag Company would secure a good surety company bond guaranteeing the performance by the Bag Company. At the time it was very apparent that the president of the appellant did not go to Chicago for any purpose other than to adjust the indebtedness then owing. Nothing indicates a desire to buy other merchandise. No satisfactory explanation is given why another purchase of bags should have been made under the circumstances. Later there was substituted in the contract the following words:

"The amount of this contract is $22,100, paid to H. B. C. [Hartenfeld Bag Company] upon the execution of this agreement, the receipt whereof is hereby acknowledged. In the event that the said H. B. Co. shall not make delivery of the said bags on or before 75 days after the date hereof, said H. B. Co. shall retain of said $22,000 only so much thereof as will pay at the contract rate for such bags, if any, as have been delivered and accepted by A. M. Co. [American Mills Company], and said H. B. Co. shall at the expiration of 75 days immediately return to A. M. Co. the difference between said $22,000 and the price of the bags delivered."

[1] This substituted a contract which called for payment on delivery into one which apparently called for an immediate advance payment and for delivery or a refund of the money. Under this change in the contract, the surety was liable, not only for damages above the contract price for failure to deliver bags, but for actual delivery of the bags or repayment of the whole recited consideration. This

change, made by the attorney for the purchaser, was disadvantageous to the ostensible purchaser, and is some evidence that the contract was not what it appeared to be, but a mere cover for an agreement to deliver merchandise in the future for the payment of debts existing and to be assumed for over $21,000, and was made solely in order to make the surety liable for the payment of the debt, either by delivery of merchandise or cash. No other satisfactory explanation is made why a creditor, which did not want to buy goods and did not go to Chicago therefor, should voluntarily change the apparent contract from one which would not require the creditor to make an advance payment to one which did.

The trial judge concluded that the contract in question was a mere blind or fraud to conceal the real agreement, and that the form in question was adopted to conceal the real transaction under the guise of a sale in good faith with an advance payment. Its purpose was plain. It was intended to induce a surety to execute a bond, and by its bond become liable for the payment of a debt then due and to be assumed from the Bag Company to the appellant. It was clear to the trial judge, as it is to us, that the purpose of the parties was to exchange this unsecured claim, which the appellant had of $12,000, plus the $9,225 indebtedness of the appellant to the Credit Company, by virtue of the assignment of the claim, into a claim of merchandise, or money if the merchandise was not delivered in 75 days, and to secure it by a bond of a surety company. What took place at the time of the execution of this contract, together with the explanations as disclosed by the record, satisfy us of the correctness of this finding in the lower court. The appellee executed this bond. After its execution, the correspondence between the parties and their course of conduct verifies the conclusion that it was a fraud attempted to be perpetrated to secure payment to the appellant.

But the validity of the decree below is attacked upon the ground that the District Court did not have jurisdiction. It appears that, after a default was made by the Bag Company in carrying out this contract, the appellant sued the Surety Company in the Illinois state court on the bond, together with the Bag Company, and served both defendants. A few days later it sued in the state courts in Georgia. Process was served only on the appellee, because it could not be served upon the Bag Company in that state. Before answer in either suit, the appellee brought a suit in the New York Supreme Court, alleging fraud in obtaining the execution and delivery of this bond, and asking for its cancellation and surrender. Because of diversity of citizenship, the appellant moved the case to the District Court of the United States for the Southern District of New York. The appellant thereupon interposed an answer, alleging that equity had no jurisdiction, because it had an adequate remedy at law, maintaining that, in actions at law pending in the courts of the states of Illinois and Georgia, it could defend upon the ground of fraud. The appellant also pleaded a counterclaim upon a cause of action at law, and claimed breaches against the appellee, and asked for judgment for $21,050. This was the same sum as

claimed by the appellant in the suits in Illinois and Georgia. The prayer for relief was as follows:

"Wherefore defendant demands judgment dismissing the complaint, with costs, and for affirmative judgment against the plaintiff on defendant's counterclaim for the sum of $21,050, with interest thereon from the 14th of December, 1918, with costs."

A reply was interposed by the appellee to the material allegations of the counterclaim and separate defenses thereto were interposed. A motion was made for judgment on the pleadings, which was denied without prejudice to renewal at the trial. Another application was made for a final decree on the pleadings, on the ground that the admissions in the appellant's answer entitled the appellee to the relief sought. In opposition to this motion, the appellant moved for a dismissal on the ground that equity had no jurisdiction, because the appellee had an adequate remedy at law. This motion was denied without prejudice. On the trial, at the close of the appellee's case, the appellant called witnesses and endeavored to establish the allegations of the counterclaim. At no time during the trial was the application to dismiss renewed upon the ground that the appellee had an adequate remedy at law. The court thereupon indicated its determination to decide in favor of the appellee and against the appellant on the facts, and stated that the only question which it desired to have argued was on the question of law. Thereupon the appellant urged that there was no equitable jurisdiction, for the reason that the appellee had an adequate remedy at law, and the court ruled that, since the counterclaim was interposed and the appellant asked affirmative relief, it had submitted itself to the jurisdiction of a court of equity, and gave a decree against the appellant.

[2-4] A bill in equity does not lie in any case where a plain, adequate, and complete remedy may be had at law. Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 33 Sup. Ct. 942, 57 L. Ed. 1288. But the objection to such jurisdiction may be waived. We think equity did not have jurisdiction, but for the waiver of the appellant. Pleading its counterclaim in the answer, and thereafter insisting upon it at the trial, and offering proof to sustain it, constituted a waiver. The equity power having been invoked, the right of the defendant to object because of the existence of a legal remedy can be waived. McGowan v. Parish, 237 U. S. 285, 35 Sup. Ct. 543, 59 L. Ed. 955. The appellee stated and proved its right to equitable relief to prevent being harassed by suits on the bond, which was procured through fraud, and while it had an adequate remedy at law in defending any suit which was attempted to be maintained on the bond, still, appellant having consented by its pleas to remain in the equity court, the jurisdiction to try the case was complete. In McGowan v. Parish, 237 U. S. 285, 35 Sup. Ct. 543, 59 L. Ed. 955, the court said:

"But 'a court of equity ought to do justice completely, and not by halves,' and a cause once properly in a court of equity for any purpose will ordinarily be retained for all purposes, even though the court is thereby called upon to determine legal rights that otherwise would not be within the range of its authority. Camp v. Boyd, 229 U. S. 530, 531."

The rule was stated in Southern Pacific R. R. v. U. S., 200 U. S. 341, 26 Sup. Ct. 296, 50 L. Ed. 507:

"It is undoubtedly true that a suit in equity cannot be maintained when there is a plain, adequate, and complete remedy at law. Such is the mandate of Revised Statutes, § 723, as well as the general rule in equity. Lewis v. Cocks, 23 Wall. 466; Killian v. Ebbinghaus, 110 U. S. 568; Litchfield v. Ballau, 114 U. S. 190; Allen v. Pullman's Palace Car Company, 139 U. S. 658. It is also true that this objection need not always be raised by some pleading, but may be presented on the hearing, even in the appellate court, and if not suggested by counsel, may be enforced by the court on its own motion. See authorities just cited. But, on the other hand, it is equally true that where the objection that the plaintiff has an adequate remedy at law is not made until the hearing, and the subject-matter is of a class over which a court of equity has jurisdiction, the court is not necessarily obliged to entertain it, even though, if taken in limine, it might have been worthy of attention. Wylie v. Coxe, 15 How. 415, 420; Reynes v. Dumont, 130 U. S. 354, 395; Kilborn v. Sunderland, 130 U. S. 505, 514; Brown v. Lake Superior Iron Company, 134 U. S. 530; Insley v. United States, 150 U. S. 512, 515; Perego v. Dodge, 163 U. S. 160, 164; 1 Daniell's Chan. Pl. & Pr. (4th Ed.) p. 555."

At no time did the appellant raise the objection until after it had pleaded its counterclaim, and while a motion to dismiss the bill was made and denied in advance of trial, this was done without any prejudice to a renewal. In place of renewing at the commencement of the trial, the appellant proceeded with the trial, and offered proof of its counterclaim, and asked for judgment. When it observed that judgment on the facts was going against it, then for the first time during the course of the trial it insisted that the appellee had an adequate remedy at law. We think this conduct at the trial was tantamount to invoking the aid of a court of equity to exercise its jurisdiction in this case. Offering proof before the court, without a jury, waived any objection to the jurisdiction of the court in equity to try and dispose of the suit. Merchants' Heat & Light Co. v. Clow & Sons, 204 U. S. 286, 27 Sup. Ct. 285, 51 L. Ed. 488. In that case the court said:

"But by setting up its counterclaim the defendant became a plaintiff in its turn, invoked the jurisdiction of the court in the same action and by invoking submitted to it. * * * There is some difference in decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none as to the proposition that when he does become an actor in the proper sense he submits. * * * As we have said, there is no question at the present day that, by an answer in recoupment, the defendant makes himself an actor, and, to the extent of his claim, a cross-plaintiff in the suit."

[5] But the appellant insists that, because of rule 30 of the new Equity Rules (201 Fed. v, 118 C. C. A. v), he was obliged to plead his counterclaim and offer proof thereof in this action in equity. Rule 30 in part provides:

"The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, and may, without cross-bill, set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim so set up shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross claims."

The courts never intended, nor had they the power, to compel a defendant to plead a purely legal cause of action as a counterclaim to a suit in equity, and rule 30 was never so intended. To do so would be in conflict with the Seventh Amendment of the federal Constitution, which provides:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

[6] The facts which might constitute a counterclaim can be pleaded in an equity action as a defense or answer by way of cross-suit, and "so as to enable the court to pronounce a final judgment in the same suit, both on the original and cross-bills." What the appellant did here was voluntarily—not compelled by any rule—to assert a cause of action at law by way of the counterclaim. This conduct was an election to proceed without a jury. Robb v. Vos, 155 U. S. 13, 15 Sup. Ct. 4, 39 L. Ed. 52; A. Klipstein & Co. v. Grant, 141 Fed. 72, 72 C. C. A. 511. As the cause proceeded, the trial judge had it within his power to dismiss appellee's cause of action (if he concluded it was without merit), and could have retained jurisdiction on the questions presented by the proofs as to the counterclaim, and could have rendered judgment on the merits thereof in favor of the appellant or appellee. The issue as to the counterclaim was presented by the reply to it, and the defenses there interposed. Where a party thus proceeds to trial before the court without objection or exception, he voluntarily waives his right to jury. Kearney v. Case, 79 U. S. (12 Wall.) 275, 20 L. Ed. 395; Perego v. Dodge, 163 U. S. 160, 16 Sup. Ct. 971, 41 L. Ed. 113. We think the court below had jurisdiction under the circumstances, and we agree with the conclusions reached below.

Decree affirmed.

CHAMPION SPARK PLUG CO. v. AUTOMOBILE SUNDRIES CO.

(Circuit Court of Appeals, Second Circuit. April 6, 1921.)

No. 142.

1. **Principal and agent ⇐41—Breach by sales agent held to justify refusal of principal to perform.**
   Where a sales agent to sell spark plugs in foreign countries breached its contract by selling plugs delivered to it for export in the domestic market, such breach justified its principal in refusing to fill any more orders, unless the principal had waived the breach.

2. **Principal and agent ⇐41—Evidence held sufficient to take to the jury the question whether the principal had waived his agent's breach.**
   In an action against a manufacturer by agent for sale in foreign countries, for the manufacturer's refusal to fill the agent's orders, evidence of negotiations between the parties and the filling of subsequent orders, after the manufacturer had charged the agent with breach of contract by selling in the domestic market, *held* sufficient to take to the jury the question whether the manufacturer had waived the agent's breach.

3. **Contracts ⇐316(1)—"Waiver" of breach must be intentional.**
   "Waiver" is an intentional abandonment or relinquishment of a known right or advantage, oversight, carelessness, and thoughtlessness being in-

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

sufficient; so that, to establish a waiver of a breach of a contract, there must appear an intention to relinquish the right to take advantage of the breach.

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

4. **Contracts ⊂=316(1)—Waiver does not require new consideration.**
Waiver of a breach of an existing contract does not require or depend on a new contract or a new consideration.

5. **Contracts ⊂=316(6)—Waiver of breach cannot be recalled.**
Waiver of a breach of a contract does not depend on estoppel, and, once made, cannot be recalled or expunged.

6. **Contracts ⊂=322(3)—Waiver of breach may be proved by express declarations or by acts.**
Waiver of a breach of contract may be proved by an express declaration of the party charged with the waiver, or by acts or language inconsistent with the purpose to stand on his rights.

7. **Contracts ⊂=323(1)—Waiver is question for jury, if facts or inferences are indisputable.**
Waiver of breach of contract is a question of law, if resting on an express declaration, or on undisputed acts or language so inconsistent with the purpose to stand on the breach as to leave no opportunity for a reasonable inference to the contrary; but if the acts or declarations relied on are denied, or if the established facts permit reasonable minds to differ as to the inferences from them, it is a question of fact for the jury.

8. **Appeal and error ⊂=1001(1)—Jury's findings on questions supported by evidence are controlling.**
The findings by the jury on questions of fact, which have some evidence to support them, are controlling.

9. **Principal and agent ⊂=47—Sales agent's contract held to create relation of principal and agent, as well as seller and buyer.**
A contract whereby a manufacturer appointed a dealer as its exclusive sales agent in foreign countries, and provided for sale of its goods to the sales agent at specified prices, creates the relationship of principal and agent, as well as that of seller and buyer, so that the agent owes the duty of complete fidelity to its principal.

10. **Principal and agent ⊂=47—Sales agency contract held not to cover rights to brands subsequently acquired.**
A contract by a manufacturer, appointing a distributor as its exclusive foreign sales agent for a specified line of spark plugs, does not give the distributor the exclusive agency of other brands of spark plugs, which were acquired by the manufacturer subsequent to the contract, and were thereafter manufactured under their original trade-names.

11. **Principal and agent ⊂=41—Agent's acceptance of commissions on manufacturer's sale in agent's territory waives manufacturer's breach by such sale.**
The breach of a contract giving a distributor exclusive sales agency in foreign countries is waived, where the agent accepts from the manufacturer commissions on sales made by the manufacturer within its territory.

12. **Principal and agent ⊂=41—Exclusive sales agent cannot recover lost profits, if it could have purchased goods in market.**
A sales agent cannot recover from the manufacturer, as damages for breach of the agency contract, the profit which the agent would have made on goods ordered of the manufacturer, and which the latter refused to ship, where the agent could have purchased the same or similar goods in the open market, and thereby have filled its resale contracts, since the agent was bound to minimize the damages.

13. Sales ⟸418(12)—**Buyer can recover lost profits on resale contract known to seller.**

Where goods are bought for the purpose of performing a contract for their resale, and this purpose is known to the seller, who agrees to make deliveries to enable the buyer to perform the resale contract, the buyer can recover from the seller as damages for breach of his contract the profits it would have made on the resale.

14. Principal and agent ⟸41—**Evidence of sales as parts of automobile held not admissible in action for breach of sales agency for spark plugs.**

In an action by a sales agent for breach of its exclusive agency for spark plugs, evidence that the manufacturer's spark plugs were included as standard equipment for an automobile sold in the agent's territory is inadmissible to show damage, since the agent can recover only for sales which it could have made in the absence of the alleged competition.

15. Principal and agent ⟸41—**Expenses of conducting business must be proved, to sustain recovery for lost profits to end of contract of exclusive sales agency.**

In an action for a breach of contract, giving plaintiff exclusive sales agency for defendant's spark plugs in foreign territory for a limited time, plaintiff cannot recover for loss of expected profits between the time of defendant's breach of the contract and the end of the term, without proving the probable cost of conducting the business during that time.

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

Action by the Automobile Sundries Company against the Champion Spark Plug Company, for breach of a contract. Judgment for plaintiff, and defendant brings error. Reversed.

For convenience, we shall refer to the parties as plaintiff and defendant. The plaintiff is an Ohio corporation, and the defendant a New York corporation. Under date of July 15, 1913, a contract was entered into between the plaintiff and defendant. This contract provided that plaintiff be made and constituted the "sales agent and distributor" of the defendant, with exclusive and sole right to sell and distribute the products of the defendant, known as spark plugs, in the territory described as follows: "All foreign countries outside of the boundary limits of the United States, including dependencies and possessions of the United States of America, with the exception of the Dominion of Canada and British Columbia." It provided as to the prices of "regular" Champion plugs, all types and sizes, "Champion X" and "Champion priming plugs." No other plugs are referred to in the contract. It further provided: "The first party [defendant] agrees that during the life of this agreement it will not sell or cause any of its articles to be sold in the above-described territory, except through the second party [plaintiff], and to refer all inquiries concerning its product from the above-described territory that may be received by it through any source or by any means whatsoever to the second party [plaintiff] for attention."

It further provided that the plaintiff use its best efforts in promoting the sales of the products of the defendant and to cover the territory by "agents, traveling representatives, correspondents, and other methods at its command to increase the business in the products of the defendant," and further "the first party [defendant] shall as far as able furnish the second party [plaintiff] promptly with such qualities of any of its products as the second party may require," and "it shall not advance the prices on its product to the second party beyond those in effect on the date of the execution thereof, and shall give the second party at all times the benefit and advantage of its lowest published prices and discounts on its products, * * * shall furnish the second party from time to time with reasonable quantities of literature and cuts for circularizing and promoting the sale of its products contemplat-

ed by this agreement, such literature to bear the name of the second party as the sole foreign distributor for the product of the first party," and further "the second party [plaintiff] shall order not less than 100,000 Champion spark plugs of assorted sizes in lots of 200 or over, as its needs may require during the first year of the term of this agreement, and an increase of 33⅓ per cent. each succeeding year over the preceding year during the term of this agreement, and, failing to do so, the first party [defendant] may, at its election at any time thereafter terminate this agreement by giving not less than 30 days' notice in writing to the second party," and further "it is further agreed that spark plugs furnished the second party at the special prices herein indicated, are for export only, * * * and the second party agrees to push the sale of Champion spark plugs in preference to any other makes, but does not agree not to sell any other plugs for which it may receive orders."

Claiming a breach of this contract, the plaintiff instituted this action upon a complaint which contains six causes of action, and demanded judgment for $353,000. The defendant interposed an answer which, in addition to affirmative defenses, set up a counterclaim and demanded judgment thereon for $130,000. It appears from the contract that the defendant had brands of spark plugs under the three specifications of "Champion." The plaintiff, by the terms of the contract, was made the sales agent and distributor exclusively for foreign territory. It therefore had no right to enter the domestic market and sell the defendant's product. But it is quite clearly established, and, indeed, admitted by the plaintiff, that, in violation of the terms of its contract, the plaintiff not only entered the domestic market and sold the defendant's products, the Champion spark plugs, but did so at reduced prices. Charged with the breach of this obligation, the plaintiff at first made denial thereof, but subsequently admitted that it sold in the domestic market. This constituted a breach of the contract, and of itself would be sufficient to defeat the plaintiff. It was contended below, and it is here, that, after entering the domestic market and selling plugs, the defendant accused the plaintiff thereof, and at a conference had at Toledo, Ohio, the defendant expressly waived this breach of the contract. This meeting took place on September 28, 1916. On the 25th of September, 1916, the defendant wrote a letter to the plaintiff, canceling the contract, giving as the reason that in violation of the contract the plaintiff had entered the domestic market, to the defendant's damage. Mr. Walters, the president of the plaintiff company, testified that he and the vice president, on their way to this meeting from New York to Toledo, discussed the question of whether they would make a clean breast of their violation of the contract, but they determined not to do so. At this conference, Mr. Walters testified that, after the denial of having sold in the domestic market, it was agreed by the defendant to make deliveries of other plugs ordered, and that thereafter shipments were made and the business relations of the parties continued. Thereafter, it is clear, the plaintiff continued to sell in the domestic market, and further complaint was made in correspondence which ensued. A meeting was held on November 24, 1916, at a hotel in New York City, where the defendant was represented by its sales manager, and it was testified by plaintiff's president that the sales manager said at this conference: "You want to stop writing those letters. * * * They'll only get you in trouble, and we'll start a clean slate now. Let bygones be bygones. Everything will be all right, but don't sell any more plugs in the domestic field." Later other shipments of plugs were made to the plaintiff. On February 5, 1917, the defendant gave final notice that it would no longer ship plugs to the plaintiff, and none were shipped after this date.

The first cause of action seeks to recover $25,000 for an order given for plugs on July 28, 1916; the second cause of action seeks to recover $5,000 damages for a failure to supply an order for 100,000 plugs, which order was given on December 7, 1916; and the third cause of action seeks to recover damages for orders given between January 30, 1915, and August 4, 1916. The fifth and sixth causes of action are for loss of profits due to failure to carry out the terms of the contract, by which failure the plaintiff lost profits during the periods mentioned in the second amended complaint. It is apparent that

no orders were received for spark plugs, and no orders were in existence or received by defendant for spark plugs, such as are mentioned in the third and fifth causes of action, at the time of making the contract. In September, 1914, the defendant bought out the business and took on new lines, buying out other manufacturers of spark plugs, to wit, the Jeffery De Witt Company, of Detroit, and the Star Specialty Company, of Chicago. The former manufactured the line known as the "J-D," which were manufactured and marketed as such. The Star Specialty Company placed upon the market and sold the brands of plugs herein referred to as "Ajax" and "Star." These lines were separately advertised and catalogued, and distinctly known and sold under such brands. There is no evidence to show that at the time of the making of the contract it was known or contemplated that the defendant would purchase either of these companies or handle their brands.

The plaintiff contended upon the trial, and was permitted to offer proof to substantiate a loss of profit due to failure of the defendant to supply it with these brands for sale in foreign markets. There is some correspondence in the record, not amounting to an admission, as to exclusive agency for these new plugs. Damages were claimed for the failure of the defendant to give the exclusive foreign agency to the plaintiff. Defendant made sales of these brands to the Lodge Sparking Plug Company, of England, and of the Champion line to the Fiat Company and Luigi Berrardo, of Italy. Upon the trial a claim was made for damages on the theory that such sales breached the contract. It further appeared upon the trial that, in the case of these latter sales (Fiat and Berrardo) to the respective companies, a commission was paid to plaintiff after explanation, and which commission it accepted with full knowledge of the facts. Upon the trial, and as sustaining a part of the third cause of action, plaintiff claimed damages for the Champion plugs shipped into the foreign territory during the life of the contract by the Ford Motor Company. The Champion X plug, standard Ford equipment, was sold at a low price to the Ford Company under the contract of 1911. Each car which the Ford Company shipped contained four Champion spark plugs, and plugs were also sent to the service stations as service stock. It appears that the Ford Motor Company did not enter into the spark plug business; that is to say, it did not place spark plugs upon the market, but used them solely for the service of customers of the Ford car. There is no evidence that the defendant instigated or otherwise caused these extra shipments so sold to the Ford Motor Company. They were sold only under the contract above referred to, and it further appears that there was no profit in such sale.

In its counterclaim the defendant alleges that there were some open charges which the plaintiff has not paid in full, and that the plaintiff so appropriated spark plugs which were furnished as to deliver them under a different cost price than that intended by the parties under the terms of the contract. In addition thereto, it is claimed that the plaintiff registered a trade-mark under the name of "Champion" for the Argentine Republic, India, and the Union of South Africa. It is claimed that as a result thereof the defendant was unable to sell these products in these countries, and therefore the plaintiff has committed a breach of the contract, which gives rise to the claims set forth in the set-off and counterclaim.

Judgment was rendered for the plaintiff. Defendant appeals.

Denison & Curtis, of New York City (James F. Curtis and Chauncey Belknap, both of New York City, of counsel), for plaintiff in error.

Robert H. Koehler, of New York City, for defendant in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge (after stating the facts as above). [1] The evidence in the record indicates, as indeed it was conceded by counsel for the plaintiff, that the plaintiff defaulted in the contract in having entered the domestic market and sold the products of the de-

fendant in competition with it, and were it not for the alleged waiver thereof, as contended for by the plaintiff, this default would end the case, and the trial judge would have been obliged to dismiss or direct a verdict.

[2] It appears that after August 4, 1916, the plaintiff sold in the domestic market approximately 44,000 spark plugs. These were for export. The amended complaint pleads such sale, and further pleads a waiver of this breach of the contract. The defendant contends that at no time previous to the service of the second complaint did the plaintiff frankly admit this breach of the contract; that in view of its persistent stand that it did not breach the contract, and the denials of the charges of the defendant that the plaintiff did, whatever occurred by way of statements made by the defendant's officers, or its conduct in subsequently filling orders given to it by the plaintiff, this did not amount to a waiver, and that therefore there was no waiver of the plaintiff's breach. The defendant's letters of September 25, 1916, written to the plaintiff, were cancellations of the contract, and the second letter of that date was a direct threat not to fill any other orders unless the plaintiff could show that they were destined to foreign ports. These letters led to the Toledo conference, where a direct accusation was made against the plaintiff that it was selling in the domestic market. There was a flat denial thereof. After this conference, according to the president and vice president of the plaintiff, matters were straightened out and business relations were resumed. But there was further complaint and incrimination, which led to the conference at a hotel in New York City on November 24, 1916. It is testified that, after this conference, the sales manager of the defendant waived whatever took place up to that time, by suggesting to let bygones be bygones and continue the business relations. It does appear that orders were received after that date and deliveries were made. We think this testimony required the submission to the jury of the question of whether or not the breach on the part of the plaintiff was waived by the defendant.

[3-5] Waiver depends upon the intention of the party who is charged with the waiver. It is an intentional abandonment or relinquishment of a known right or advantage. But for such waiver, the party who enjoys it could not be released from the obligations of the contract. It is a voluntary act, and does not require or depend upon a new contract or a new consideration. Nor does it depend upon estoppel, and, once made, it cannot be recalled or expunged. Hotchkiss v. City of Binghamton, 211 N. Y. 279, 105 N. E. 410.

[6, 7] Oversight, carelessness, or thoughtlessness will not create a waiver. There must appear to be an intention to relinquish the right or advantage, and it must be proved. It may be proven by an express declaration of the party charged with the waiver. It may also be proven by the existence of acts or language so inconsistent with the purpose of the person charged to stand upon his rights as to leave no opportunity for a reasonable inference to the contrary. If such be the facts, the question of waiver is one of law, and not of fact. It may also be proven by declarations or acts which, although denied, indicate unmis-

takably or unequivocally an intent to abandon or relinquish the breach. Under such circumstances, it is for the jury to say whether the facts, as proved, indicate that such an intention exists. It must indicate a voluntary choice not to claim the advantage of the breach. So much depends upon the intention of the parties that, where such intent is disputed, it necessarily becomes a question for the determination of a jury. Therefore, if the established facts permit reasonable minds to differ as to the inferences or effects from them, a question of fact arises. It is only where facts proven permit of one inference, and that a waiver, that the question becomes one of law.

[8] In the case at bar, we think that, in view of the testimony referred to, the question of waiver was a proper one for submission to the jury. The conversations which took place at the Toledo conference, as well as the New York conference, and the defendant's thereafter filling the plaintiff's orders under the terms of the contract, recognized the contract as still existing, and was some evidence of the waiver of the breach made by the plaintiff of the contract in selling in the domestic market. Shappirio v. Goldberg, 193 U. S. 232, 24 Sup. Ct. 259, 48 L. Ed. 419; Grymes v. Sanders, 93 U. S. 55, 23 L. Ed. 798. The trial court left the question of breach of contract on the part of the defendant, as well as on the part of the plaintiff, to the jury as questions of fact. These questions have been resolved in favor of the plaintiff, and, since they have some evidence to support them, they are controlling upon us, and would require an affirmance of this judgment, except for the errors which have been assigned, and which we think were committed during the course of the trial.

[9] The trial court refused to charge that the contract created between the parties the relationship of principal and agent for the purposes therein specified, and charged that the only relationship which existed between the parties was that of buyer and seller. The defendant requested the court to charge that "the contract on which this action is based created between the parties the relation of principal and agent for the purposes therein specified." This was refused. We think this was error. The court did charge:

"The contract on which the plaintiff is suing is a contract for purchase and sale, and not a contract of agency, and the relationship which existed between the parties was that of buyer and seller."

Under the terms of the contract, the relations of principal and agent were coexistent with that of buyer and seller. The contract had a double aspect. In one respect it created a relation of principal and agent, and in another it contemplated, as between the parties, purchases and sales. It provides that the "second party is hereby made and constituted sales agent and distributor by the first party." The term "agent" is employed. The contract called for fidelity in carrying out the terms of the contract, and it was therefore important to have the jury understand the requirement of complete fidelity, which was owing by the agent to its principal, and which the defendant had the right to expect, the violations of which might justify terminating the relationship at once. In Willcox & G. Sewing Mach. Co. v. Ewing, 141 U. S. 627, 12 Sup. Ct. 94, 35 L. Ed. 882, the first party was described as

an exclusive vendor for the sewing machines, parts, and attachments of the party of the second part within a given territory. A breach of the contract was alleged and proven on the trial of the action. The Supreme Court held that in the use of that term, and in the clause of the contract which prohibited him from soliciting trade directly or indirectly in the territory "of other agents," the relationship of principal and agent existed, requiring the fidelity which is imposed by reason of such relationship. It was said:

"So far as the company's power of revocation is concerned, the case is not materially different from what it would be if the plaintiff had agreed to sell such machines as were delivered to him at the established retail prices, receiving, as compensation for his services, the difference between those prices and the amount he agreed to pay for them under the contract of 1874. In either case, his relation to the company would be one of agency, that could be terminated at its will or by renunciation upon his part, at least after 1875. Of course, the revocation by the principal of the agent's authority could not injuriously affect existing contracts made by the latter under the power originally conferred upon him." 141 U. S. 637, 12 Sup. Ct. 97, 35 L. Ed. 882.

We think that the court erred in charging as it did and refusing to charge as requested by defendant.

[10] The court charged the jury that the contract gave the plaintiff exclusive foreign selling rights of the J–D and Ajax special brand and Lodge plugs. These were not a part of the Champion line. The court also admitted evidence that the defendant had sold these plugs for export, on the theory that such sale was a violation of the contract. We think these rulings constituted error. At the time the contract was entered into, the only spark plugs which the defendant was manufacturing and selling was the Champion line. It was subsequent to the making of the contract that the defendant became the owner of the other lines of spark plugs. It was upon the theory that, by the contract, the plaintiff obtained "exclusive and sole right to sell and distribute the products of the first party known as spark plugs," the plaintiff became the sales agent and distributor of subsequently acquired lines of spark plugs. But it will be observed that in a later paragraph of the contract the types and sizes of the plugs are specifically mentioned. No reference is made in the contract to subsequently acquired makes of spark plugs which the defendant might manufacture or control or offer for sale in the market.

Particularly is it to be noted that no reference is made to lines of the different types or trade-names than the Champion. The Champion was a registered trade-mark owned by the defendant, and its mechanical features were protected by patents. It was only through the purchase of competitors in September, 1914, that the defendant became the owner of the J–D. spark plug. After such purchase, and in placing this product upon the market, the plugs were prominently marked with the letters "J–D." Its construction was along different lines than that of the defendant's own plugs. It does appear that in order to take advantage of some feature which possessed special value by two of the J–D plugs, they were renamed "Champion sparks in water" and "Champion magneto." These were permanently incorporated in Cham-

pion lines, and were considered by the defendant to come within the plaintiff's agency, and duly recognized as such. However, the others were sold as a separate line and could hardly be said to be in competition with the Champion plugs. They were listed separately, with a mark well displayed in the circulars and upon the articles. Full opportunity was given to the plaintiff to handle these goods on the same basis as every other exporter, and the record does not disclose that any better price was offered to any other exporter. Nor is it disclosed that the plaintiff suffered a loss in its sale of the Champion plugs, due to any alleged competition of the J–D's.

Later the defendant purchased the Star Specialty Manufacturing Company, with its line of Ajax plugs. We think the same rule applied as to these plugs. They were separately marked and sold under this trade-name. The J–D Company manufactured and sold special brand plugs, which constituted a make of plugs made to order stamped with the customer's name or brand. This business was continued by the Champion Company, and evidence was permitted to show damages sustained by the plaintiff by reason of the failure to give exclusive agency for such sale to the plaintiff. We think it was error to admit this evidence, and to enhance the profits of the plaintiff by such admission. Such sales were not part of the Champion line, and were not covered by the contract between the parties.

[11] The claim of the plaintiff that sales were made by foreign shipments to the Lodge Spark & Plug Company, of England, the Fiat Company, and the Berrardo Company, and that this was a breach of the contract, was waived by the plaintiff's correspondence and its acceptance of commissions for these shipments. The proof quite conclusively establishes that commissions were paid to the plaintiff upon their demand, and were received by the plaintiff with full knowledge of all the facts. By receipt of such commissions, the plaintiff relinquished all right of action which it is claimed to have had by reason of this alleged breach of the contract. Further we believe that the shipments which were made to the Lodge Company were spark plugs which were not included in the contract between the parties, and the plaintiff was not entitled to commissions therefor.

[12] Error was also committed by the judge below in charging the jury on the question of damages for breach of contract. The jury was instructed that the plaintiff might recover, if at all, for loss of prospective retail profits of the spark plugs, because of nondelivery of the plugs ordered before the final breach. These were summarized in 13 separate claims, amounting to $270,475.15. The plaintiff was obligated to minimize the damages by buying plugs in the market and claiming the difference between the price paid and the price agreed upon. There are exceptions to this general rule, as where the injured buyer is allowed to recover special damages as resale profits, which loss he has suffered by reason of the breach on the seller's part. If there be no market value for the goods which were purchased under the terms of the contract, or which substantially answer the purpose of such goods, and the buyer suffers damages because of the failure of the seller to deliver, such damage can be recovered.

[13] If the buyer has made a contract in advance and for the resale of the goods, and that fact has been disclosed and is known to the vendor, and the latter undertakes to furnish the goods and deliver at the time specified in the contract according to the terms of the contract, so that the buyer may fulfill his contract of resale, then, if the vendor fails to deliver the property, he will be liable for damages on the basis of profits the vendee would have realized on his contract for such resale. This record, however, discloses the existence of no resale contracts having been brought to the attention of the defendant at the time of its orders.

There is some proof contained in correspondence with reference to the 100,000 plugs sold to Morris Russell, but the record discloses that 50 per cent. of these plugs so ordered were intended for stock, and as to those which were sold to Morris Russell's order it appears that there was no difference between the contract and the market price. To be entitled to resale profits, it must appear that the buyer had an existing contract for resale at the time of the purchase, and the purchase must be made for the purpose of enabling the buyer to perform the obligations of his contract of resale, and such facts must be made known, clearly, to the seller. And the theory then is that the contract by the seller has been entered into to enable the buyer to perform his obligations under the contract of resale. Setton v. Eberle-Albrecht Flour Co., 258 Fed. 905, 169 C. C. A. 625; Holloway & Bro. v. White Shoe Co., 151 Fed. 216, 80 C. C. A. 568, 10 L. R. A. (N. S.) 704. Spark plugs of other makes were obtainable in the market, which could have been purchased by the defendant, and the loss minimized, examples of which were the Mosler plug. In many instances in which orders were filled by the plaintiff, it did so by substitution of other makes. We find nothing in this record which would require us to depart from the usual rule of damages. Vulcan Iron Works Co. v. Roquemore, 175 Fed. 11, 99 C. C. A. 77; Parsons v. Sutton, 66 N. Y. 92.

[14] An item of damage claimed and proven was for alleged sales made by the defendant to the Ford Company in foreign territory, both before and after the date of the alleged breach of contract, and it was claimed that it would have resulted in profit to the plaintiff of $151,669.18. It was contended by the plaintiff that it might be inferred that all sales made by the defendant and the Ford Company would have been made by the plaintiff, except for the breach of contract. There was no proof, however, to show that the plaintiff had lost any orders by reason of such sale. We think this evidence was inadmissible, and was not an element of damages which the jury might consider. The selling and distribution of the spark plugs was the obligation of the plaintiff under the terms of the contract, and, in the absence of some proof showing that the defendant interfered with or sold to the customers of the plaintiff, proof of this character was inadmissible and was prejudicial to the defendant.

It would be against the most elementary rules in respect of damages for breach of contract to allow the plaintiff the profits of a sale which he did not make, and which there is no reason to believe he would have made. The plaintiff, if it made out its right to recover, was en-

titled to any actual damages sustained by reason of its being obliged to purchase spark plugs in the market at the market value and at a price above the contract price, thus resulting in loss to the plaintiff. Cincinnati, etc., Gas Co. v. Western, etc., Co., 152 U. S. 200, 14 Sup. Ct. 523, 38 L. Ed. 411.

[15] The trial court, as an element of damages, permitted the plaintiff to offer proof as to estimates of profits it would have made if the contract had continued to be performed down to the date of its termination, July 15, 1918. In estimating what this loss sustained would be, due regard must be had for cost of carrying on the business of the plaintiff, its cost of selling. This is a subject which should be a matter of proof, and not an estimated loss of profits. Damages for the interruption or destruction of established business may be recovered; but the plaintiff must do so by establishing, with reasonable certainty and by competent proof, what the amount of his loss actually was. This character of proof was not offered.

For the errors assigned, the judgment below is reversed.

SMITH-KLINE & FRENCH CO. v. AMERICAN DRUGGISTS SYNDICATE.

(Circuit Court of Appeals, Second Circuit. April 27, 1921.)

No. 237.

1. **Trade-marks and trade-names ⇐60—Red band with initial held not infringed by red parallelogram with different initials.**
   Plaintiff's trade-mark for aspirin which, as registered, consisted of a red band around the box, on which band plaintiff's initials were printed, the representation of the box being expressly disclaimed as part of the trade-mark, is not infringed by defendant's trade-mark for aspirin, which consisted of a red parallelogram on which the name of the drug was printed and above the center of which was a red half circle containing defendant's initials.
2. **Trade-marks and trade-names ⇐17—Color of paper alone cannot be claimed as trade-mark.**
   One cannot have a trade-mark monopoly in the color of paper alone.
3. **Trade-marks and trade-names ⇐70(4)—Unfair competition held not shown by use of somewhat similar package.**
   That, while plaintiff was using a flat paper box on which its red band trade-mark was placed, defendant adopted as a container for the same drug a green enameled tin box, on which its red parallelogram trade-mark was placed does not show unfair competition by defendant, after plaintiff had begun to use a container similar to defendant's, though there was evidence that on occasions when red band aspirin, by which name plaintiff's product had been known, was asked for, defendant's product was sold.

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

Suit by the Smith-Kline & French Company against the American Druggists Syndicate for infringement of a registered trade-mark and for unfair competition. Decree for plaintiff, and defendant appeals. Reversed.

Hauff & Warland, of New York City (John C. Tomlinson and William E. Warland, both of New York City, and James Hamilton Lewis, of Chicago, Ill., of counsel), for appellant.

Julian S. Wooster, of New York City (Frank B. Fox, Henry N. Paul, Jr., and Joseph C. Fraley, all of Philadelphia, Pa., of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. On the 19th of December, 1918, the appellee filed in the Patent Office of the United States, an application for a registered trade-mark for aspirin tablets, and on September 23, 1919, a certificate of registration, No. 126,617, was granted. The mark adopted and used was a red colored band with initials. The representation of the box formed no part of the mark. In the affidavit, the trade-mark is said to have been used continuously since March 1, 1917. The trade-mark is applied and affixed to the packages containing the goods by placing thereon a printed label, on which the mark is shown with the initials "S. K. & F." across the red band.

On October 24, 1916, the appellant obtained a certificate of registration, No. 113,541, of its trade-mark. It was registered in the same class as the appellee's. The mark consists of a label, a semicircle; there being printed on the label the letters "A. D. S." in white. The appellant and appellee are manufacturers of and dealers in drugs and pharmaceutical supplies. Among the variety of goods which each manufactures and sells are aspirin tablets. The claim of infringement and unfair competition arises from the use of the mark on the box or package which is used by the appellant in marketing its goods. The appellant adopted its label in 1907, and has continuously used it on many of its goods ever since. The body of the label so used was in white, or a color approaching white, with the name of the article printed in the same color upon a red background, consisting in some cases of a rectangle, and in some others of a red band or stripe, and over the center of this red block was a red semicircle, upon which was printed in the same colors as the lettering on the band, the letters "A. D. S." Such labels were used on a great variety of its products, and the sales between the year 1912 and the date of the trial of this action amounted to $4,300,000, or about 2,500,000 dozen packages.

On February 27, 1917, the Bayer patent on aspirin expired, and both the appellant and appellee entered the field in the manufacture and sale of aspirin tablets. The appellee marketed its aspirin tablets in a paper box with a solid red band around it. The record is clear that, when it did so, it knew of the extensive use of the label by the appellant. It was prior to January, 1919, when the appellant decided to put aspirin on the market in small retail tin containers. It then contracted for such tin packages with the Metal Package Corporation. The trade-mark of the appellant is substantially the same as that which has been used by it on its labels for a long period prior. The box came on the market June 5, 1919. In either March or April, 1919, the appellee decided to use a package of similar size, duplicating what had previously been

adopted by the appellant in marketing its aspirin. On July 16, 1919, after the appellant had obtained its tin boxes, the appellee placed an order with a can manufacturer adopting the appellee's tin box. It placed its trade-mark thereon and then commenced the sale of its aspirin in such packages. Its claim here is that the appellant has infringed its trade-mark and that, in selling aspirin tablets in such packages with the label or mark used by the appellant thereon, it is engaged in unfair competition, resulting in damages to the appellee.

[1] We think it was error to hold that the appellant has infringed appellee's trade-mark. The trade-mark granted shows a rectangular box with a band of about one-third the width of the box, with the initials "S. K. & F." running diagonally on the band. The statement in the Patent Office contains the following: "The representation of the box forms no part of the mark." All that the trade-mark shows is a red band with the appellee's initials on it. The form of the box having been disclaimed, there is nothing to show the size or shape of the band, and the appellee has made the initials on the band an essential and integral part of such band. It is stated that "the description and drawing presented truly represents the trade-mark sought to be registered."

The appellant's red mark is different in sufficient identifying respects. It is a solid red stripe or parallelogram, instead of a band proper. It has above the center of the band constituting a part of it, a red semicircle about one-third of the length of the red background, and of a height about equal to the width of the stripe. The initials "S. K. & F." are absent. The word "aspirin" appears, and, in the semicircle, the letters "A. D. S." In no sense can it be said that the appellant's mark has a "band." The stripe of the appellant's does not go to the edge of the box. The band of the appellee goes around and encircles the box. The registered trade-mark which the appellee possesses must be limited to the specific design shown. The mere color may be impressed in a particular design and constitute a valid trade-mark, such as a circle, square, triangle, cross, or star. Leschen Rope Co. v. Broderick & Bascom Rope Co., 201 U. S. 166, 26 Sup. Ct. 425, 50 L. Ed. 710. But with a parallelogram and not a band used, and without the initials of the appellee, but with prominent use of the initials of the appellant in the semicircle constructed above the parallelogram of the appellant and attached thereto, such would not constitute a use of the appellee's trade-mark. Schlitz Brewing Co. v. Houston Ice Co., 250 U. S. 28, 39 Sup. Ct. 401, 63 L. Ed. 822.

[2] In the Schlitz Case the manufacturer of beer claimed the exclusive right to use brown bottles with brown labels. It was held there that the adoption by a competitor may contribute to a wrongful deception, if combined with an imitative inscription, but that, where the label was dissimilar to the plaintiff's in shape, script, meaning, and mode of attachment, it could not be said to add appreciably to the deception which might arise from the brown label or bottle.

"But it is true that the unlawful imitation must be what achieves the deception, even though it could do so only on the special background lawfully used."

Using a green color in soap, or on a wrapper or box of soap cannot be enjoined. Omega Oil v. Weschler, 35 Misc. Rep. 441, 71 N. Y. Supp. 983. One cannot have a trade-mark monopoly in the color of paper alone. Lalance & Grosjean Mfg. Co. v. Nat. Enameling & Stamping Co. (C. C.) 109 Fed. 317. The appellee's aspirin has been called the "red band" aspirin. It therefore claims the exclusive right to use the package with the red band upon it and call it "red band" aspirin. But to use this name is merely descriptive of the appellee's mark, which the appellant does not infringe.

[3] Nor do we think that this record discloses a case of unfair competition. Prior to the adoption of a metal box, the appellee used a paper package. The paper box was thinner than the tin box. It was flat, with sharp square corners. The color was white, with a red band. The appellant had a greenish white enamel on its tin box. It had rounded corners and a convex cover, and the only point of resemblance is that on both boxes there was the red color of the label or mark. But when the appellee came into the market, and adopted the tin box, it did so after the appellant's adoption of such box. The appellee accepted the original design as selected by the appellant. It was a box of the same material, same size and shape, having the same general color scheme. The lettering was in many respects identical. The appellant placed its mark upon it, which consisted of a parallelogram and a semicircle at the top connected therewith, and its initials "A. D. S." on the semicircle. The appellee adhered to its initials placed across the red band. The appellant is enjoined from the use of the tin box. There could be no confusion between the packages by the ordinary observer. If there be an imitation or attempt to imitate, we think the appellee made the attempt. With full knowledge of the appellant's use of the red color and its label, the appellee adopted a red band as a trademark. It then, after the appellant had entered the field in using the tin box, chose a tin box resembling closely the shape and size of the appellant's, and placed its trade-mark thereon, and proceeded in competition in the sale of aspirin tablets.

We think by no possibility could the ordinary observer be confused between the appellee's and appellant's boxes and the marks placed thereon. Whatever confusion may have resulted was brought about by the appellee's imitation and selection of the type of tin box used by the appellant. There are three incidents which are called to our attention as evidence of confusion between the containers of the appellee and appellant. The first was a decoy order, given appellant for "red band" aspirin, and which was filled by sending the appellant's product. The second was found on exhibition, a large box, on a druggist's counter, with three containers of appellant's aspirin and six containers of appellee's therein. The third is when purchases of aspirin were made at two retail drug stores by employés of the appellee who, when they purchased, merely asked for "red band" aspirin, and were given aspirin tablets of the appellant. The circumstances which led up to each of these instances, do not justify the claim of confusion. Mere similarity is not, as a matter of law, conclusive evidence of intention to deceive.

Such intent must be inferred as a matter of fact from similarity. Form, color, and general appearance may be considered. The greater the number of points of similarity, the stronger is the inference of an intentional imitation with intent to deceive. But with the well-defined marks of each of the litigants upon the red stripe across the face of each mark we think it unlikely that the ordinary observer would be mistaken or that deception was likely. Coats v. Merrick Thread Co., 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847.

The appellant in its answer filed a counterclaim and asked for affirmative injunctive relief. The reasons which we have assigned for denying relief to the appellee hold with equal force as against the claim of the appellant, and for the same reasons the appellant cannot succeed.

Decree reversed.

REAP v. HINES, Agent, etc. (LEHIGH VALLEY R. CO.).

(Circuit Court of Appeals, Second Circuit. April 27, 1921.)

No. 194.

1. **Commerce ⟸27(7)—Switchman, removing intrastate car to assist in making up interstate train, is engaged in "interstate commerce."**
   A switchman, who was injured by falling from a car containing an intrastate shipment, while it was being moved from one track to another to enable the switching crew to get other cars to make up an interstate train, was engaged in interstate business, or in an act so directly and immediately connected with such business as substantially to form a part or necessary incident thereof, and therefore could maintain suit for his injuries under the federal Employers' Liability Act (Comp. St. §§ 8657–8665).

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

2. **Commerce ⟸27(6)—Federal act requires hand brake on car, though used in intrastate commerce.**
   Under the Safety Appliance Act of March 2, 1893, as amended April 1, 1896 (Comp. St. § 8610) which by Act March 2, 1903 (Comp. St. § 8613), was made applicable to all cars used on any railroad engaged in interstate commerce, and under Act April 14, 1910 (Comp. St. §§ 8617, 8618), requiring all cars subject to the Safety Appliance Act (Comp. St. § 8605 et seq.) to be equipped with efficient hand brakes, a railroad company which is engaged in interstate commerce must equip with an efficient hand brake a car which was then being used for intrastate commerce.

3. **Master and servant ⟸286(13)—Negligence in failing to provide hand brake held for jury.**
   In an action for injuries to a railroad switchman, who fell from a car while attempting to apply the hand brake, evidence that an attempt had been made to take up the slack in the brake chain by a stick of wood *held* sufficient to take to the jury the question whether the car was equipped with an efficient hand brake, as required by the Safety Appliance Act (Comp. St. § 8605 et seq.).

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

Action by James J. Reap against Walker D. Hines, as Agent of the United States Railroad Administration (Lehigh Valley Railroad Company), under the federal Employers' Liability Act, to recover damages for personal injuries. There was a judgment of nonsuit, and plaintiff brings error. Reversed.

John C. Robinson, of New York City, for plaintiff in error.

Allan McCulloh, of New York City (Clifton P. Williamson, of New York City, of counsel), for defendant in error.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. On May 15, 1919, the plaintiff in error was employed by the defendant in error as a brakeman at or near Coxton, state of Pennsylvania. He suffered a severe injury by being thrown from a car which was being taken out of the classification yard of the railroad company. He had been engaged for four or five months prior to the date of his accident in this yard. His duty was, with other members of the crew, to ride upon cars in making up trains in this yard. This work was called classification, and consisted of pushing strings of cars along tracks in the classification yard as were required for the making up of trains to leave for destination in other states. At the time in question, a string or "push" of coal cars was moved down from Austin Junction, and the cars were distributed to the various tracks. In this string of cars there was one which it was desired to remove from the track, and which was not bound west out of the yard. It was taken out to be placed on another track, called a "B. O. track back of the shanty," so as to make up other "pushers." Plaintiff in error testified that he mounted the car in question after the engine had reversed and pushed the car back over the hump (a track on which the cars were allowed to run down by gravity and were switched into the various tracks), and as it was proceeding by its own momentum down the grade he turned on the brakes in order to see if they took hold properly and found they did not. As he was putting some strength into the attempt to turn the wheel, it suddenly was released; he lost his balance and fell off the car and was injured. After the accident, it was discovered that a stick of wood was inserted in the chain which connected the brake and shaft with the brake lever. The plaintiff in error said:

"I twisted it up a little on the chain, and it seemed as though something had catched it or something, and would not let the chain come any more, and still it was not holding, was not operating the brake, and I pulled harder and harder, and all at once it left go and went around in the direction that I was twisting it, and just let go right in a sudden and throwed me off the car." "I intended to check the car up, and still the brake did not hold."

The block of wood which was found was about nine inches long, and was put in there for the purpose of shortening or taking up the slack in the brake chain; and although there was a mechanical device on the car, called the "brake adjuster," whose "purpose is that, if a brake is slack and don't take hold on the wheels, to take up slack of the brake, and you won't have to use so much chain," it was not used. It was not the plaintiff in error's duty to inspect the cars or brakes.

It was testified that the chain was wrapped around the piece of wood. One of the defendant in error's witnesses and employés testified that, if the chain was looped around the wood as described, the brakes would not apply.

[1] The first question presented is whether the evidence discloses that the plaintiff was engaged in interstate commerce at the time, or in work so closely related to it as to be practically a part of it, and thus be entitled to the benefits of the federal Employers' Liability Act (Comp. St. §§ 8657–8665). There were 13 tracks in this classification yard, and it was testified that the freight cars bound for Western points outside the state of Pennsylvania were brought up in large strings into the yard from the East, and there were separated and switched into the different classification tracks in accordance with the ultimate destination of each car. There was a leader track, which ran over the hump and then down a grade. It was the duty of the brakeman to apply the brakes while descending this grade. There is testimony that the coal that morning was bound for Auburn, Wendey, and Suspension Bridge, N. Y.; but the particular car on which the plaintiff in error was riding and attempting to brake, at the time he fell and was injured, was not destined for a point outside of the state. It was, however, necessary to remove this car from track No. 17, and shift it so that the balance of the cars on that track might be made up into a train which would leave Pennsylvania and go west into New York. The balance of the cars on this track consisted of about 30, and "all went west, all but that one." It is thus apparent that the purpose of removing this one car was to make way for a train of cars intended for interstate commerce.

In New York Central R. v. Carr, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298, a brakeman on a freight car running on a train between points in New York state had in the train some cars which were carrying interstate freight. While in New York state a movement was engaged in to uncouple the train and pull these cars from the track and back them into a siding, there to remain until picked up by another train which would carry them on in their interstate movement. While engaged in this movement, the brakeman was injured. In sustaining a right of recovery, the court said that the brakeman while so engaged, was engaged in interstate commerce.

"The scope of that statute [Federal Employers' Liability Act] is so broad that it covers a vast field about which there can be no discussion. But, owing to the fact that, during the same day, railroad employés often and rapidly pass from one class of employment to another, the courts are constantly called upon to decide those close questions, where it is difficult to define the line which divides the states from interstate business. * * * But the matter is not to be decided by considering the physical position of the employé at the moment of injury. If he is hurt in the course of his employment while going to a car to perform an interstate duty, or if he is injured while preparing an engine for an interstate trip, he is entitled to the benefits of the federal act, although the accident occurred prior to the actual coupling of the engine to the interstate cars. * * * Each case must be decided in the light of the particular facts, with a view of determining whether, at the time of the injury, the employé is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof."

To assist in raising a wrecked car to rescue fellow employés, and incidentally to clear the track for interstate commerce, was held to be work of an interstate character. Southern R. Co. v. Puckett, 244 U. S. 571, 37 Sup. Ct. 703, 61 L. Ed. 1321, Ann. Cas. 1918B, 69. Where two loaded cars coming from without the state were received at the railroad yard, and switching movements necessary to place the cars on private tracks were indulged in, it was held to be work incident to interstate commerce. Pennsylvania Co. v. Donat, 239 U. S. 50, 36 Sup. Ct. 4, 60 L. Ed. 139.

Examining the character of the act which was being performed by the plaintiff in error at the time of his injury, we think he was engaged in the work of preparing a train which was to move out of the state of Pennsylvania into New York state. A necessary part of this work was to drill the cars in making up the train. The removal of a purely intrastate car, or one which was simply to be shifted in the yard, and thus to facilitate the interstate movement of the train, justifies the claim of the plaintiff in error that he, at the time, was engaged in an act which was directly and immediately connected with interstate business, and which subsequently formed a part or was a necessary incident thereof.

[2] The Act of March 2, 1893, as amended April 1, 1896 (Safety Appliance Act), being Comp. St. § 8610, provides for equipment of automatic power brakes, automatic couplers, grabirons, and the height of drawbars. It is provided by the Act of March 2, 1903 (32 Stat. at Large, 943, c. 976 [Comp. St. § 8613]):

"The provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grabirons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the territories and the District of Columbia and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith."

By the Act of April 14, 1910 (Comp. St. §§ 8617, 8618), it was provided:

"That the provisions of this act shall apply to every common carrier and every vehicle subject to the act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, commonly known as the 'Safety Appliance Act.'

"Sec. 2. That on and after July 1st, nineteen hundred and eleven, it shall be unlawful for any common carrier subject to the provisions of this act to haul, or permit to be hauled or used on its line any car subject to the provisions of this act not equipped with appliances provided for in this act, to wit: All cars must be equipped with secure sill steps and efficient hand brakes."

The amendment of 1903 applies to all trains, locomotives, tenders, cars, and steam vehicles used on any railroad engaged in interstate commerce, and by the amendment of 1910 it is provided that efficient hand brakes shall be supplied to every common carrier and every vehicle subject to the act of March 3, 1893, as amended April 1, 1896, and March 2, 1903. The defendant in error was an interstate railroad company; therefore it was required, under the Safety Appliance Act, to provide efficient brakes whether used in interstate or intrastate com-

merce. Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 36 Sup. Ct. 482, 60 L. Ed. 874; Southern Ry. Co. v. United States, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72; Ronald v. Lehigh V. R. (C. C. A.) 265 Fed. 138; Ross v. Schooley, 257 Fed. 290, 168 C. C. A. 374; Ward v. Erie, 230 N. Y. 231, 129 N. E. 886. For a breach of this obligation, absolute liability of the railroad company, in case of injury because of a failure to comply with the act, is imposed. St. Louis, etc., Ry. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061; Atlantic City R. Co. v. Parker, 242 U. S. 56, 37 Sup. Ct. 69, 61 L. Ed. 150. In the latter case, the court said:

"If there was evidence that the railroad failed to furnish such 'couplers coupling automatically by impact' as the statute requires (Johnson v. Southern Pacific Co., 196 U. S. 1, 18, 19), nothing else needs to be considered. We are of opinion that there was enough evidence to go to the jury upon that point. No doubt there are arguments that the jury should have decided the other way. Some lateral play must be allowed to drawheads, and, further, the car was on a curve, which, of course, would tend to throw the coupler out of line. But the jury were warranted in finding that the curve was so slight as not to affect the case, and in regarding the track as for this purpose a straight line. If couplers failed to couple automatically upon a straight track, it at least may be said that a jury would be warranted in finding that a lateral play so great as to prevent coupling was not needed, and that, in the absence of any explanation believed by them, the failure indicated that the railroad had not fully complied with the law."

In Minneapolis & St. Louis R. R. Co. v. Gotschall, 244 U. S. 66, 37 Sup. Ct. 598, 61 L. Ed. 995, it was said:

"The jury, under an instruction of the court, was permitted to infer negligence on the part of the company from the fact that the coupler failed to perform its function, there being no other proof of negligence. It is insisted this was error, since, as there was no other evidence of negligence on the part of the company, the instruction of the court was erroneous as, from whatever point of view looked at, it was but an application of the principle designated as res ipsa loquitur, a doctrine the unsoundness of which, it is said, plainly results from the decisions in Patton v. Texas & Pacific Ry. Co., 179 U. S. 658, and Looney v. Metropolitan R. R. Co., 200 U. S. 480. We think the contention is without merit, because, conceding in the fullest measure the correctness of the ruling announced in the cases relied upon to the effect that negligence may not be inferred from the mere happening of an accident, except under the most exceptional circumstances, we are of opinion such principle is here not controlling, in view of the positive duty imposed by the statute upon the railroad to furnish safe appliances for the coupling of cars."

[3] We think the evidence here of the condition of the brake with a piece of chain wrapped around a piece of wood to take up the slack was sufficient evidence to require the submission of the question of fact to the jury as to whether the defendant in error has complied with the requirements of the statute.

Judgment reversed.

SKEEM et al. v. UNITED STATES et al.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1921.)

No. 3528.

1. Indians ⟸11, 16(4)—**Treaty reservation of irrigation water rights held to reserve right to waters necessary for land subsequently reduced to cultivation; water rights not lost by lease of land.**

As respects lands on the Ft. Hall Indian Reservation, occupied and retained by Indians under article 6 of the Ft. Bridger Treaty, ratified February 24, 1869 and the treaty ratified by Act Feb. 23, 1889, *held* that, the treaty of 1898 ceding to the government land comprising the southern portion of the reservation, but providing that Indians occupying and making their homes on lands under the earlier treaty might retain them, did not, by providing in article 8 "that water from streams on that portion of the reservation now sold, which is necessary for irrigation on land actually cultivated and in use, shall be reserved for the Indians now using the same so long as said Indians remain where they now live," operate to limit the extent of the water rights of the occupying Indians, by reserving to them only the quantity of water necessary for the irrigation of such of their lands as were at the time of the 1898 treaty irrigated, but the reservation covered water subsequently required for land later reduced to cultivation, and furthermore reserved water rights to the use of tenants of the land in case they were leased by the Indian allottees under Act June 25, 1910, and neither the actual leasing of their lands nor the surrender of possession to the lessees operated to relinquish any water rights in the land which the Indians chose to retain.

2. Indians ⟸11—**All rights not specifically granted by Indians in treaty are reserved to them.**

By an Indian treaty granting Indian lands to the United States, all rights not specifically granted are reserved to the Indians.

3. Indians ⟸11—**Treaty provisions as to lands occupied by Indians liberally construed in favor of such occupant.**

Provisions of Indian treaties respecting lands occupied and cultivated by Indians, such as article 11 of the Ft. Bridger Treaty, ratified February 24, 1869, and article 3 and 8 of the 1898 treaty with the same Indians, should be construed in the light of the purpose of the government to induce the Indians to relinquish their nomadic habits and till the soil, and such meaning should be given them as will enable the Indians to cultivate eventually the whole of their lands so reserved to their use.

4. Indians ⟸11—**Treaties construed in their favor.**

Where there is ambiguity in a treaty granting Indian lands to the government, the language used in the treaty should not be construed to the prejudice of the Indians.

Appeal from the District Court of the United States for the Eastern Division of the District of Idaho; Frank S. Dietrich, Judge.

Suit by the United States and another against C. S. Skeem and others. Decree for plaintiffs, and defendants appeal. Affirmed.

J. H. Peterson and T. C. Coffin, both of Pocatello, Idaho, for appellants.

J. L. McClear, U. S. Atty., and J. R. Smead, Asst. U. S. Atty., both of Boise, Idaho, for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. [1] The United States brought a suit on behalf of certain Indians who had belonged to the Ft. Hall Indian reservation, to determine their rights as against the appellants herein to the waters of Indian creek for irrigation purposes. In 1868 a treaty was consummated between the United States and the Bannacks and the eastern band of the Shoshones, known as the Ft. Bridger Treaty, which in 1869 was ratified by Congress (15 Stat. 673). Article 6 of the treaty provided that any Indian who might desire to commence farming might select a tract of land "within the reservation of his tribe" for agricultural purposes, and that thereafter he should have the exclusive possession of the same, and that thereafter said land "may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it." In 1880 a second treaty was entered into, by which it was directed that allotments in severalty should be made on the Ft. Hall reservation, one to each head of a family, and to other persons belonging to the tribes on such reservation. It was further provided that the reserved lands should be surveyed for the purpose of such allotment, and that the same after allotment should be patented. The treaty was ratified in 1889 (25 Stat. 687). In 1898 (31 Stat. 672) a treaty was made whereby the Indians ceded to the United States a large body of land comprising the southern portion of the reservation. The treaty provided that any Indians who had taken lands and made homes on the reservation and were then occupying and cultivating the same under the sixth article of the Ft. Bridger Treaty, should not be removed from the ceded lands, but might retain the tracts of which they had taken possession under the earlier treaty and might receive allotments of the same.

The Indians whose rights were asserted by the government in the present suit had taken possession of and had commenced the cultivation of the lands involved in the suit. This they had done some years prior to the treaty of 1889. They elected to retain the lands which they occupied. The act whereby the treaty of 1898 was ratified provided that any portions of the ceded tract retained by Indians in accordance with the Ft. Bridger Treaty should be allotted to them before any of the ceded lands should be open to settlement or entry. All the remainder of the ceded lands were made subject to entry under the homestead, townsite, stone, timber, and mining laws of the United States. Thereafter the lands were surveyed and allotted, and included among the allotments were the lands of the Indians whose rights are involved in the present controversy. Trust patents were issued for the benefit of the Indians, containing a provision that the lands so patented "shall not be subject to the judgment, order, or decree of any court."

Article 8 of the treaty of 1898 provides:

"That water from streams on that portion of the reservation now sold which is necessary for irrigating on land actually cultivated and in use shall be reserved for the Indians now using the same, so long as said Indians remain where they now live."

The appellants contend that the article operates to limit the extent of the water rights of the Indians, and that it reserves to them only

the quantity of water necessary for the irrigation of such portions of their lands as were at that time actually irrigated, and that they were without authority to use water for the irrigation of the remainder of their lands in case they might subsequently reduce the same to cultivation. The court below, properly, we think, ruled against this contention. The language of article 8 should be construed in the light of the following considerations:

[2] First. The grant was not a grant to the Indians, but was a grant from the Indians to the United States, and such being the case all rights not specifically granted were reserved to the Indians. United States v. Winans, 198 U. S. 371, 25 Sup. Ct. 662, 49 L. Ed. 1089; Winters v. United States, 207 U. S. 564, 28 Sup. Ct. 207, 52 L. Ed. 340.

[3] Second. Article 8 should be construed together with article 3 of the same treaty, which provides:

"Where any Indians have taken lands and made homes on the reservation, and are now occupying and cultivating the same, under the sixth section of the Ft. Bridger Treaty hereinbefore referred to, they shall not be removed therefrom without their consent, and they may receive allotments on the lands they now occupy; but in case they prefer to remove they may select land elsewhere on that portion of said reservation not hereby ceded, granted, and relinquished, and not occupied by any other Indians."

The right so conceded to the lands the Indians "are now occupying and cultivating" clearly refers to the lands of which they were in possession, and not to that portion of the lands which they had actually cultivated and irrigated, and article 8 should be given no narrower construction than Article 3. Article 8 should also be construed in the light of the Ft. Bridger Treaty, article 11 of which provided:

"No cession by the tribe shall be understood or construed in such a manner as to deprive without his consent any individual member of the tribe of his right to any tract of land selected by him, as provided in article 6 of this treaty."

The purpose of the government was to induce the Indians to relinquish their nomadic habits and to till the soil, and the treaties should be construed in the light of that purpose and such meaning should be given them as will enable the Indians to cultivate eventually the whole of their lands so reserved to their use.

[4] Third. If there is ambiguity, the language used in the treaty should not be construed to the prejudice of the Indians. Choctaw Nation v. United States, 119 U. S. 1, 27, 7 Sup. Ct. 75, 30 L. Ed. 306.

It is contended further that article 8 reserves water rights only to the Indians "now using the same, so long as said Indians remain where they now live," and that the court below erroneously ruled that such rights were reserved to the use of tenants of the lands in cases where the Indians had leased the same. The litigation concerns seven contiguous allotments of 80 acres each. Two of the allottees had died before the commencement of the suit, and all the allotments were leased to the appellee Hofhine in 1914, and the allottees have not since resided thereon. By Act of Congress of June 25, 1910 (36 Stat. 855), it was provided:

"That any Indian allotment held under a trust patent may be leased by the allottee for a period not to exceed five years, subject to and in conformity with such rules and regulations as the Secretary of the Interior may prescribe."

Regulations were prescribed, and many leases were made of Indian allotments. The treaty of 1898 provided that the Indians who held isolated tracts on the land ceded to the United States might retain the same, or if they chose to do so might remove to the reservation. The clause of article 8, "so long as said Indians remain where they now live," referred to those who chose the latter alternative, and it seems clear that water was intended to be permanently reserved for the tracts which the Indians chose not to relinquish, and that neither the actual leasing of their lands under the authority to lease nor the surrender of possession to the lessees operated to relinquish any water rights in the lands which they so chose to retain. This is the view which the executive authorities took, for the patents which were issued for all allotments were identical in their provisions, and made no distinction between the lands allotted to individuals who retained their isolated tracts and the lands allotted to those on the larger reservation. They contained no provision that any rights should be lost in the event the allottee should lease his allotment or absent himself therefrom.

The decree is affirmed.

ROCKHILL IRON & COAL CO. v. CITY OF TAUNTON.

(Circuit Court of Appeals, First Circuit. May 12, 1921.)

No. 1458.

1. **Municipal corporations ⇐232—In the absence of regulations, manager of electric plant can contract for coal to be delivered after his term expires.**
   Under St. Mass. 1905, c. 410, § 3, authorizing the mayor to appoint a manager of municipal lighting, to have, under the direction of the mayor, full charge of the plant and of the purchase of supplies, a manager appointed by the mayor for a fixed term can, in the absence of regulations by the mayor to the contrary, make a contract for the purchase of coal needed by the plant for a period extending beyond the manager's term, and such contract is binding on the city after the expiration of such term.

2. **Sales ⇐381—Burden is on defendant to prove damages could have been minimized.**
   In an action for breach of contract for the purchase of a particular kind of coal, where the plaintiff claimed the right to recover the difference between the contract price and the cost of production, on the theory that the coal was to be specially mined to fill the contract, the burden was on defendant to prove that such damages could have been prevented, by proving that plaintiff had the coal ready for delivery, and that the difference between the market price of such coal at the time and place of delivery and the contract price would have been less than the damages claimed by plaintiff, if such were the facts.

3. Sales ⊂=384(6)—**Measure for breach of contract to sell coal not mined is difference between contract price and cost of production.**
The measure of damages for the breach of a contract for the purchase of a particular kind of coal, which was not yet mined by the seller, is the difference between the contract price and the cost of producing the coal, and of delivering it at the place of delivery.

4. Damages ⊂=12—**Only nominal damages can be recovered for breach of contract, if evidence does not establish substantial damages.**
In an action for breach of contract, only nominal damages can be recovered, if there is no evidence produced from which the facts necessary to determine the damages under the proper rule can be determined.

5. Sales ⊂=383—**Evidence held not to show cost of coal at place of delivery.**
In an action for breach of a contract for the purchase of coal to be delivered by the seller, a table of cost of producing coal and of its selling price at the mine is insufficient to sustain a judgment for substantial damages, if the table referred to coal of a kind different from that specified in the contract, or even if it referred to the same kind of coal, since it cannot be assumed that the profit on the sales at the mine was the same as the profit on the sales under the contract, which would be necessary to establish the difference between the mine price and contract price as the cost of delivery.

Anderson, Circuit Judge, dissenting in part.

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

Action by the Rockhill Iron & Coal Company against the City of Taunton. Judgment for defendant (261 Fed. 234), and plaintiff brings error. Reversed and remanded.

Asa P. French, of Boston, Mass., for plaintiff in error.

Harvey H. Pratt, of Boston, Mass. (Albert Fuller, of Taunton, Mass., on the brief), for defendant in error.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

BINGHAM, Circuit Judge. This is an action brought by the Rockhill Iron & Coal Company, a Pennsylvania corporation, against the city of Taunton, a Massachusetts municipal corporation, for breach of contract.

The plaintiff's business consists in mining coal in Pennsylvania and shipping it to purchasers in the different states. The defendant corporation was authorized (Acts of Massachusetts 1905, c. 410, § 3) to maintain and operate a plant for manufacturing and distributing electricity for the benefit of its inhabitants. The provisions of the above act, so far as material to this case, read as follows:

"Sec. 3. The mayor of a city * * * shall appoint a manager of municipal lighting who shall, under the direction and control of the mayor * * * have full charge of the operation and management of the plant, the manufacture and distribution of gas or electricity, the purchase of supplies, the employment of agents and servants, the method, time, price, quantity and quality of the supply, the collection of bills, and the keeping of accounts. His compensation and term of office shall be fixed in cities by the city council [or corresponding body]. * * * All bills chargeable to the plant or to the appropriations therefor shall be paid by the treasurer on requisition by the manager. * * *"

By ordinance the term of the manager was fixed at three years. On December 16, 1911, Michael Golden was appointed manager for an unexpired term ending June 30, 1914. June 17, 1913, he entered into a contract in behalf of the defendant with the plaintiff for the purchase of coal for the lighting plant, covering the balance of his term and a year and a half beyond it.

In the contract it was agreed that the plaintiff would supply and the defendant would buy all of the bituminous coal required by the lighting plant from the date of the contract to December 31, 1915. For the year 1913 the defendant was to take 4,000 tons more or less, and for each of the years 1914 and 1915, 5,000 tons more or less. All shipments were to be alongside wharf of the lighting plant and the price of the coal was to be $4.25 per gross ton alongside. Payments were to be made on the 15th day of each month for coal furnished the previous month, and the coal was to be of the brand known as "Rockhill" semi-bituminous smokeless coal and of the same quality previously furnished the lighting plant.

Under this contract 7,866 tons of coal were delivered from time to time down to and including August 7, 1914, and were paid for. Of this amount five shipments of 2,336 tons were received between July 1 and August 7, 1914.

On or about July 1, 1914, Leland D. Wood was appointed manager to succeed Golden, whose term had expired. August 7, 1914, Wood, having entered upon the performance of his duties, notified the plaintiff that the defendant refused to recognize as valid the contract of June 17, 1913, and declined to receive or pay for any further coal which might be tendered under the contract; whereupon, on the 19th of December, 1914, this action was brought.

During the period from August 7, 1914, to December 31, 1915, the defendant, through its manager, purchased from another dealer for use at its plant 9,895 tons of coal, which was the total amount purchased for consumption at the plant during the unexpired term of the contract. It further appeared what the coal thus purchased cost at the mines and what its selling or market price there was, and that the profit to the vendor on this basis of computation for the 9,895 tons was $5,641.43.

In the declaration the plaintiff set out the contract, alleged its breach by the defendant, and that it had been at all times ready and willing to perform.

The defendant in its answer set up three defenses: (1) It denied the authority of Golden to make a contract for the city beyond the period of his employment; (2) alleged that the plaintiff and Golden did not act in good faith in making the contract; and (3) that the contract was void for the reason that the plaintiff was not licensed to do business in Massachusetts. No evidence was adduced at the trial to support the second defense, and, as to the third, the court found and ruled against the defendant.

It was agreed that no regulations pertaining to the duties of the manager of the lighting plant had been prescribed by the mayor, and that none were in force during Golden's tenure of office.

The case was submitted to the court upon agreed facts and certain oral testimony, the latter of which is not reported, as it is not material to the questions presented.

The plaintiff requested the court to rule: (1) That, upon all the evidence, Golden, as manager, was authorized to execute, in behalf of the defendant, the contract declared upon; (2) that Wood's refusal, as manager, to receive or pay for the balance of the coal, constituted a breach by the defendant of the contract; (3) that, upon all the evidence, the measure of damages was the difference between the cost of production and the selling price at the mines of such coal as the defendant refused to receive and pay for in accordance with the terms of the agreement; and (4) that, upon all the evidence, the plaintiff was entitled to recover damages in the sum of $5,641.43, with interest from the date of the writ. These requests were refused, and the plaintiff excepted.

The court found and ruled: (1) That Golden had no authority to make the contract, unless it was conferred upon him by the statute under which the defendant operated its municipal lighting plant; (2) that it was not established that the contract sued upon was actually or impliedly authorized; (3) that the defendant rightfully terminated the contract on August 7, 1914, and is not liable for its refusal to accept subsequent deliveries thereunder; and (4) that the plaintiff, if entitled to recover, could recover only nominal damages. Judgment was entered for the defendant, and the plaintiff prosecutes this writ of error.

In Capron v. Taunton, 196 Mass. 41, 81 N. E. 873, section 3 of chapter 410 of the act of 1905, and the preceding acts of which it was an amendment, were under consideration. It was held that section 3 took away from the city council the right of supervision over the manager previously vested in that body and conferred it "solely upon the mayor"; that while the mayor, like the city council before it, was not required to prescribe regulations by which the manager's "statutory duties should be performed," he was empowered, if he thought it expedient, to prescribe "such general regulations concerning the exercise by him of his statutory powers as were found to be reasonably required, and as did not violate the statute."

After stating that, subsequent to the enactment of section 3, "no regulations whatever were established by the mayor under which the manager should perform his official functions," the court further held that the legislative purpose manifest throughout the act was "that original authority to contract in behalf of the city for the hiring of all employees, or to discharge them, was delegated only to the manager," and that, inasmuch as the plaintiff, an employee of the electric lighting plant, had been discharged by the manager, the discharge was lawful, "and, the mayor not being vested with any authority to re-employ him, he [had] no cause of action either for wages or damages against the city."

The mayor having appointed Golden manager of the city lighting plant, without establishing any regulations limiting his discretion in the performance of his duties, the first question is whether the manager was authorized to make the contract here in suit.

[1] By section 3 express authority was vested in Golden as manager to purchase coal. In the language of the act he was given "full charge * * * of the purchase of supplies," and, inasmuch as no regulations had been established by the mayor limiting his discretion and bad faith was not shown, the question reduces itself to whether, from the mere fact that the contract related to the purchase of a supply of coal for a year and a half beyond the period of his term of office, it can be said that he was acting without authority and that the contract was void.

In Blood et al. v. Manchester Electric Light Co. et al., 68 N. H. 340, 341, 39 Atl. 335, 336, the question before the court was whether a contract entered into by the city councils of Manchester with the Manchester Electric Light Company for lighting its streets was illegal and unauthorized for the reason that it was one for a term of ten years. In discussing this matter the court said:

"The city councils of Manchester were authorized to exercise the powers of the corporation, namely: 'All the powers vested by law in towns, or in the inhabitants thereof.' P. S. c. 50, § 1; Laws 1846, c. 384, § 14. This language excludes all ground for believing that the Legislature intended to limit the authority of the councils, so that they could not bind the corporation beyond the unexpired part of their term of office. The Legislature would not leave such intention to be inferred from language which conveys no suggestion of the limitation. The necessity for continuity in the operations of the government is a reason why there should be no such limitation. The agencies of the government change, but the government goes on without interruption. The authority of the city councils while in office being coextensive with the powers of the city or its inhabitants, the limitation in their term of office is immaterial in the decision of the question under consideration. The contract stands the same as if it had been made by a vote of the inhabitants acting under a town organization. * * *

"In making contracts, a town or city does not act in its legislative capacity, but in what is termed, for the sake of distinction, its private capacity. 1 Dill. Mun. Cor. §§ 27, 39. In this capacity it resembles an individual or private corporation, and its contracts have the same binding force upon it that the contracts of individuals and private corporations have upon them. Greenland v. Weeks, 49 N. H. 472, 480, et seq.; South Hampton v. Fowler, 52 N. H. 225, 231; Small v. Danville, 51 Me. 359, 361. * * * The city councils, in exercising the powers of the city, could determine the kind of lights to be used for lighting the streets, their location, when they should be lighted, and all other details of the business. They had power also to determine the length of time a contract for lighting should continue, in view of the necessity and convenience of the service required. If they, in good faith, exercised the discretion lodged with them, their contract is a legal contract, and will bind the city the same as a similar contract made by the directors of a private corporation binds it. Dibble v. New Haven, 56 Conn. 199; Putnam v. Grand Rapids, 58 Mich. 416, 419. If they should make a contract for a term of unreasonable duration, this circumstance would be evidence of want of good faith on their part."

To the same effect, see Illinois Trust & Savings Bank v. Arkansas City, 76 Fed. 271, 282, 283, 22 C. C. A. 171, 34 L. R. A. 518; Biddeford v. Yates, 104 Me. 506, 515, 72 Atl. 335, 15 Ann. Cas. 1091; Baily v. Philadelphia, 184 Pa. St. 594, 39 Atl. 837, 63 Am. St. Rep. 812; Manley v. Scott, 108 Minn. 142, 121 N. W. 628, 29 L. R. A. (N. S.) 652.

The authority of Golden while in office, so far as concerned the purchase of supplies for the lighting plant, was coextensive with the

powers of the city, and the limitation in the term of his office was immaterial. Under the authority vested in him by section 3 it was within his power to determine the kind and amount of coal he would buy and when it should be delivered; and the only limitation upon this power, in the absence of regulation by the mayor, was that he should exercise good faith in making the purchase. As he was authorized to buy the coal, and did not act in bad faith or in fraud of the rights of the city in making the contract, it was valid, and the defendant was at fault in refusing to accept the balance of the coal.

If the mayor, by establishing regulations, might have limited the discretion of the manager in the purchase of supplies to such as were necessary during his term of office, he did not do so, and, the contract having been made, the city cannot complain.

The plaintiff tried its case in the court below on the theory that the applicable rule of damages was the difference between what it cost to produce the coal at the mines and its selling or market price there, and, having introduced evidence with that theory of the law in mind, it requested the court to rule:

"That upon all the evidence the measure of damages [was] the difference between the cost of production and the selling price at the mines."

This request was refused, and its refusal is assigned as error. The court then stated that the rule of damages, if substantial damages were recoverable, was "the difference between the contract price and what the plaintiff could have sold the coal for to other persons" (meaning no doubt what it could have sold the coal for in the market at the time and place of delivery, Tufts v. Burnett, infra), but remarked that the evidence failed to show that the plaintiff had sustained any loss, saying:

"For aught that appears, the plaintiff may have resold to other persons all the coal contracted for and not taken by defendant at a price equal to that specified in the contract. If so, it suffered no loss."

The court then found and ruled as follows:

"On all the facts, I find and rule that the plaintiff, if entitled to recover, is entitled to recover only nominal damages."

This ruling is also assigned as error.

The plaintiff in presenting its case here has shifted its position from that taken in the court below. It no longer contends that the rule of damages is the difference between the cost of production and the selling or market price at the mines, as contended in the court below, but that it is the difference between the contract price and the cost of production and delivery of the coal at Taunton, for the reason that the evidence discloses that the coal contracted for was of a special kind, controlled solely by the plaintiff. Roehm v. Horst, 178 U. S. 1, 21, 20 Sup. Ct. 780, 44 L. Ed. 953; Hinckley v. Pittsburg Steel Co., 121 U. S. 264, 275, 276, 7 Sup. Ct. 875, 30 L. Ed. 967; United States v. Purcell Envelope Co., 249 U. S. 313, 320, 39 Sup. Ct. 300, 63 L. Ed. 620.

In Roehm v. Horst the plaintiffs contracted to sell and deliver to the defendant in New York "prime Pacific Coast hops" in installments.

They purchased and shipped to the defendant the first installment, but the defendant refused to receive it. The plaintiffs had not purchased the balance of the hops required to fulfill the contract at the time of the defendant's refusal, but they could have made subcontracts at prices stated for subsequent shipments. Instead of purchasing or subcontracting for the balance of the hops, they immediately brought suit for breach of the contract. It was held that the damages the plaintiffs were entitled to recover were the difference between the contract price and the cost at the place of delivery. It was there said:

"If a vendor is to manufacture goods, and during the process of manufacture the contract is repudiated, he is not bound to complete the manufacture, and estimate his damages by the difference between the market price and the contract price, but the measure of damage is the difference between the contract price and the cost of performance. Hinckley v. Pittsburg Company, 121 U. S. 264. Even if in such cases the manufacturer actually obtains his profits before the time fixed for performance, and recovers on a basis of cost which might have been increased or diminished by subsequent events, the party who broke the contract before the time for complete performance cannot complain, for he took the risk involved in such anticipation. If the vendor has to buy, instead of to manufacture, the same principle prevails, and he may show what was the value of the contract by showing for what price he could have made subcontracts, just as the cost of manufacture in the case of a manufacturer may be shown. Although he may receive his money earlier in this way, and may gain, or lose, by the estimation of his damage in advance of the time for performance, still, as we have seen, he has the right to accept the situation tendered him, and the other party cannot complain."

In United States v. Purcell Envelope Co., supra, the plaintiff agreed to furnish the Post Office Department with "stamped envelopes and newspaper wrappers in such quantities as may be called for by the department during a period of four years." The government having refused to carry out the contract, the Envelope Company brought suit. The evidence showed what the total cost to the Envelope Company would have been to produce the envelopes and wrappers and deliver them to the department, and judgment was entered for the difference between that sum and the contract price. On appeal the Supreme Court affirmed the judgment, following the decision in Roehm v. Horst, supra.

In support of the ruling in the District Court the defendant relies upon the case of Tufts v. Bennett, 163 Mass. 398, 40 N. E. 172. In that case the plaintiff contracted to sell and deliver certain goods then on hand; to manufacture, sell, and deliver certain other goods; to sell and deliver additional goods that he was to purchase elsewhere; and to perform labor and furnish stock for renovating certain apparatus belonging to the defendant. The plaintiff had the goods ready for delivery at the time agreed upon, but the defendant refused to carry out the contract. Under these circumstances the court held that the measure of damages was "the difference between the market value of the goods at the time and place of delivery and the contract price"; but, as there was no evidence from which it could be found what that difference was, only nominal damages were allowed. In that case it will be noted that at the time the defendant broke the contract the plaintiff had the goods on hand ready for delivery, and that the only

damage which he could have sustained was the difference between the market value of the goods at the place of delivery and the contract price. If at the time the defendant broke the contract the plaintiff had not had on hand the goods called for by the contract, but was able to procure or manufacture them, his damages would have been the difference between the cost of purchasing or producing the goods and the contract price; and it would not have been open to the defendant, who had broken the contract, to complain because he had not gone to the trouble of purchasing or manufacturing the goods.

[2] It does not appear in this case that the plaintiff had on hand Rockhill coal ready for delivery at the times when it would have been required to make deliveries, had the defendant not broken its contract, or, if it had it on hand, that the difference between the market price of such coal (at the time and place of delivery) and the contract price would have been less than the difference between the cost of producing and delivering it and the contract price. If it was less, and the defendant desired to avail itself of the lesser sum, the burden was upon it to show the fact.

"The burden of proving that the damages which have been sustained in such cases could have been prevented, unquestionably rests upon the party guilty of the breach of contract." Hamilton v. McPherson, 28 N. Y. 72, 84 Am. Dec. 330; Sedgwick on Damages (9th Ed.) § 227.

[3-5] Such being the case, we regard the rule stated in the above decisions of the Supreme Court as applicable and that the plaintiff is entitled to recover the difference between the contract price and the cost of production and delivery of the coal at Taunton, provided there is evidence from which this difference can be found; otherwise, only nominal damages can be allowed. Is there evidence which will justify a finding for other than nominal damages? If the figures in the table put in evidence showing the number of tons of coal purchased by the defendant during the balance of the term of the contract and the figures representing the selling price and cost at the mine relate to other kinds of coal than that which the plaintiff contracted to sell and deliver (as they appear to), it is evident that there would be no evidence from which it could be found what the damage was that the plaintiff sustained, for it could not be ascertained from it what it would have cost the plaintiff to produce the balance of the coal and deliver it at the defendant's wharf. And we encounter the same difficulty, only in a lesser degree, if we regard the figures here in evidence as stating the selling or market price and cost at the mine of Rockhill coal; for, if we assume that the evidence shows what a ton of that coal cost the plaintiff at the mine, it does not show what it would cost to deliver it at the defendant's wharf.

The mere showing of what the plaintiff's profit at the mine would have been has no tendency to prove what its damage was under the contract, for under the contract it was to deliver the coal at Taunton, and without evidence of the cost of delivery there, the damage which it suffered could not be determined. It may be said that, inasmuch as the plaintiff was entitled under the contract to receive $4.25 a ton for its

coal—if it can be assumed that the selling or market price at the mine for such coal was $1.78 a ton—the cost of transportation to Taunton would be $2.47, and that, if that were so, it could be determined what the plaintiff's damage was, for in such case the profit on the coal delivered at Taunton would be the same as the profit at the mine, without delivery. But the difficulty with this is that the difference between the cost of production and the selling or market price at the mine may not have been the same as the profit under the contract at Taunton, and whether it was the same or not could only be ascertained by evidence showing what the cost of transportation was. Such evidence is wanting. Its introduction was not necessary to sustain the rule of damages contended for in the court below, but is now, in view of the different rule here adopted; and, if we are right in our interpretation of the table put in evidence, the only judgment that can be entered is one for nominal damages.

If, however, we are mistaken as to the meaning of the figures and the statements contained in the table, and the statements and figures, when offered in evidence, were intended and understood to relate to "Rockhill coal" and not to "Berwind's standard" and "New River" coal, as stated in the table, and it was understood that the difference between the cost of production and the selling price at the mine was the same, and should be treated as the profit which the plaintiff would have made under the contract had it delivered the coal at Taunton, then the plaintiff would be entitled to recover the sum of $5,641.43, with interest from the date of the writ. In view of this situation, it is ordered:

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

ANDERSON, Circuit Judge. I am unable to concur with my Brethren's interpretation of the "table of profits" due the plaintiff on coal purchased by the defendant from other parties during the term of the contract. This table, construed in the light of the record and of the opinion of the court below, seems to me to show plainly that the stated difference between the "selling price at mines" (uniformly $1.78) and "cost at mines" (slightly varying around $1.20) was understood by the court below and by both counsel as meaning the difference between the gross cost of production plus transportation and the contract price at Taunton ($4.25), thus necessarily implying that the transportation cost was at the uniform price of $2.47 per ton—an implication entirely consistent with the known general course of business and with the fact that rail and water coal rates have for years been, in effect, made under orders of the Interstate Commerce Commission.

Nor can I concur in the statement that such implied evidence of transportation cost "was not necessary to sustain the rule of damages contended for in the court below, but is now, in view of the different rule here adopted." The rule now adopted is, in my view, the rule

consistently contended for by plaintiff's counsel from beginning to end. I discover no shifting in his position.

But as under the mandate the case may, if necessary, stand in the District Court for further hearing on damages, I concur in the result.

FIRST NAT. BANK OF LITCHFIELD v. PIPE & CONTRACTORS' SUPPLY CO.

(Circuit Court of Appeals, Second Circuit. April 20, 1921.)

No. 192.

1. **Contracts ⇐144—Governed by law where made and to be performed.**
   A contract of sale, which was made and to be performed in Connecticut, is to be interpreted in the light of the Uniform Sales Act, which has been adopted in that state.
2. **Sales ⇐82(3)—Contract held to be for cash on delivery by loading on cars.**
   A contract which expressly required the balance of the purchase price to be paid when the property was loaded on the cars makes the payment of the price concurrent with delivery of the goods, within Gen. St. Conn. 1918, §§ 4707, 4708.
3. **Sales ⇐300—Unpaid seller in possession has lien.**
   An unpaid seller of goods, who has not parted with possession, has a lien thereon, which authorizes him to resell, where the buyer has been in default in payment an unreasonable time, under the authority given by Uniform Sales Act (Gen. St. Conn. 1918, § 4726).
4. **Appeal and error ⇐1008(2)—Findings by a court after jury is waived have effect of verdict.**
   In a case tried with a jury waived, the findings of fact by the court have the force and effect of a jury's verdict, and are conclusive upon a court reviewing by writ of error, if based on any supporting evidence.
5. **Trial ⇐136(3)—Meaning of plain words is question for court as "question of law."**
   The meaning of plain words, in whatever form of writing contained, is for the court, and such matters of interpretation are commonly called "questions of law," though the meaning of language derived from examination of dictionary is a "question of fact," in one sense of that phrase.
6. **Sales ⇐182(1)—"Reasonable time" is question for court, where the facts are undisputed.**
   Whether the seller, before rescinding the contract and reselling the goods, gave the buyer a "reasonable time" within which to make payment —that is, such time as is necessary conveniently to do what the contract requires should be done—is a question of law, where the facts are clearly established, or are undisputed or admitted.

   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reasonable Time.]
7. **Sales ⇐174—Week held reasonable time to wait for payment of goods loaded on cars.**
   Where a sales contract required payment of a balance of the price when the goods were loaded on cars, and the seller waited a week after notice to buyer that the goods were loaded, during which time communication between the parties was open, he had waited a reasonable time for buyer to make payment, and is not liable for breach of contract for thereafter selling goods to another and returning the advance payment to the first buyer, less the demurrage charges paid.

In Error to the District Court of the United States for the District of Connecticut.

Action by the Pipe & Contractors' Supply Company against the First National Bank of Litchfield for breach of contract of sale. Judgment for plaintiff (268 Fed. 138), and defendant brings error. Reversed, and new trial awarded.

The defendant below (hereinafter called the Bank) in July, 1918, owned and had in the vicinity of Litchfield, Conn., certain secondhand rails, pipe, engines, drills, etc., being machinery and appliances theretofore used in the construction or extension of a certain reservoir. The property was bulky and heavy. On July 25th the Bank agreed in writing with plaintiff below (hereinafter called Pipe Company) to sell this property to Pipe Company. The contract writing recites that Pipe Company, having paid $500 on account, agreed "to pay the further sum of $1,475 for the [property aforesaid] when it is loaded on cars at the Litchfield station. This $1,975 includes the purchase price and moving [the property] to station."

On August 15th the Bank wrote to Pipe Company that it expected the cars to be ready and the material on the ground ready to load on August 19th. The letter concluded with the following: "Kindly acknowledge receipt of this letter. I understood that you wanted to have some one here when the stuff was ready to load." The word "here" meant Litchfield, Conn. To this letter Pipe Company returned no answer.

On August 22d the Bank wrote again, referring to the previous letter of August 15th, and saying: "Much of the material is already loaded, and we are assured the balance will all be on cars to-morrow afternoon, except crusher and boiler, which are on the ground, and we feel sure it will be loaded on Saturday. Kindly give this your prompt attention, and favor us with your check for $1,475 as agreed." The "Saturday" referred to was August 24th, and on that day all the property was loaded on cars at Litchfield station and ready to move.

On August 23d Pipe Company called up the Bank by telephone and requested that the goods be shipped with a sight draft attached to the bill of lading, and this the Bank refused. Thereupon Pipe Company's officer said over the telephone that he would come up in a few days, which he did not do. On August 31st the Bank wrote to Pipe Company stating that, "not having heard from you [and] in order to protect ourselves," it had sold the property to somebody else, and with the letter returned the partial payment of $500, less demurrage charges on the loaded cars, of $86.

To this the Pipe Company replied on September 5th, professing surprise at the contents of the letter of August 31st, averring that it had always been "ready, able, and willing" to carry out the bargain, and substantially threatening suit. Subsequently this action was brought, wherein a breach of contract is alleged, in that the Bank "failed, neglected, and refused to deliver to [Pipe Company] the goods described in the list attached to" the complaint, viz: the property first above referred to.

Pipe Company is a New York corporation, and its office in New York City; the Bank transacts business at Litchfield, Conn.; jurisdiction depended on these facts. A jury was waived, the court found the foregoing facts, and held in opinion filed that "it was unreasonable of the bank to act so quickly; [Pipe Company] was entitled to a reasonable time within which to make the balance payment, and it did not get it." Thereupon the court assessed as damages the difference between agreed price and market value, entered judgment accordingly, and the Bank took this writ.

William M. Foord, of Torrington, Conn., and Charles Welles Gross, of Hartford, Conn., for plaintiff in error.

Slade, Slade & Slade, of New Haven, Conn. (Benjamin Slade, of New Haven, Conn., of counsel), for defendant in error.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1, 2] The contract at bar was made and was to be performed in Connecticut. It is therefore to be interpreted in the light of the Uniform Sales Act, which has been adopted in that state. The relevant sections of that statute are Nos. 41, 42, and 60 (Gen. Stat. Conn. §§ 4707, 4708 and 4726).

The bargain between Bank and Pipe Company is plain and plainly expressed, viz. that Pipe Company was to pay the Bank $1,475 when the property was loaded on cars at Litchfield. The price was due and payable the moment that loading occurred. In the language of section 42 of the act, "delivery of the goods" (which in this case means completed loading on cars at Litchfield) and "payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods." The intention of parties, as derived from their chosen words, was that title should pass when goods were laden on cars at Litchfield. The transaction was intended to be cash, and the contract was "Do ut des." Frech v. Lewis, 218 Pa. 143, 67 Atl. 45, 11 L. R. A. (N. S.) 948, 120 Am. St. Rep. 864, 11 Ann. Cas. 545.

But Pipe Company, although notified when the cars would be loaded, and pointedly asked for the price, neither sent for the goods nor paid. They did ask for a variation of the contract, which was refused, and at the end of a week from the time when payment was due the Bank sold. This was in assumed compliance with section 60 of the Sales Act, which provides that "where the buyer has been in default in payment of the price an unreasonable time an unpaid seller having a right of lien * * * may resell the goods."

[3, 4] That an unpaid vendor who has not parted with possession has a right of lien is entirely plain; wherefore the only point in this litigation is whether the bank sold before the expiration of a "reasonable time." The case was tried below with a jury waived; consequently the findings of fact by the court have the force and effect of a jury's verdict. This reduces the case to the inquiry whether the finding of the trial judge that the week aforesaid was not a reasonable time is a question of fact or law; for if it be of fact, and based upon any supporting evidence, it is conclusive upon a court reviewing by writ of error.

[5] It is doubtless true that the phrase "question of law" often disguises matters which with equal propriety might have been called questions of fact. Thus the meaning of language as derived from the mere examination of a dictionary is a question of fact in one sense of that phrase. Yet it is perfectly settled that the meaning of plain words, whether contained in a contract, statute, or other writing, is for the court, and that such matters of interpretation or signification are commonly called questions of law has long been a matter of no moment. Cf. Williston, Cont. § 616.

[6] The meaning of the phrase "reasonable time" is not doubtful; it is "such time as is necessary conveniently to do what the contract

requires should be done." Chapman v. Dennison, 77 Me. 211. The subject-matter oftentimes suggests a rule or meaning; thus it was said in Illinois, etc., R. R. v. Mulberry, etc., Co., 238 U. S. 280, 35 Sup. Ct. 762, 59 L. Ed 1306: "What is a reasonable time is to be determined in view of the requirements of interstate commerce."

This was a commercial transaction. The parties were separated by no great distance, and, as the record shows, postal, telephonic, and railway communications were in working order. There is not a disputed fact in the case, and "where the facts are clearly established, or are undisputed, or admitted, the reasonable time is a question of law." Hill v. Hobart, 16 Me. 164; and to the same effect Bowen v. Detroit, etc., Ry., 54 Mich. 501, 20 N. W. 559, 52 Am. Rep. 822. If the contract specifies no time, as in the present case, a reasonable time is implied by law, and what is such reasonable time is a question of law. Morse v. Bellows, 7 N. H. 549, 28 Am. Dec. 372; Sentenne v. Kelly, 59 Hun, 515, 13 N. Y. Supp. 529.

[7] Having regard to the admitted situation of the parties, we have no doubt that the week allowed by the Bank before exercising its right of sale was a reasonable time.

The judgment is therefore reversed, with costs, and a new trial awarded.

McRAE, Commandant, etc., v. HENKES.

(Circuit Court of Appeals, Eighth Circuit. May 14, 1921.)

No. 5556.

1. **War ⇐32—Record sufficient to show jurisdiction of court-martial.**
   It is not necessary that every fact essential to the jurisdiction of a court-martial and the competency and qualification of its members should be set out in the record in each case, but with respect to formal matters relating to the creation of the court, such as a recital that an order of the War Department was "by direction of the President" or the designations of the rank and official position of officers, regularity will be presumed.
2. **War ⇐32—Order convening court-martial, signed "by command" of the department commander, held valid.**
   That an order convening a court-martial was not signed personally by the department commander, but by a staff officer by his "command," *held* not to render it invalid.
3. **Army and navy ⇐39—Officer may be convicted for same acts under both articles 95 and 96, Articles of War.**
   Offenses under Articles of War 95 and 96 (Comp. St. § 2308a, arts. 95, 96) are not the same, nor established by the same evidence, the former being applicable to officers and cadets; and the conviction of an officer under both articles on the same facts *held* not illegal, as placing him twice in jeopardy for the same offense.
4. **War ⇐32—Decision of court-martial on matter of procedure not reviewable by civil courts.**
   The decision of a court-martial, having jurisdiction, on a question of procedure, is not reviewable by the civil courts.

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

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

Petition by David A. Henkes against J. H. McRae, commandant of the United States Disciplinary Barracks, Ft. Leavenworth, Kan., for writ of habeas corpus. From an order discharging petitioner, defendant appeals. Reversed.

For opinion below, see 267 Fed. 276.

L. S. Harvey, Asst. U. S. Atty., of Kansas City, Kan., and Lieut. Col. W. A. Graham, of Washington, D. C. (Fred Robertson, U. S. Atty., of Kansas City, Kan., and Maj. Charles Marvin, of New York City, on the brief), for appellant.

Lee Bond, of Leavenworth, Kan., and Maj. John S. Maxwell, of Jacksonville, Fla., for appellee.

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

LEWIS, District Judge, delivered the opinion of the Court.

[1] This is an appeal from an order discharging appellee on writ of habeas corpus from confinement in the U. S. Disciplinary Barracks at Fort Leavenworth, to which he had been sentenced by general court-martial on conviction of offenses against the 95th and 96th articles of war. (Comp. St. § 2308a, arts. 95, 96). If there was jurisdiction in that court over the offenses and the person, and it did not exceed its power, the confinement should have been held to be lawful and the prisoner's discharge denied. Carter v. McClaughry, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. Ed. 236; 2 Black on Judgments, § 524. Henkes was, at the time of trial and for many years had been, a captain in the regular army. Exhibits attached to and made a part of his petition for the writ present, among others, a transcript of the order appointing the court and detailing the officers to compose it. It reads thus:

Headquarters Eastern Department.
Governors Island, New York.

Special Orders No. 304. November 27, 1917.

3. A general Court-Martial is appointed to meet Wednesday the 28th day of November, 1917, at 11 o'clock, A. M. or as soon thereafter as practicable at Governors Island, N. Y., and thereafter at such other stations in the vicinity of New York City, for the trial of such persons as may be properly brought before it.

Detail for the Court.

1. Col. William S. Patten, retired.
2. Col. George H. G. Gale, retired.
3. Col. Edwin P. Brewer, retired.
4. Col. Tredwell W. Moore, retired.
5. Lieut. Col. Edward E. Hardin, retired.
6. Lieut. Col. Edward R. Morris, retired.
7. Lieut. Col. James A. Goodin, retired.
8. Maj. Charles G. Dwyer, retired.
9. Capt. William H. Wheeler, retired.
10. Capt. Otto. A. Nesmith, retired.

Maj. Jackson A. Dykman, J. A. O. R. C., Judge Advocate.
First Lieut. John G. Livingston, retired, Assistant Judge Advocate.
The employment of a stenographic report is authorized.

The journeys required in complying with this order are necessary in the military service (250.42 J. A.)

By Command of Brigadier General Hoyle,
W. A. Simpson, Adjutant General,
Adjutant.

The appellant, who was commandant of the barracks, attached to his return and made a part of it the 151st paragraph of Special Orders 165, as follows:

War Department
Standard Form No. 13.3–1826
Special Orders
No. 165.

War Department,
Washington, July 18, 1917.

Extract.

* * * * * * * * * * *

151. By direction of the President, the following-named retired officers are placed on active military duty under the provisions of the next to the last proviso of Section 24, act of Congress approved June 3, 1916:

Col. William S. Patten.
Col. Treadwell W. Moore.
Col. George H. Gale.
Col. Edwin P. Brewer.
Lieut. Col. James A. Goodin.
Lieut. Col. Edwin E. Hardin.
Lieut. Col. Edward R. Morris.
Maj. John Bigelow.
Maj. Charles G. Dwyer.
Capt. Otto A. Nesmith.
Capt. William H. Wheeler.
First Lieut. John G. Livingston.

The officers named will report in person to the commanding general, Eastern Department, Governors Island, N. Y., for assignment to duty. The travel directed is necessary in the military service.

* * * * * * * * * * *

By order of the Secretary of War: Tasker H. Bliss,
Major General, Acting Chief of Staff.

Official:
H. P. McCain,
The Adjutant General.

Brigadier General Hoyle, as commanding officer of the Eastern Department, had the right and authority under the 8th article of war (Comp. St. § 2308a) to select the retired officers named in the order as members of the court and to order them to serve as such, provided they had been assigned by the Secretary of War to active duty, with their consent. 33 Stat. 264 (Comp. St. § 2078); U. S. v. Tyler, 105 U. S. 244, 26 L. Ed. 985. They were also competent to serve as members of the court and subject to call and orders to discharge that duty, provided the President in his discretion, and in time of war, directed that they be employed on active duty. 39 Stat. 183 (Comp. St. § 1920aa). The requirement appears to have been covered in both ways, so that no room for doubt might be left. But the petition for the writ alleges, "that the members constituting the general court-martial which attempted to try your petition were not qualified under the laws of the United States and the Articles of War to sit on a court-martial and that any judgment

or sentence attempted to be rendered by said court-martial was null and void, as said court, so constituted and composed, had no jurisdiction over your petitioner, and no authority to render any judgment or pass any sentence upon him." Amplifying that position in argument here it is said that the court, being one of special and limited jurisdiction, all jurisdictional facts must appear upon its record, that the competency and qualification of its members to sit as such is a jurisdictional fact which the record should disclose; that prima facie, retired army officers are not qualified to sit, indeed are disqualified; hence the judgment is void and subject to collateral attack and its invalidity cannot be cured. To demonstrate that the argument is wholly without merit we deem it necessary to refer only to the opinion of the Supreme Court in Givens v. Zerbst, 255 U. S. 11, 41 Sup. Ct. 227, 65 L. Ed. ——, lately decided. See also opinion of that Court in Kahn v. Anderson, lately handed down, 255 U. S. 1, 41 Sup. Ct. 224, 65 L. Ed. ——. For we think it must follow from what is said in the Givens Case that the omission from the court record of the action taken by the President and Secretary of War disclosed in Special Orders 165 did not render the judgment and sentence void and subject to collateral attack. Indeed, we are of opinion that such facts could not be appropriately made a part of the record,—no more than facts showing that the members of the court had been commissioned as officers. In reality the proceeding in the present aspect is in the nature of quo warranto, which is not permissible. 1 Black on Judgments, Sec. 256. Moreover, although it was necessary that each member of the court be fully competent to sit, nevertheless, we are of opinion that Order No. 304, convening the court and appointing the detail and the resulting service and action taken by those detailed, raised the presumption that its members were competent and possessed all the necessary qualifications entitling them to sit as such, and that the burden rested on the petitioner to overthrow that presumption. The principle is applied in the civil courts, and we see no reason why it should not be applicable in the military as well. It is a rule of evidence in procedure, not to be confounded with substantive law, which measures the effect of facts already established, e. g., the acts of de facto officers.

"Precedent acts and conditions essential to the validity of the subsequent act in question are presumed to have been regularly and properly performed." 9 Encyc. of Evid. p. 948.

"It is not, in general, necessary to prove the written appointments of public officers; for this would be attended with general inconvenience; and a strong presumption arises from the exercise of a public office, that the appointment to it is valid. * * * In the case of justices of the peace, constables, &c., it is sufficient to prove that they acted in these characters without producing their appointments." 1 Phillipps on Evidence, p. 489.

Mr. Justice Story, in delivering the opinion in Bank v. Dandridge, 12 Wheat. 64, 6 L. Ed. 552, said:

The law "will presume that a man, acting in a public office, has been rightly appointed."

In Rankin v. Hoyt, 4 How. 327, 11 L. Ed. 996, the inquiry was on the appointment of appraisers by the collector of customs. At page 334 of 4 How. (11 L. Ed. 996) it is said:

"In saying that the appraisers had no right to act without the previous request of the collector, and that no such request appears in the evidence, nothing is stated beyond the truth. But, in the absence of testimony to the contrary, the legal presumption is, that the appraisers and collector both did their duty, he requesting their action, as by law he might, and they complying."

See also 2 Chamberlayne, Modern Law of Evidence, § 1199 et seq.; Nofire v. U. S., 164 U. S. 657, 17 Sup. Ct. 212, 41 L. Ed. 588; Cofield v. McClelland, 16 Wall. 331, 21 L. Ed. 339.

[2] Objections are also made to the order convening the court, that it does not appear to have been subscribed personally by Brigadier General Hoyle but by his staff officer, and also that the department of which he is in command should appear below his personal signature. The proposition is rested upon forms of such orders recommended in Winthrop's Military Law. We regard the insistence, however, as relating purely to a matter of form, and not substance. The order shows on its face that the court was convened and the detail fixed by command of the brigadier general, and the caption shows the department of which he was commanding officer. In both respects we regard the objections as not well taken. We cannot draw the desired inference that, whereas the suggested form would show that the order received both the personal and official attention of the commanding officer, the one used would not.

[3] There were three specifications under each charge, consisting of three letters written by appellee of dates May 26, June 29, and October 10, in 1917. That is, the three specifications under the charge of violating the 95th article were identical with those under the charge of violating the 96th article; and it is alleged in the petition for the writ that inasmuch as the specifications set up the same facts to be proved under each charge, this operated to put the petitioner twice in jeopardy for the same offense. Only an officer or cadet can commit the offense named in the 95th article. It reads:

"An officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service."

It exacts conduct becoming both an officer and a gentleman. We appreciate the high requirement and purpose of the article and understand in a broad sense the offense, but confess a lack of knowledge of its definite limitations, and also admit a superior capacity in the military court over the civil to deal with it. The same comments and admission go to the 96th article, though it is broader in scope than the 95th. As to persons, it includes every one subject to military law, as to the offense, "all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service" are covered, and as to the punishment, that on conviction is left to the discretion of the court. An excerpt from Dynes v. Hoover, 20 How. 65, 82 (15 L. Ed. 838), is apt:

"Notwithstanding the apparent indeterminateness of such a provision, it is not liable to abuse; for what those crimes are, and how they are to be punished, is well known by practical men in the navy and army, and by those who have studied the law of courts-martial, and the offenses of which the different courts-martial have cognizance. With the sentences of courts-martial which have been convened regularly, and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise, the civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obligation has been confided by the laws of the United States."

[4] But, as a question of pleading, it is very clear to us that the two charges are not one and the same offense. Furthermore, that was a question in procedure, not of jurisdiction, and which the court-martial, having obtained jurisdiction, was competent to decide. Ex parte Bigelow, 113 U. S. 328, 5 Sup. Ct. 542, 28 L. Ed. 1005; In re Eckart, 166 U. S. 481, 17 Sup. Ct. 638, 41 L. Ed. 1085; Rose ex rel. v. Roberts, 99 Fed. 948, 40 C. C. A. 199. Our answer to the other element embodied in the contention is: Gavieres v. U. S., 220 U. S. 338, 31 Sup. Ct. 421, 55 L. Ed. 489. Here, as there, it was necessary to establish a fact under one charge not required under the other. Conviction could not be had under the 95th article, unless it be proven that defendant is an officer. No such proof is needed under the 96th. See also Carter v. McClaughry, supra.

There was error in discharging appellee.

Reversed.

McDOUGAL et al. v. BLACK PANTHER OIL & GAS CO. et al. JACKSON v. SAME. McKINNEY v. SAME.

(Circuit Court of Appeals, Eighth Circuit. May 7, 1921.)

Nos. 5573, 5574, 5580.

1. **Judgment ⇐638—In case of action in courts of concurrent jurisdiction first final judgment is conclusive.**
Where two actions between the same parties involving the same cause of action proceed at the same time in courts of concurrent jurisdiction, it is not the final judgment in the action first brought, but the first final judgment, although that may be in the action last brought, that renders the issues res judicata in both actions.

2. **Judgment ⇐829(1)—Judgment of federal District Court, determining heirs of deceased Indian allottee, conclusive, notwithstanding act giving Oklahoma probate courts authority to determine such question.**
Notwithstanding Act June 14, 1918 (U. S. Comp. St. Ann. Supp. §§ 4234a, 4234b), respectively declaring a determination as to who are the heirs of a deceased allottee of the Five Civilized Tribes by the probate court of the state of Oklahoma having jurisdiction to settle the estate of the said deceased shall be conclusive, provided that an appeal may be taken, etc., and that the lands of full bloods shall be subject to the laws of Oklahoma providing for partition of real estate, the probate court is not given any exclusive right of determination, and there being no repeal, express or implied, of the statutes giving the federal District Court authority to determine such question. a judgment of the District Court de-

termining question of heirship will not be set aside on the theory that the probate court had exclusive jurisdiction; the purpose of the statute being to provide a tribunal which could determine the question of heirship as against persons not parties—that is, against the entire world.

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Frank A. Youmans, Judge.

Bill by the United States against Bessie Wildcat and others. The Black Panther Oil & Gas Company and others, Saber Jackson, D. A. McDougal and others, and W. E. McKinney, guardian of Martha Jackson, intervened. The suit was decided against the United States, and continued in separate suits by interveners against the original defendants. From decrees for defendants, the several interveners appealed. Wiley Knight, a party to the suits below, moved that the appeals be remanded, with instructions to the lower court to vacate its findings and final decrees, and hold funds in its control until the county court had made a final decree adjudicating who were the heirs of the original deceased Indian allottee. Motion denied.

Eugene B. Smith, of Sapulpa, Okl., and Archibald Bonds, of Muskogee, Okl., for the motion.

Charles B. Stuart, of Oklahoma City, Okl., and Joseph C. Stone, of Muskogee, Okl., for respondent Black Panther Oil & Gas Co.

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

SANBORN, Circuit Judge. In the year 1914 the United States brought this suit against those who it alleged were claimants as or under the full-blood Indian heirs of Barney Thlocco, a deceased full-blood Creek Indian, to whom or to the heirs of whom the lands in question in this case had been duly allotted, patented, and conveyed with the approval of the Secretary of the Interior prior to 1904, for the purpose of having such allotment, patent, and conveyance avoided. Many claimants as or under these heirs to the title to this land, and to the oil and gas derived from it, became parties to the suit, either as defendants or interveners. The Black Panther Oil & Gas Company had an oil and gas lease under a claimant to this heirship who proved to be successful, and has been operating under that lease and under the direction of the court upon and in this land, and paying the royalties to a receiver and to the court below.

In May, 1915, that court rendered a decree upon the merits against the United States, which was ultimately affirmed by the Supreme Court, and a decree of its dismissal from this suit, based upon the mandate of the Supreme Court, was rendered in the District Court below in February, 1918. By that time the amounts received from the royalties under the control and subject to the disposition of the court below aggregated more than $1,000,000, and that court proceeded to hear and adjudge the claims to this fund and to the land of the defendants and interveners. The hearing of these issues was commenced in December, 1918, and final decrees adjudging the rights of the respective parties were rendered in 1919, and have been brought to this court for review by the appeals of several claimants.

Wiley Knight, a party to the suit below, has made a motion in the appeals above entitled that the cause presented by these appeals be remanded to the court below, with instructions to vacate its findings and final decrees and hold the funds in its control until the county court of Okfuskee county, Okl., has made a final decree who the heirs of Barney Thlocco were, or with instructions to dismiss the cause below outright.

Counsel for Mr. Knight found this motion upon the Act of Congress of June 14, 1918, 40 Stat. 606, U. S. Comp. St. Supp. 1919, §§ 4234a and 4234b, which provide that:

Section 4234a: "A determination of the question of fact as to who are the heirs of any deceased citizen allottee of the Five Civilized Tribes of Indians who may die or may have heretofore died, leaving restricted heirs, by the probate court of the state of Oklahoma having jurisdiction to settle the estate of said deceased, conducted in the manner provided by the laws of said state for the determination of heirship in closing up the estates of deceased persons, shall be conclusive of said question: Provided, that an appeal may be taken in the manner and to the court provided by law, in cases of appeal in probate matters generally: Provided further, that where the time limited by the laws of said state for the institution of administration proceedings has elapsed without their institution, as well as in cases where there exists no lawful ground for the institution of administration proceedings in said courts, a petition may be filed therein having for its object a determination of such heirship and the case shall proceed in all respects as if administration proceedings upon other proper grounds had been regularly begun, but this proviso shall not be construed to reopen the question of the determination of an heirship already ascertained by competent legal authority under existing laws. * * *"

Section 4234b: "The lands of full-blood members of any of the Five Civilized Tribes are hereby made subject to the laws of the state of Oklahoma, providing for the partition of real estate. * * *"

The contention of Mr. Knight's counsel is that, as the answer to the question who were the heirs of Thlocco necessarily conditions the rights of each of the claimants in this suit, the court below had no jurisdiction, after the passage of the act which has been recited, to adjudge their claims or rights, or to render the decrees below by which it determined them. In support of this position they have cited, and the court has read and considered, the opinions of the courts in Hallowell v. Commons, 239 U. S. 506, 507, 508, 36 Sup. Ct. 202, 60 L. Ed. 409; Pel-Ata-Yakot v. United States (D. C.) 188 Fed. 387, 389; Parr v. Colfax, 197 Fed. 302, 304, 117 C. C. A. 48; McKay v. Kalyton, 204 U. S. 466, 467, 469, 27 Sup. Ct. 346, 51 L. Ed. 566; Ross v. Stewart, 227 U. S. 532, 537, 33 Sup. Ct. 345, 57 L. Ed. 626; United States v. Kagama, 118 U. S. 375;[1] Caesar v. Krow (Okl.) 176 Pac. 927, 928—and in other cases, including State v. Huser, 76 Okl. 130, 184 Pac. 113, 122, 124, and State v. Wilcox, 75 Okl. 158, 182 Pac. 673, cited by opposing counsel.

All parties to this suit claim under the heirs of Barney Thlocco and concede: (1) That all the claimants derive their rights from full-blood restricted heirs of a deceased citizen allottee of one of the Five Civilized Tribes; (2) that an answer to the question who were the heirs of Thlocco was indispensable to the just adjudication of the claims of the parties to the suit; (3) that the jurisdiction to adjudge the answer

[1] 6 Sup. Ct. 1109, 30 L. Ed. 228.

to that question was in terms granted to the probate court, the county court of Okfuskee county, by the Act of June 14, 1918; and (4) that the court below had plenary jurisdiction and dominion of the subject-matter and the parties to the suit below, and lawful authority to adjudicate all questions in that suit including the answer to the question who were the restricted heirs of Thlocco until the act of June 14, 1918, was passed. But counsel argue that when that act took effect the exclusive jurisdiction to hear and decide that question was vested in the probate court of Okfuskee county, and that all jurisdiction and power of the court below to determine it was revoked and ceased. In support of this contention they seem to place their chief reliance upon the decisions in Hallowell v. Commons, 239 U. S. 506, 507, 508, 36 Sup. Ct. 202, 60 L. Ed. 409, Pel-Ata-Yakot v. United States (D. C.) 188 Fed. 387, 389, and Parn v. Colfax, 197 Fed. 302, 304, 117 C. C. A. 48, to the effect that the Act of Congress of June 25, 1910, 36 Stat. 855, granted to the Secretary of the Interior the exclusive jurisdiction to adjudge who were the legal heirs of a deceased intestate Indian allottee, and thereby deprived the courts from that time of the power to adjudge that question either in cases then pending or subsequently commenced. But the Act of June 14, 1918, radically differs from that of June 25, 1910, and at first blush does not seem to do more than to give to the probate courts therein mentioned jurisdiction concurrent with the federal and state district courts of the question who were the restricted heirs of the respective deceased allottees described in the act.

[1] It is the established and familiar rule that where two actions between the same parties, involving the same cause of action, proceed at the same time in courts of concurrent jurisdiction, it is not the final judgment in the action first brought, but the first final judgment, although it may be in the action last brought, that renders the issues res adjudicata in both actions. Boatmen's Bank v. Fritzlen (8th C. C. A.) 135 Fed. 650, 657, 68 C. C. A. 288; Insurance Co. v. Harris, 97 U. S. 331, 336, 24 L. Ed. 959.

[2] Let us compare the acts of 1910 and 1918 with this rule of law in mind. The Act of June 25, 1910 (Comp. St. § 4226), reads that "the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent [the decedent described in the act], and his decision thereon shall be final and conclusive," and there it stops without making any exception, granting any right of appeal, or in any way limiting or modifying the exclusive and absolute power conferred and duty imposed on the Secretary to determine the question. Not so is the Act of June 14, 1918, or its grant. It declares that "a determination of the question of fact as to who are the heirs" of the decedent described therein "by the probate court of the state of Oklahoma having jurisdiction to settle the estate of said deceased, conducted in the manner provided by the laws of said state for the determination of heirship in closing up the estates of deceased persons, shall be conclusive of said question: Provided, that an appeal may be taken in the manner and to the court provided by law, in cases of appeal in probate matters generally." Comp. St. Ann. Supp. 1919, § 4234a. Note that if no appeal is taken the de-

termination of the probate court of the question of heirship has the same effect, no greater, no less, than the determination of that question by a federal or state court had, if no appeal were taken, upon the parties to an action in that court. It is conclusive upon them in that court and elsewhere. In other words, Congress, by the Act of June 14, 1918, was sedulous to give by apt words the same effect to the determination by the proabte court of the question of heirship treated by that act that the determination of that question by the federal and state district courts theretofore having jurisdiction thereof had under the general rule of law.

Again, the Act of June 25, 1910, not only conferred the power, but it imposed the duty, upon the Secretary to hear and decide who were the heirs of each decedent named therein, its command was the Secretary "shall ascertain the legal heirs of such decedent and his decision thereon shall be final and conclusive," and that command was an injunction against the subsequent effectual determination of such heirs by any other tribunal. On the other hand, the Act of June 14, 1918, contains no command to the probate courts to ascertain the restricted heirs of the decedents described in the act and no injunction against their ascertainment and determination by other tribunals which had jurisdiction of that issue. Moreover, the Act of June 25, 1910, declared the determination of the Secretary final and conclusive in each case. It made no exception and provided no method of review. But the Act of June 14, 1918, excepts from the jurisdiction of the probate court "an heirship already ascertained by competent legal authority under existing laws," declares that "the lands of full-blood members of any of the Five Civilized Tribes are hereby made subject to the laws of the state of Oklahoma, providing for the partition of real estate"—laws which confer jurisdiction of such partition upon the district courts of that state—and declares that the determination of the probate court shall be conclusive, not final, and allows an appeal from every such determination to the proper district court of the state. When all the terms and provisions of the act are read together and given their proper effect, it is in legal effect a simple provision that, if the proper court having probate jurisdiction determines who the restricted heirs of one of the deceased allottees described in that act are, after the notices have been given and the proceedings have been taken as prescribed therein, and if that heirship had not been already determined by legal authority under existing laws, and if no appeal is taken from the probate court's determination, but not otherwise, it shall be conclusive.

And if a broader view be taken, if the situation of the restricted heirs at the time of the passage of the act and the practical operation thereof be considered, one cannot fail to see that the effect of it must be, and that the purpose of it doubtless was, to open another and a more facile, convenient, and comprehensive avenue of approach to a final and conclusive adjudication of the question it treats by the federal and state district courts by means of the probate proceedings authorized in the act against all the world and by the appeals from the decisions of the probate court to the federal and state district courts.

In State v. Huser, 76 Okl. 130, 184 Pac. 122, 124, Judge Rainey in

an exhaustive, instructive, and convincing opinion, has pointed out that when this Act of June 14, 1918, was passed, while the federal and state district courts had jurisdiction to adjudge who were the heirs of the decedents described in the act as between the parties to the suits in those courts, their judgments and decrees failed to estop claimants to heirship who were not parties to such suits, that in many cases there was no judicial method by which an adjudication of the question who were the restricted heirs of such a decedent as is described in the act could be had which would be conclusive against all the world, and that the purpose and effect of the act were, not to deprive the courts which prior thereto had jurisdiction to adjudge this question between the parties to the suits in those courts, but so to supplement their jurisdiction that decrees determining who were the only heirs of decedents described in the act might be obtained which would quiet titles under them and be conclusive against all the world. Reference is made to that opinion for a more extended statement and a more persuasive argument to this effect.

The radical difference between the objects and terms of the Act of June 25, 1910, upon which the decisions in Hallowell v. Commons, 239 U. S. 506, 507, 508, 36 Sup. Ct. 202, 60 L. Ed. 409, Pel-Ata-Yakot v. United States (D. C.) 188 Fed. 387, 389, and Parr v. Colfax, 197 Fed. 302, 304, 117 C. C. A. 48, are based, and the objects and terms of the Act of June 14, 1918, deprive the opinions in those cases of persuasive, much more of controlling, authority in the consideration of the proper construction and effect of the latter act.

There is no express repeal, nor is there any indication in the Act of June 14, 1918, that Congress intended thereby to repeal or to terminate the effect of the laws which gave jurisdiction to the federal and state district courts to ascertain who were the restricted heirs of the decedents described in that act, and such a repeal or termination thereby may not be presumed and ought not to be implied. A contruction of this act that by it Congress intended to vest and did vest only concurrent jurisdiction in the probate courts of Oklahoma with the jurisdiction already vested in the federal and state district courts is consonant with all the terms of the act with the demands of the time and the situation under which it was passed with reason and authority. And the result is that a deliberate consideration of the jurisdiction of the federal and state district courts to determine who were the restricted heirs of the decedents described in the Act of June 14, 1918, prior to the time of its passage, of the uncertain and doubtful condition of titles and rights of such heirs and of those claiming under them, of the evil at which it was aimed, of the purpose of its enactment, of the carefully guarded and limited terms of its grant of jurisdiction to the probate courts, of the exceptions from that grant, of the fact that all the decisions of those courts under it were made reviewable by the federal and state district courts, and of the general scope and tenor of this legislation, have left no doubt that it was not the intention of Congress by that act, nor was it the legal effect thereof, to deprive the federal or state courts of the jurisdiction vested in them before its passage to adjudge who were the restricted heirs of the decedents de-

scribed in that act, or to vest exclusive jurisdiction of that question in the probate courts therein mentioned, but that the intention of Congress was, and the effect of the act was and is, to grant to the probate courts concurrent jurisdiction with the federal and the state courts to ascertain and adjudge the question of which it treats.

Since no proceedings have ever been had in the probate court of the state of Oklahoma to ascertain, and no determination has ever been made by any such court, who were or are the restricted heirs of Barney Thlocco, and since that question has long since been adjudged by the final decrees of the court below, there is no logical or reasonable way of escape from the conclusion that that court had full jurisdiction to hear and adjudge that question of heirship, and that this court has had and still has jurisdiction to review that adjudication. The motions of Mr. Knight to dismiss these appeals and to remand the cause in which they were taken to the court below, with directions to vacate its findings and decrees therein, and to hold the funds in its control until the probate court of Okfuskee county, Okl., determines who the restricted heirs of Thlocco were, or to dismiss the cause outright, must therefore be and they are in all things denied, with costs against Mr. Knight.

FIRST NAT. BANK OF SILVERTON, COLO., v. MERCANTILE NAT. BANK OF PUEBLO, COLO., et al.

(Circuit Court of Appeals, Eighth Circuit. May 4, 1921.)

No. 5609.

1. **Banks and banking ⇐262—National bank bound by acts of managing cashier within scope of cashier's general authority.**
   Where the cashier of a national bank and two subordinate employés, who were subject to discharge by him, constituted the acting board of directors, the remaining directors being nonresidents, the cashier having in fact absolute control and management of its affairs, his acts and knowledge were the acts and knowledge of the bank in dealings with third parties, and it was bound by all his acts as cashier which were within the general scope and power of a cashier.

2. **Banks and banking ⇐262—Liability of national bank for bonds deposited held question for jury.**
   The cashier of defendant national bank, on behalf of himself and his father, the president, made an agreement for purchase of a controlling interest in plaintiff bank, which had a correspondent in the same city as defendant, with which it kept an account and also its certificates of deposit for $60,000. The correspondent also held a much larger amount in securities and bonds for plaintiff for safe-keeping and collection. The day following the stock purchase defendant's cashier, who for more than a year had been in full control of its business, over his signature as such cashier, wrote the cashier of plaintiff, requesting the transfer of plaintiff's account, time deposits, securities, and bonds from its then correspondent to defendant, and when the transfer was made he receipted for the same as cashier of defendant, but made no entry on its books of the bonds so transferred, amounting to $97,000, and later appropriated them and other funds to his own use and absconded. *Held* that proof of such facts was sufficient to require submission to the jury of the question of defendant's liability for the value of the bonds.

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3. Banks and banking ⟸262—Want of knowledge of transaction by other officers of national bank does not affect authority of cashier to bind bank.

The fact that other officers of a national bank had no knowledge of the receipt of bonds on its behalf by its cashier for safe-keeping and collection, or the fact that the bank received no benefit because of the unlawful conversion of the bonds by the cashier to his own use, did not affect his authority to receive them for it, nor relieve it from liability to account for them.

In Error to the District Court of the United States for the District of Colorado; John A. Riner, Judge.

Action at law by the First National Bank of Silverton, Colo., against the Mercantile National Bank of Pueblo, Colo., and others. Judgment for defendants, and plaintiff brings error. Reversed.

C. C. Dorsey, of Denver, Colo. (Gerald Hughes, of Denver, Colo., and M. G. Saunders, of Pueblo, Colo., on the brief), for plaintiff in error.

Henry McAllister, Jr., of Denver, Colo. (George E. Tralles, of Denver, Colo., on the brief), for defendants in error.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

SANBORN, Circuit Judge. The First National Bank of Silverton, Colo., the plaintiff below, complains of many alleged errors in the trial of an action which it brought to recover of the Mercantile National Bank of Pueblo, the defendant below, the value of certain bonds and other securities of the par value of $97,000, which the plaintiff alleged it deposited with the defendant for safe-keeping and collection on February 13, 1915, and the defendant had refused to account for or return after due demand and had appropriated to its own use. The defendant answered in effect, so far as the trial here in question is concerned, that no such deposit was made with it, that C. C. Slaughter was at that time the vice president of the plaintiff, and as such he took and misappropriated the bonds and securities in question. The case was tried to a jury. At the close of the trial the court below granted a motion of the defendant to instruct the jury to return a verdict in its favor, and this ruling is the chief of the numerous alleged errors specified.

[1] The main question in the case therefore is: Was the evidence at the close of the trial so conclusively in favor of the defendant that, if it had been submitted to the jury under proper instructions and they had found a verdict for the plaintiff, it would have been the duty of the court below to set it aside because there would have been no substantial evidence to sustain it? In other words, was the evidence such that reasonable men in the exercise of an honest and impartial judgment could properly draw from it no other conclusion than that the defendant was not liable to the plaintiff on account of the securities and bonds, which for convenience will hereafter be termed the bonds. The evidence established these facts without substantial conflict: W. B. Slaughter and C. C. Slaughter, his son, from 1911 to April, 1915, owned a controlling part of the stock of the defendant, and were re-

spectively its president and cashier. They, with Robert Grant, vice president, W. E. Grant, teller, and W. D. Grisard, assistant cashier, were its board of directors. Robert Grant lived in California, owned some stock in the bank, and his son, W. E. Grant, owned 10 shares and was paid a salary of $100 to $125 per month, while Mr. Grisard's salary was small, and he and W. E. Grant were minor employés, subject to the control, direction, employment and discharge of C. C. Slaughter, the cashier. W. B. Slaughter went to Texas to live in the early part of 1914. For a year and a half prior to March, 1915, those who sat at and attempted to act as the board of directors of the bank were C. C. Slaughter, W. E. Grant, and W. D. Grisard. No committee or members of the board, other than C. C. Slaughter, made any examination or investigation of the latter's acts or account with the bank during the two years prior to March, 1915, and he alone had and exercised the absolute management and control of its business during that time. So that when, in February, 1915, the transaction to be considered was had, he was for all business purposes the bank itself in all his acts, sayings, and writings as its cashier, which were within the general scope of the powers of a cashier of the bank, or of any other ministerial officer of such a bank. Hence, in a transaction between C. C. Slaughter as the defendant's cashier and other banks and parties, the defendant may not be heard to deny that the acts and knowledge of this cashier, within the scope of the customary and apparent powers of such an officer of a bank, were its acts and its knowledge. Auten v. United States Nat. Bank, 174 U. S. 125, 148, 19 Sup. Ct. 628, 43 L. Ed. 920; Rankin v. Tygard, 198 Fed. 795, 802, 119 C. C. A. 591.

[2] Prior to February 6, 1915, M. D. Thatcher was the president, and John H. Werkheiser was and until May, 1917, continued to be, the cashier, of the plaintiff. Mr. Thatcher and other members of his family, who followed his direction and advice, owned practically all the stock of that bank, and he controlled the course of action of these members with reference to their stock and directed the management of the business of that bank. On February 6, 1915, C. C. Slaughter, for himself and his father, W. B. Slaughter, made an agreement to buy from Mr. Thatcher and his associates their stock in that bank. Thereupon the parties proceeded to carry out this agreement of purchase; 460 of the 500 shares of stock of the plaintiff were assigned to W. B Slaughter, and 20 shares of it to C. C. Slaughter; and on February 11, 1915, M. D. Thatcher, president, and John H. Thatcher, vice president thereof, resigned, and W. B. Slaughter was elected president and C. C. Slaughter vice president of the plaintiff. They made a partial payment for the stock of this bank, and in April, 1915, after the transactions to be considered, and after the failure on March 29, 1915, of the defendant, they resigned these positions, and the Thatchers again took control and became the officers of the plaintiff. On February 7, 1915, the day after the sale of the stock of the plaintiff was agreed upon, C. C. Slaughter, over his signature as cashier of the defendant, sent a letter to Mr. Werkheiser as cashier of the plaintiff, which contained these statements and requests:

"I was present yesterday afternoon when Mr. M. D. Thatcher wrote you regarding our purchase of the stock of the First National Bank, which letter I presume you will receive in the next three or four days, and he stated it was up to me to write giving instructions in reference to the future handling of this account. I desire to state, naturally, having become the sole owner of the bank, we are very anxious to obtain any benefits possible out of this purchase. Hence I would request that upon receipt of this letter you transfer all of your account you have in the First National Bank [of Pueblo] to the Mercantile National Bank. * * * Hence, do this immediately; also draw your drafts in the future on the Mercantile National Bank. * * * Furthermore, it was the understanding that the last four certificates of deposit of $5,000 you have issued, should be sent to the First National Bank [of Pueblo] and they would pay them, and we would issue our certificates in lieu thereof. Furthermore, about the 21st or 22d of this month you will have another certificate of the First National Bank due, and I would request you send same to us and we will issue our certificate in lieu thereof."

The First National Bank mentioned in this letter was the First National Bank of Pueblo, which had been and was the correspondent in that city of the plaintiff, and had held its commercial paper, promissory notes, and bonds for safe-keeping, collection, and remittance, and its moneys on deposit with the First National Bank of Pueblo subject to the plaintiff's order. When this letter was written the First National Bank of Pueblo held for the plaintiff subject to its checks or drafts about $30,000, and it was the money in this account that C. C. Slaughter in the letter quoted above requested Werkheiser, the cashier of the plaintiff, to cause to be transferred to the defendant. The plaintiff also held twelve certificates of deposit of the First National of Pueblo, of $5,000 each, representing $60,000, six of which are referred to in that letter. The First National Bank of Pueblo also held commercial paper of the plaintiff aggregating $60,000, copies of which, with the receipts of the First National for the originals, the plaintiff had, and the First National of Pueblo also held bonds to the amount of $97,000, for $87,500 of which the plaintiff held the receipt of the First National. The letter of Mr. Thatcher to Mr. Werkheiser, cashier of the plaintiff, referred to in the letter of Slaughter, as cashier of the defendant, of February 6, 1915, read, so far as it is material here, as follows:

"I have made a sale of the First National Bank of Silverton stock to Mr. W. B. Slaughter. The entire assets of the bank, of every nature, are to be turned over to Mr. W. M. Slaughter, or Mr. C. C. Slaughter, or their representative, whenever they require it."

This letter also contained directions about the transfer of the stock to the Slaughters and the election of new officers. Under date of February 8, 1915, C. C. Slaughter, under the title of cashier of the defendant, wrote Mr. Werkheiser, the cashier of the plaintiff, again to transfer the account of the plaintiff from the First National of Pueblo to the defendant, and added:

"Furthermore, you will also send all receipts and papers that you hold, representing commercial paper that is now held by the First National Bank of Pueblo, aggregating about $60,000, and also the bonds, aggregating something about $90,000, and we will get these papers from the First National Bank and hold same for you, sending the necessary receipts for your files."

Under date of February 11, 1915, Mr. Werkheiser, as cashier of the plaintiff, wrote a letter in reply to C. C. Slaughter, cashier of the Mercantile National Bank, as follows:

"Dear Sir: We inclose all copies of commercial paper; originals are in the hands of the First National Bank, Pueblo, Colo., belonging to this bank: [Here followed a list of promissory notes, aggregating $60,000.] Kindly acknowledge receipt covering same. We also inclose receipts for bonds and stocks from the First National Bank, Pueblo, as follows: [Here followed a list of bonds, aggregating $97,500.] Kindly send us your receipt for the above, or the bonds, as you prefer."

Albert S. Booth was the vice president of the First National of Pueblo in 1913. He testified that he was aware of the sale of the stock of the plaintiff to W. B. Slaughter and C. C. Slaughter when it was agreed upon on February 6, 1915, and that Mr. Thatcher then told him that he could turn the bonds over to them whenever they called for them, and they would probably want to make the Mercantile National the depository, the same as the First National of Pueblo had been. He testified that the latter bank had been holding the commercial paper, bonds, and other securities of the plaintiff for safe-keeping and collection; that on February 13, 1915, C. C. Slaughter came to his office and said that, as they had purchased an interest in the Silverton Bank, the Mercantile Bank would now take the same place as the First National had with reference to these notes, bonds, and securities; that they had arranged for the transfer of the checking account, and the Mercantile National would then take over the commercial paper, and bonds the First National held for the plaintiff; and that he asked for the commercial paper and securities. He testified that, on this request being made by Slaughter as cashier of the defendant, the latter presented and delivered to him copies of the notes owned by the plaintiff for $60,000, on the backs of which his receipts for the originals to the plaintiff as vice president of the First National Bank of Pueblo were written; that Slaughter as cashier presented to him his receipt to the plaintiff as vice president of the First National for all the bonds, excepting $10,000 of them, which had been purchased after the date of the receipt, wrote on that receipt the words: "Received all of the above bonds. C. C. Slaughter, Cashier"—and in addition receipted for each lot of these bonds and the lot of $10,000 that had been bought after the date of the First National's receipt, upon the books of the First National of Pueblo by writing thereon his signature as cashier opposite each lot of these bonds. Asked on cross-examination what order or authority he had from the First National of Silverton, the plaintiff, to deliver the bonds, he answered, referring to Mr. Thatcher's direction of February 6, 1915, to turn over the account and securities held for the plaintiff to the Slaughters whenever they called for them:

"Well, Mr. Thatcher's order was verbal. At that time his resignation had not taken effect."

He further testified on cross-examination that the plaintiff had changed its account to the defendant when he delivered the bonds; that it was understood that he would deliver them on C. C. Slaughter's request; that the fact that his father, W. B. Slaughter, had purchased

the stock of the plaintiff had some effect; that the facts that C. C. Slaughter and his father had been elected directors of the plaintiff, and respectively president and vice president, "had some right"; that, had it not been for these circumstances, he would not have delivered the bonds to C. C. Slaughter without a written order of some kind; that he considered it sufficient authority from the plaintiff that C. C. Slaughter, its vice president, who had negotiated the deal with Thatcher, asked him to do so; and that if no deal had been made with Mr. Thatcher for the stock, and C. C. Slaughter and his father had not been made officers of the plaintiff, he would not have delivered the bonds to C. C. Slaughter on his receipt as cashier of the defendant.

Under date of February 13, 1915, on the official letter head of the defendant, and over the signature of "C. C. Slaughter, Cashier," the latter wrote Mr. Werkheiser, cashier of the plaintiff:

"I am very much pleased to acknowledge receipt of your favor of February 11th furnishing me a list of the commercial paper now held by your bank which is in the hands of the First National Bank of Pueblo, together with receipt, etc., for which accept my thanks. I desire to state I delivered the receipts to Mr. A. S. Booth this morning, and received in return $55,000 of commercial paper described as follows: [Here followed a list of 11 pieces of this paper, of $5,000 each], and am inclosing copies of the notes which we hold for your account, which you can put in your note case and we will do the necessary towards collecting. I desire to state that the Howe Bros.' note of $5,000 [one of the notes taken over from the First National of Pueblo by Slaughter as cashier of the defendant] was paid, and I received a $5,000 cashier's check, and am crediting your account to-day with proceeds. I also received the bonds you have listed, and am inclosing herewith our receipt for the same, which I believe you will find satisfactory. * * * I would also ask, upon receipt of this letter, you forward the other seven certificates of deposit you hold of the First National Bank of Pueblo, and in lieu of them we will issue our deposits for like amount. * * * We will endeavor to either purchase some commercial paper or give you a good note, and will advise you accordingly sometime next week."

Under the same date and over the same signature, "C. C. Slaughter, Cashier," the latter sent to Mr. Werkheiser, as cashier of the plaintiff, a receipt for the bonds in these words:

"Dear Mr. Werkheiser: The following is a list of the bonds we are now holding for safe-keeping for your account, which were turned over to us by the First National Bank this morning: [Here followed a list of the bonds, aggregating $97,500.]"

Under date of March 8, 1915, over the signature of "C. C. Slaughter, Cashier," the latter wrote Mr. Werkheiser, cashier of the plaintiff, among other things:

"Would also advise we received from the Silver City National Bank of Silver City, N. M., $500 on account of bond No. 12 of the town of Silver City [one of the bonds originally held by the First National of Pueblo for the plaintiff], and are crediting your account $512.50, the $12.50 being interest."

Between February 13, 1915, and the failure of the defendant bank on March 29, 1915, on account of the misappropriations and delinquencies of C. C. Slaughter, who fled and has never returned, the defendant collected from the commercial paper of the plaintiff which it received on February 13, 1915, from the First National Bank of Pueblo $35,000,

and the plaintiff subsequently received back from the receiver of the defendant $25,000 of that paper in kind.

On January 9, 1912, the board of directors of the defendant passed this motion:

"Moved by C. C. Slaughter and seconded by W. D. Grisard that the practice of the bank receiving things of value from its customers for safe-keeping be discontinued, and that all such parties, requesting the bank to keep such things of value, be asked to rent a safety deposit box."

C. C. Slaughter made no record in the books of the defendant of the bonds, amounting to $97,500, of the plaintiff, which he obtained as cashier of the defendant from the First National Bank of Pueblo and none of the other officials of the defendant knew that he had obtained them until after he had pledged all but $10,500 of them on February 20, 1915, to the First National Bank of Kansas City, Mo., to secure the payment of a promissory note of W. B. Slaughter and C. C. Slaughter to that bank for $50,000, with the proceeds of which he bought the controlling interest in the stock of the Alamosa Bank after Slaughter's deal for the purchase of the stock of the plaintiff. There was testimony tending to prove that the signature of W. B. Slaughter to this note and to the letters used to procure this loan from the Kansas City bank was forged. The first of these letters was dated February 15, 1915. Mr. Trotter, an officer of the First National Bank of Pueblo, testified that he had a preliminary talk with C. C. Slaughter about the possible purchase of the interests in the Alamosa Bank, after the deal for the purchase of the stock of the plaintiff, and that the Alamosa deal was a quick one. Search was made for the $10,000 of bonds that were not pledged to the Kansas City bank, but they were never found. Due demand was made by the plaintiff of the defendant and its receiver for the return of all the bonds or the payment of their value before this action was commenced.

The evidence of some of the facts which have been recited was rejected at the trial by the court below, but none of it has been stated or considered which was not, in the opinion of this court, competent and relevant to the issues tried. There was evidence of some other minor facts, but none which are material to the issue whether or not there was error in the direction by the court of the verdict for the defendant.

One cannot thoughtfully consider the established facts that C. C. Slaughter was and had been for two years before this transaction the cashier and the active and uncontrolled manager of all the business of the defendant; that as such cashier he requested and obtained from the cashier of the plaintiff its receipts from the First National Bank of Pueblo for the plaintiff's $60,000 of commercial paper and for some $90,000 of bonds; that at, in effect, one and the same time, and as part of the same transaction, by acting, directing, and receipting as such cashier, he procured from the First National Bank of Pueblo the transfer to the defendant bank of this property of the plaintiff, to wit, more than $30,000 of money on deposit to its credit in its checking account, $60,000 on deposit, for which the plaintiff held the certificates of deposit of the First National of Pueblo, and $60,000 of commercial paper, for which it held the receipts of the latter bank; that at the

same time and as a part of the same transaction, by receipting for them as cashier of the defendant, he obtained and carried away the $60,000 of commercial paper from the First National of Pueblo and $97,000 of the plaintiff's bonds; that the defendant bank received and used the moneys on deposit, collected $30,000 of the commercial paper, and derived the benefit of the use of all these funds—one cannot contemplate these facts without finding great difficulty in resisting the conclusion that there was substantial evidence in this case that by these acts of its cashier the defendant was estopped from denying that these bonds were deposited with and accepted by it for safe-keeping and collection, as were the plaintiff's other securities.

Counsel for the defendant, however, have forcibly and persuasively argued in opposition to this conclusion. One of their contentions is that, at the time the bonds were delivered to C. C. Slaughter as cashier of the defendant, he was also the vice president of the plaintiff, and he and his father owned its stock, and that it was by virtue of his authority as such vice president, and as the representative of himself and his father, that he caused the bonds to be taken from the First National of Pueblo, delivered to himself as cashier of the defendant, and misappropriated. In support of this argument they cite the testimony of Mr. Booth that, after the contract for the sale of the plaintiff's stock, Mr. Thatcher told him thereof and instructed him to turn over the account and securities of the plaintiff in the First National of Pueblo to the Slaughters, and that if no deal for the sale of the stock had been made, and if C. C. Slaughter had not been made vice president and W. B. Slaughter president of the plaintiff, he would not have delivered the bonds to C. C. Slaughter as cashier of the defendant on his receipt as such, and that when C. C. Slaughter, the vice president of the plaintiff, who had negotiated the purchase of the plaintiff's stock requested him to deliver the bonds, he considered that request sufficient authority to warrant him in so doing. But there is no evidence in the record that C. C. Slaughter ever claimed to exercise or did exercise any authority or power as vice president of the plaintiff in getting these bonds into his possession as cashier of the defendant. Booth testified that Thatcher told him before he ceased to be president to turn over all the securities and the account to the Slaughters when they called for them; that when C. C. Slaughter came for them he said, "We have taken one of your accounts away from you—the Mercantile has taken it away"; and that the Mercantile would now take the place and hold the bonds for the First National Bank of Silverton, just the same as the First National Bank of Pueblo had held them for the First National Bank of Silverton.

Moreover, the question here is not by what authority did Slaughter, as cashier of the defendant, get the bonds. No one questions his right to their possession as its cashier. He never asked or pretended to receive them in any other capacity, and the question here is: In what capacity did he take or hold them? Was it as agent and representative of himself and W. B. Slaughter individually, was it as vice president of the plaintiff, or was it as cashier of the defendant? The letters and receipts show on their faces, and the testimony of the witnesses is, that

it was as cashier of the defendant, and no writing or testimony has been discovered to the effect that at the time of the transaction C. C. Slaughter, or any one connected with the transaction, claimed or conceived the idea that he asked for, took, received, or receipted for either the bonds, the commercial paper, the certificates of deposit, or the moneys in the checking account in any other capacity. The fact that he took from the First National Bank of Pueblo the moneys in the plaintiff's checking account, the certificates of deposit issued by the First National Bank, and the commercial paper as cashier for the defendant bank is competent and persuasive evidence to the same effect. This case is as one would have been if, after receiving as cashier of the defendant and carrying away the pieces of commercial paper, he had subsequently appropriated one of them to his own use while the others were accounted for by the bank. The truth is that the agreement of sale of the stock was single, the request for the transfer of all the property of the plaintiff in the possession of the First National of Pueblo and the grant of that request constituted one transaction, and evidence of the treatment of every part of that property is competent and persuasive upon the issue of the capacity in which C. C. Slaughter received and accepted every other part of it.

Another contention of counsel for the defendant is that, even if C. C. Slaughter received and accepted the bonds for the defendant as its cashier, yet since he was during this time the vice president of the plaintiff, and as such had authority to take for the plaintiff the bonds, the other securities, and the moneys from the defendant bank and its cashier, it was as vice president of the plaintiff, and not as cashier of the defendant, or as an individual, that after he had taken them from the First National Bank he appropriated them to the use of himself and his father. But no evidence has been discovered in this record that Slaughter ever exercised his authority as vice president of the plaintiff to do or ever committed any such act, nor can we find any evidence that he or any of the parties in interest ever claimed or thought of his so doing before this suit was commenced.

Counsel contend that since the other officers of the defendant did not know that Slaughter, as its cashier, had received, accepted, and receipted for the bonds as a part of the property of the plaintiff held by the First National of Pueblo and turned over to it, and as no entry of the bonds was made on the books of the defendant, and it never received any of the proceeds thereof, except $500, the knowledge of its cashier that they were obtained and receipted for by Slaughter for the bank was not imputable to it, and consequently it was not estopped from denying the receipt or acceptance of the bonds for safe-keeping or collection by Slaughter's acts. In support of this position they cite and the court has examined American Surety Co. v. Pauly, 170 U. S. 133, 156, 18 Sup. Ct. 552, 42 L. Ed. 977; American National Bank of Nashville v. Miller, 229 U. S. 517, 33 Sup. Ct. 883, 57 L. Ed. 1310; Bank of Overton v. Thompson (8th C. C. A.) 118 Fed. 798, 800, 56 C. C. A. 554; Central Coal & Coke Co. v. Geo. S. Good Co. (8th C. C. A.) 120 Fed. 793, 798, 57 C. C. A. 161; Mulrooney v. Royal Ins. Co. (8th C. C. A.) 163 Fed. 833, 835, 90 C. C. A. 317;

Interstate Nat. Bank v. Yates Center Nat. Bank (8th C. C. A.) 245 Fed. 294, 157 C. C. A. 486; School District v. De Weese (C. C.) 100 Fed. 705; Gunster v. Scranton Illuminating Heat & Power Co., 181 Pa. 327, 37 Atl. 550, 59 Am. St. Rep. 650. In American Surety Co. v. Pauly, the president of a bank certified to the honesty and integrity of a Mr. O'Brien, and a surety company in reliance upon that certificate signed his bond, and the court held that the bank was not liable to the surety company, because the making of such a certificate was not within the scope of the power or duties of the president of a bank. But surely the acceptance and receipt by the cashier of a bank of the moneys on deposit, commercial paper and bonds of another bank for safekeeping and collection, are not beyond the general scope of the powers of such a cashier.

In School District v. De Weese (C. C.) 100 Fed. 705, 708, 709, the cashier of a Sedalia bank, as agent of a school district, sold some new bonds it had issued to pay off old bonds, paid the proceeds of the sale for and took up the old bonds, but did not cancel them, and sold the old bonds again, and placed the proceeds to the credit of his bank with its Eastern correspondent, and as soon as this was done placed these proceeds to his own individual credit in his account with his bank. The court held that because, from the time this cashier wrongfully sold the old bonds, which he ought to have canceled, he evidently had the intention to steal or appropriate them and their proceeds, that he was from that time acting in his own interest adversely to that of his bank, and that consequently his knowledge that the old bonds and the proceeds thereof were the property of the school district was not imputable to that bank. This and the other authorities cited rest on the exception to the general rule that the knowledge of and notice to the agent is the knowledge of and notice to his principal which arises when the agent is shown to have been acting in a transaction adversely to his principal for himself and in his own interest.

The evidence in this case does not bring it under this exception because no substantial evidence has been found that before or at the time the bonds, the other securities, and the deposits were received and accepted by C. C. Slaughter as cashier of the defendant, and that transaction was finally closed on February 13, 1915, Slaughter was ever acting in his own interest adversely to the bank, and there is very persuasive, if not conclusive, evidence that he was not so acting in the transaction. If he had been, he could easily have appropriated to himself the $30,000 in the checking account or the $60,000 represented by the certificates of deposit, without the delay, labor, and inconvenience of procuring the loan of the Kansas City bank. The legal presumption is that in this transaction he was acting honestly and faithfully until it was completely closed, and that he did not conceive the intention to misappropriate any of this property until some days after the property was delivered to him on February 13, 1915. The testimony accords with the presumption and his knowledge of that transaction must be imputed to the defendant, and it is thereby estopped from denying that it received and accepted the bonds from the plaintiff for its account (Lerch v. Bard, 162 Pa. 307, 29 Atl. 890, 893, 894), at the time of this transaction.

And since the plaintiff had the right to rely on the general rules that the cashier of a bank has greater inherent power than any other officer thereof and is ordinarily its active manager and agent, that, while those who deal with him as cashier are presumed to know the extent of his general powers, a limitation thereof is not binding on those who are not cognizant thereof (7 C. J. § 160), that he is held out to the public as having authority to act according to the general usage, practice, and course of business conducted by such institutions, and generally evidence of such usages, practice, and course of business is competent and admissible, that his acts within the scope of such usage, practice, and course of business will generally bind the plaintiff in favor of third persons, and that those dealing with a bank have a right to presume integrity on the part of its cashier when acting within the apparent sphere of his duties, and the bank is bound accordingly, the legal presumption is that a cashier, performing his functions within the scope of the powers of the bank, acted in his official capacity rather than in an individual one, and for the interest of the bank rather than adversely to it and for his own and other interests. When all the evidence in this case is considered in the light of these familiar rules, the conclusion is unavoidable that it was such that, if it had been submitted to the jury under proper instructions and they had returned a verdict for the plaintiff, it would not have been the duty of the court below to set it aside, and it was such that reasonable men in the exercise of an honest and impartial judgment of the evidence might well conclude that the plaintiff was entitled to a recovery.

Referring, now, as briefly as convenient, to some other questions than the sufficiency of the evidence to sustain a verdict for the plaintiff, these conclusions have been reached:

[3] The absence of knowledge of the other officials of the bank of the receipt and acceptance of the bonds, the failure of C. C. Slaughter to record the bonds in the books of the bank, and the failure of the defendant to derive benefit from the bonds because its cashier, after his receipt and acceptance of them for the defendant, unlawfully appropriated them to his own use, did not revoke his authority to receive them for it or relieve it from its liability to account for them to the plaintiff.

The fact that the receipt of "C. C. Slaughter, Cashier," dated February 13, 1915, read, "The following is a list of the bonds we are now holding for safe-keeping for your account," did not render other written evidence or parol evidence inadmissible to show, or estop court or jury from finding upon convincing and competent evidence, that the taking by the defendant at the same time of all the moneys and securities formerly held by the First National Bank of Pueblo, including the bonds, was for safe-keeping and collection, and that the bailment was not gratuitous.

The motion adopted by the board of directors of the defendant, to the effect that the bank should discontinue holding articles of value for customers and should request them to take safety deposit boxes, did not restrict or limit the authority of Slaughter as cashier to receive

and accept for the defendant the moneys and securities taken from the First National of Pueblo.

Evidence of the negligence of the defendant, if any, prior to February 13, 1915, in failing to employ one as cashier fit in ability, character, integrity, and habits, or in retaining one unfit to discharge the responsible duties of that office, in failing to examine with proper care and frequency his accounts and acts with and for the bank, to discover in him a character, acts, or habits that disqualified him for such an office, was competent in rebuttal on the trial of this action below, and doubtless will be competent at the trial to come. Preston v. Prather, 137 U. S. 610, 611, 11 Sup. Ct. 162, 34 L. Ed. 788.

In case the defendant claims in the next trial that C. C. Slaughter took the bonds, or any of them, from the defendant after February 13, 1915, in the capacity of vice president of the plaintiff, the receipt of the Bankers' Trust Company of February 15, 1915, will be material and competent evidence as to that claim. The silence of the court upon questions presented upon which no decision is announced does not indicate any opinion of the court upon them.

Let the judgment below be reversed, and let the case be remanded to the court below, with instructions to grant a new trial.

ATCHISON, T. & S. F. RY. CO. v. MERCHANTS' LIVE STOCK CO.

(Circuit Court of Appeals, Eighth Circuit. May 7, 1921.)

No 5654.

1. **Carriers ⇐211—Duty of caretakers to care for stock at feed stations.**
Under the provision of Twenty-Eight Hour Law, § 2 (Comp. St. § 8652), that "animals so unloaded shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing then by the railroad * * * at the reasonable expense of the owner or person in custody thereof," where the carrier furnishes free transportation to caretakers for a shipment of stock, as permitted by law, it is primarily their duty as matter of law to unload, care for, and reload the stock at rest stations, and the refusal of the caretakers to perform such duty or to assist therein is matter of defense in an action against the carrier for loss of stock alleged to have been due to the improper and unskillful manner in which the stock was handled and reloaded by its employés, especially where the bills of lading expressly provided that it should not be liable for any loss, damage, or delay due to the act or default of the shipper or his agents

2. **Carriers ⇐228(3)—Evidence held incompetent in action for loss of stock.**
On an issue as to liability of a railroad company for loss and damage to stock in shipment, alleged to have been due to improper handling and delay in the transportation, evidence that another shipment a month later went through in two days' less time and with much smaller loss, without showing the comparative condition of the cattle, the conditions under which the shipments were made, or whether the time made was usual or unusual, *held* incompetent, as introducing collateral and irrelevant issues.

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

Action at law by the Merchants' Live Stock Company against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Gardiner Lathrop, of Chicago, Ill. (W. C. Reid, C. M. Botts, and G. S. Downer, all of Albuquerque, N. M., on the brief), for plaintiff in error.

L. O. Fullen and W. A. Dunn, both of Roswell, N. M., for defendant in error.

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

LEWIS, District Judge. The Merchants' Live Stock Co. recovered a judgment against the Railway Co. as its damages to a shipment of 41 carloads of cows and calves from Avalon, N. Mex., to Kansas City, Mo. The cattle were driven in from the range 60 miles out in five days, held for a day in a pasture nearby, loaded into cars during the forenoon of October 25, 1917, left Avalon that afternoon and reached Kansas City on the morning of October 30th. Five calves and 66 cows in a total of 1,678 died in transit, or were left on the way as too weak to be reloaded,—some at Amarillo, the first unloading place, but the most of them, more than 50 head, at Strong City, where they were again unloaded for feed, water and rest. Two dead cows were left at Wellington and two or three were dead in the cars at Kansas City. The complaint charged that the loss was occasioned by slow speed of the train, long and needless stops, inadequate pens and facilities for feeding and watering at Amarillo and Strong City, failure to supply them with water, negligently loading after unloading, so that some cars were overloaded and calves unnecessarily separated from their mothers, jerking, jarring and roughly handling the train, all of which caused the cattle to be greatly weakened, trampled in the pens and in the cars, and those that were not killed, crippled or abandoned on the way reached destination in an injured condition and shrunken in weight, thus decreasing their market value, and that if they had been transported with reasonable diligence they would have been sold on a higher market than the one which obtained when destination was reached. The Railway Company denied these charges in its answer, and put in proof to show that the damages claimed were caused largely by the poor and weakened condition of the cows when they were loaded for shipment, by failure of the caretakers who accompanied the shipments to assist in unloading and reloading the cattle and feeding and watering them at Amarillo and Strong City, and also that a cold north wind accompanied with snow set in before Strong City was reached, which, together with the poor and weak condition of the cows caused the large loss of them there. The season had been unusually dry, the range was not good, the cows were old and thin in flesh and were being shipped out for the purpose, in part, of leaving grass so that the remainder and better part of the herd could winter through. There were four caretakers with the shipment, including the general manager of the Live Stock Company, who had all been given transportation to accom-

pany the shipment as caretakers. That practice is of long standing, Ry. Co. v. Chatham, 244 U. S. 276, 37 Sup. Ct. 499, 61 L. Ed. 1131, L. R. A. 1917F, 1128, and has had express legislative recognition. The Act to regulate commerce (34 Stat. 584, § 1 [Comp. St. § 8563(5)], permits free transportation "to necessary caretakers of live stock"; and one of the alleged errors assigned and relied on is the claim that the court incorrectly instructed the jury as to the duty of these caretakers in assisting to unload, reload, feed and water the cattle at Amarillo and Strong City. The bills of lading referred to the caretakers as "attendants in charge of this shipment," and expressly provided that "the carrier shall not be liable for any loss, damage or delay due to * * * the act or default of the shipper or his agents," and the tariffs of the carrier filed with the Interstate Commerce Commission repeat the substance of Sec. 2 of the 28-Hour Law, 34 Stat. 608 (Comp. St. 8652). That law provides that animals unloaded for rest, feed and water "shall be properly fed and watered during such rest, either by the owner or person having the custody thereof, or in case of his default in so doing," then by the railroad company, and if that service is performed by the railroad company it shall "have a lien upon such animals for food, care, and custody furnished."

[1] On the foregoing, the contention is made by plaintiff in error that the shipper, through its caretakers, was under the legal duty to assist in unloading, reloading, feeding and watering the cattle at Amarillo and Strong City,—indeed, that these were primarily duties of the caretakers,—and that the court should have expressly so instructed the jury, and that the caretakers could not be permitted to judge for themselves whether they would or would not lend assistance under the surrounding circumstances, and that plaintiff's damage should be diminished to the extent that the assistance of the caretakers would have lessened the loss. The general manager forbade the caretakers to give any assistance at Strong City, and there is testimony that they gave none at Amarillo, although a part of the damage claimed was dependent on the manner in which the cattle were unloaded, reloaded, and fed and watered at those points. The court, in the forepart of an instruction (No. 24) declared the law, as now and then contended for by plaintiff in error, that is, that it was the duty of the caretakers to assist in unloading, feeding, watering, resting and reloading the cattle, and that if the caretakers, by using their reasonable diligence and the means at their command could have prevented or diminished the damage done, then any such damage which might have been so prevented, or the amount in which such damage might have been diminished, the defendant was not responsible for. But the court added to this declaration of law the following:

"And it is for you to say from all the evidence in this case bearing upon that point, whether or not, under all the circumstances as they existed at the time, the use of reasonable diligence on the part of the caretakers and the means at their command *required* them to assist in the unloading, feeding, watering, resting and reloading the cattle at Strong City."

The jury was instructed before argument, and the excerpt was added by the court after the case had been partly argued. The defendant

saved its exception to the instruction as thus changed. We are of opinion that the instruction was right without the addendum,—it declared the duty as a matter of law; and that with it, it was wrong and prejudicial for two reasons: 1st, it left the matter of duty a question of fact to be settled by the jury, and 2d, the instruction thus became self-contradictory. There was no issue on the facts as to the question of duty. The train arrived at Strong City 1:30 a. m., October 29th. The crew were properly notified that the cattle must be unloaded there to keep within the 28-Hour Law (Comp. St. §§ 8651–8654) under which an extension to 36 hours had been made. They had been confined in the cars 34 hours since being loaded at Amarillo. The general manager of the Live Stock company insisted that they proceed to a station beyond, where pens and facilities for feeding and watering were larger and better, as he claimed; and because his request was not acceded to he refused to let the caretakers render any assistance in unloading, feeding and watering. The Railway Company was not able, with the available help, part of the train crew and section men, to get all of the cattle out of the cars until about nine o'clock. The caretakers stood by and looked on as they were directed to do by the general manager. One of them testified:

"Q. How were the cattle unloaded by the people who unloaded them, just describe as nearly as you can how the cattle were handled in the cars and how in the yards by the men. A. They didn't seem to know anything about stock. * * *

"XQ. You knew that the stock was suffering greatly by reason of not being unloaded more rapidly? A. Yes, sir.

"XQ. You knew the stock was suffering greatly by reason of the inexperience of these men in unloading the cattle? A. Probably so."

They gave no assistance whatever in unloading, but one of them testified that when it came to reloading, the railroad men were so inapt, did the work so poorly, and treated the cattle so badly that he finally went in and helped out. One element of damages insisted upon by the plaintiff was that feed for the cattle was put on the ground, and so many were crowded in a pen that they trampled it and did not eat it. Another ground was that some of them were not watered. One pen at Amarillo, and perhaps one at Strong City, had no watering trough. Some of them had racks for hay. One of the caretakers testified as to those subjects in reference to the stop at Amarillo:

"XQ. Why didn't you and the other parties put it (hay) in the racks? A. Because we had nothing to do with the feeding. * * *

"XQ. Why didn't you put the feed in the racks? A. I wasn't supposed to. * * *

"XQ. You could have put the cattle in other pens and watered them? A. I had nothing to do with it."

Counsel for defendant in error took the position in argument that the only duty of a caretaker is to get cattle up on their feet when they are down in the cars. We are not advised as to just why he makes that limitation, nor are we persuaded that the contention is sound. In view of the long practice, the statutory provisions and the terms of the bills of lading, we think there was a clear legal duty and obligation on the shipper to render such aid and assistance through the caretakers

from time to time en route as would be helpful in protecting the shipment against loss and damage. Such an arrangement between shipper and carrier was not then prohibited. The rigor of the common-law rule against the carrier, which had not been changed in that respect, "might be modified through any fair, reasonable and just agreement with the shipper which did not include exemption against the negligence of the carrier or his servants." Adams Express Co. v. Croninger, 226 U. S. 491, 509, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257. Loss or damage attributable to the shipper is not caused by the carrier's negligence. Starr v. R. R. Co., 103 Neb. 645, 173 N. W. 682; Fluckiger v. Ry. Co., 99 Neb. 6, 154 N. W. 865; Grieve v. R. R. Co., 104 Iowa, 659, 74 N. W. 192; Cleve v. Ry. Co., 77 Neb. 166, 108 N. W. 982, 124 Am. St. Rep. 837, 15 Ann. Cas. 33; Weaver v. Ry. Co., 9 Ga. App. 34, 70 S. E. 222; Railway Co. v. Schuldt, 66 Neb. 43, 92 N. W. 162; Webster v. R. R. Co. (D. C.) 200 Fed. 597; Lumber Co. v. Ry. Co., 34 Interst. Com. Com'n R. 1; Beef & Provision Co. v. R. R. Co., 46 Interst. Com. Com'n R. 401; Stock Exchange v. Ry. Co., 52 Interst. Com. Com'n R. 209, 223.

[2] Over the defendant's objection the court permitted the plaintiff below to prove that one month after the shipment in question it shipped over the same line 800 head of cattle of like kind, which it gathered from the same range, from Avalon to Kansas City, and that while the first shipment required five days in transit the last went through in three days, that of the last shipment only one calf and two cows were lost, and that the shrinkage in weight was two or three times more per head in the first shipment than in the last one. The effect of this was to bring into the case many collateral issues, to present issues of fact which the Railway Company was not prepared to meet, and to lead the jury aside on an inquiry of facts which would not furnish it a safe guide in reaching a correct and just conclusion on the questions which it was called to hear and determine. What were the comparative ages and physical strength of the cattle in the two shipments? What were the comparative conditions as to flesh? When and to what extent had the cattle in each shipment been fed and watered prior to being put on the cars? Was three days the average run from Avalon to Kansas City or was it exceptionally short? The first would be a fair guide, the latter misleading. How much time was consumed in driving the last shipment in from the range and what were the conditions as to feed and water on the way, as compared to the first shipment? What was the difference in weather conditions, and its effect? Even if these inquiries had not been collateral and therefore irrelevant, the defendant could not have been expected to be prepared to meet them. We think the challenged proof was irrelevant, misleading and prejudicial.

Other assigned errors have been considered, but they are deemed to be without merit.

Reversed.

MASON et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. May 17, 1921.)

No. 3548.

1. **Mines and minerals ⟸9—Order withdrawing public lands held effective to prevent subsequent valid mineral entry.**
An order of the Interior Department withdrawing certain described public lands from settlement and entry, "or other form of appropriation," *held* effective to prevent the subsequent location of a valid mineral claim on the lands, where its purpose was to withdraw them pending investigation of their value for oil and gas.

2. **Mines and minerals ⟸7—Trespasser liable for oil taken, without deduction for cost of production.**
A trespasser, who extracted and sold oil from public land, claiming under a mineral location made with knowledge that the land had been withdrawn by the Land Department from "Settlement and entry or other form of appropriation," *held* liable, at law or in equity, for the value of the oil so taken, without deduction for the cost of its production.

3. **Mines and minerals ⟸7—Advice of counsel held not to justify trespass.**
Where a trespasser extracted and sold oil from public land, claiming under a mineral location made with knowledge of an order of the Interior Department withdrawing the land from any form of appropriation, and that the Land Department had construed such order as barring mineral locations, the fact that he sought and obtained an opinion from counsel giving a contrary construction to the order cannot justify the trespass as one made in good faith, so as to affect the measure of the trespasser's liability.

4. **Public lands ⟸8—Measure of recovery for trespass on public lands not governed by local laws.**
The measure of recovery by the United States for an alleged unlawful appropriation of public lands is not governed by local laws or decisions, but by general principles having uniform operation in all federal courts.

5. **Mines and minerals ⟸7—Liability for trespass cannot be lessened by payment to cotrespasser.**
The liability of a trespasser for oil taken from public land cannot be lessened by the amount paid as royalty to a lessor, who was also a trespasser.

Appeal and Cross-Appeal from the District Court of the United States for the Western District of Louisiana; Rufus E. Foster, Judge.

Suit in Equity by the United States against Sam W. Mason and others. From the decree, all parties appeal. Affirmed in part and reversed in part.

S. L. Herold and J. A. Thigpen, both of Shreveport, La. (R. L. Batts, of Pittsburgh, Pa., D. Edward Greer, of Houston, Tex., and Hampden Story, J. A. Thigpen, and S. L. Herold, all of Shreveport, La., on the brief), for appellants and cross-appellees.

Robert A. Hunter, of Shreveport, La., Sp. Asst. Atty. Gen., for the United States.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. This was a suit in equity, brought by the United States, appellee and cross-appellant (herein referred to

as the plaintiff), against the appellants and cross-appellees (herein referred to as the defendants). The relief prayed for included the cancellation and annulment of a mineral location made on March 26, 1910, by the defendants Sam W. Mason and W. W. Mason, covering a described 20 acres in section 5, township 20, range 16 west, in Caddo parish, La., and of a lease made by said Sam W. Mason and W. W. Mason to the defendant Gulf Refining Company of Louisiana; an adjudication that said land is the property of the plaintiff; the issuance of an injunction; for an accounting by the defendants for oil and gas removed or extracted from said land, and for all moneys, or things of value derived from the sale or disposition of same, and for all rents, royalties, and proceeds arising from the sale or lease of the same; and the recovery by the plaintiff from the defendants of all such sums so received by them, and all damages sustained by the plaintiff in the premises.

The court decreed the cancellation of the above-mentioned mineral location and lease, that the land mentioned is the property of the plaintiff, and that the defendants pay to the plaintiff the ascertained value of the oil produced from the well bored on the land, less the ascertained drilling and operating costs incurred. The defendants complain of the action of the court in deciding against the validity of the above-mentioned mineral location, and in not deducting as an expense of operation, from the net amount produced by the defendant Gulf Refining Company of Louisiana, the amounts paid to its codefendants as royalties. The plaintiff complains of the decree because it was not in its favor for the full value of the oil extracted and removed from the land, without deduction of the amount of costs and expenses incurred in producing that oil.

[1] The plaintiff relied on the following order as having the effect of invalidating the above-mentioned mineral location:

"5496 A. D. Department of the Interior, General Land Office, Dmg-3fs File. Washington, D. C., December 15, 1908. Address Only the Commissioner of the General Land Office. Register and Receiver, Natchitoches, Louisiana. See, also, 1910–44655. Sirs: To conserve the public interests, and, in aid of such legislation as may hereafter be proposed or recommended, the public lands in townships 15 to 23 north, and ranges 10 to 16 west, Louisiana meridian, Natchitoches Land Office, Louisiana, are, subject to existing valid claims, withdrawn from settlement and entry, or other form of appropriation.

"Respectfully, Fred Dennett, Commissioner.

"Approved:

"LRS. James Rudolph Garfield, Secretary."

The defendants admitted that the plaintiff owned the land in question on and before the date of the above set out order, but contend that that order did not have the effect of invalidating the attacked mineral location. That order was "ratified and confirmed and continued in full force and effect" by an order of the President made on the 2d day of July, 1910, under the authority conferred by the Act of June 25, 1910, entitled "An act to authorize the President of the United States to make withdrawals of public lands in certain cases." 36 Stat. 847 (Comp. St. §§ 4523–4525). As the last-mentioned order was made after the date of the mineral location in question and after the boring

of an oil-producing well on the land, the plaintiff must rely on the order of December 15, 1908, to sustain its contention as to the invalidity of the mineral location.

The Director of the United States Geological Survey, by several communications addressed to the Secretary of the Interior in October and November, 1908, called attention to waste of natural gas and oil in the Caddo oil field, to the fact that lands in, or in the neighborhood of, that field remained in federal ownership, referred to tracts in township 20 north, range 16 west, as "clearly within the known productive area of this oil and gas field," and recommended that the government take action to prevent further drilling for oil or gas in that field until effective measures be taken to prevent the waste of gas, and that public lands within and near to that field be withdrawn from entry pending the investigation then under way as to their value for oil and gas. On December 15, 1908, the date of the above set out withdrawal order, the Commissioner of the General Land Office gave notice of the withdrawal to the register and receiver at Natchitoches, La., by a telegram of the body of which the following is a copy:

"Public lands in townships fifteen to twenty-three north, inclusive, of ranges ten to sixteen west, inclusive, Louisiana meridian, withdrawn this date by Secretary from all settlement, entry, and appropriation."

The Commissioner confirmed his telegram by a letter of the same date, which contained the following:

"Confirming my telegram of December 15, 1908, you are advised of the withdrawal on that date by the Secretary from all settlement, entry, and appropriation of the public lands in townships 15 to 23 north, inclusive, of ranges 10 to 16 west, inclusive, Louisiana meridian. Make proper notations upon your records. No right whatever can be obtained by any location or settlement made, or claim initiated, after the withdrawal, and any applications, selections, or entries based thereupon must be rejected by you subject to appeal."

The mineral location relied on by the defendants was invalid, and conferred no right if it was inconsistent with the terms of the above set out withdrawal order. United States v. Midwest Oil Co., 236 U. S. 459, 35 Sup. Ct. 309, 59 L. Ed. 673; United States v. Morrison, 240 U. S. 192, 36 Sup. Ct. 349, 60 L. Ed. 541. In behalf of the defendants it is contended that the use in that order of the words "settlement and entry" was meant to refer to acquisition under the homestead law, as only acquisition under that law requires both settlement and entry, and that the use of the immediately succeeding language, "or other form of appropriation," was meant to cover only forms of appropriation more like the one specifically mentioned than one initiated by a mineral location. Certainly nothing in the order plainly indicates the existence of an intention to exempt from its operation any form of appropriation of public land in the townships named. The words used are consistent with the existence of an intention to cover all forms of appropriation of government land. A mineral location is the initiation of a method of appropriating public land provided for by law. If it is assumed that the words "settlement and entry" referred only to acquisition under the homestead law, and that the mak-

ing of a mineral location is to be regarded as the initiation of a form of appropriation of a distinctly different class, nevertheless the rule that where particular words of description are followed by general terms the latter will be regarded as applicable only to persons or things of like class is not to be so applied as to keep the words "other form of appropriation" from embracing one initiated by a mineral location, when to do so gives the order of withdrawal an operation different from that intended and disclosed by the officials who made and approved it. Danciger v. Cooley, 248 U. S. 319, 39 Sup. Ct. 119, 63 L. Ed. 266.

The language of the withdrawal order is to be read with reference to the facts and circumstances connected with the making of it and the evils sought to be remedied, and in the light of the contemporaneous construction of it by the official who made it and who was charged with the duty of enforcing it. 36 Cyc. 1137 et seq. Evidence above referred to makes it plain that the order was intended to prevent the waste of gas and oil from government land and to keep the lands mentioned from passing from government ownership pending the investigation then under way as to their value for oil and gas. It is evident that the lands embraced in the order were selected for withdrawal because they were within, or in close proximity to, an area already proved to be productive of oil and gas. As lands valuable for minerals are not subject to homestead entry and are by statute reserved from sale, except as otherwise expressly directed by law (R. S. §§ 2302, 2318 [Comp. St. §§ 4591, 4613]), an order of withdrawal was not needed to keep the land in question from passing from government ownership in either of the just mentioned modes. The situation dealt with by the order was such as to make it extremely unlikely that the appropriation of that land would be attempted otherwise than under the laws relating to placer mineral claims. U. S. Compiled Statutes, § 4638. If the last-mentioned mode of appropriation was not interfered with by the order, it was ineffective to prevent the only mode of appropriation likely to be resorted to under the then existing circumstances, and the public lands in the townships named remained as much subject to wasteful exploitation of their oil and gas contents as they were before this order was made.

If the order had the meaning attributed to it by counsel for the defendants, its futility as a conservation measure was obvious. The order utterly failed to accomplish the purpose disclosed by the circumstances connected with the making of it, if it left the land mentioned subject to mineral locations. The making of the order is not to be dissociated from the contemporary promulgation of it by the official who made it, the Commissioner of the General Land Office. Those acts were parts of one transaction. That official's telegram and letter of the same date to the register and receiver in immediate charge of the enforcement of the order show unequivocally that he construed the order as having the effect of withdrawing the land embraced in it from "all settlement, entry and appropriation," with the result that "no right whatever can be obtained by any location or settlement made, or claim initiated, after the withdrawal." The language of the order is not

such as to require that it be given a meaning different from that contemporaneously attributed to it by the maker of it, who was the highest officer of the executive department charged with the duty of executing it. That being so, the contention made in behalf of the defendants as to the meaning and effect of the withdrawal order could not be sustained without disregarding considerations which are entitled to persuasive influence in the interpretation or construction of it. For reasons above indicated, we conclude that the withdrawal order of December 15, 1908, was meant to, and did, prevent such a mineral location as the one relied on from conferring any right on anyone claiming under it.

[2] It follows that the defendants were trespassers, and their occupation and use of the government's land were with full knowledge of the facts which made such occupation and use unlawful. They knew of the existence of the withdrawal order. In their behalf it is contended that because, after getting a lawyer's advice on the subject, they, in pursuance of the advice given, acted under the influence of mistakes of law as to the validity and meaning of the order, they were entitled, in an accounting with the government for the value of the oil taken from its land, to be credited with the drilling and operating costs incurred. If the plaintiff had sued at law to recover the damages for which the defendants made themselves liable, the latter's above-mentioned mistakes of law would not have stood in the way of the recoverable damages being measured by the value of the oil taken, without credit or deduction for the expenses incurred by the wrongdoers in getting it. Union Naval Stores Co. v. United States, 240 U. S. 284, 36 Sup. Ct. 308, 60 L. Ed. 644. In the case cited the Naval Stores Company was sued for the conversion of spirits of turpentine and rosin produced from gum taken from trees on land embraced in an unperfected homestead entry, and acquired by the defendant from the homesteader with knowledge of the facts which made the turpentining operations on the land unlawful, and after it was informed that when the homesteader turpentined the land he thought there was no law against his doing so. It was decided that the homesteader, having acted with full knowledge of the facts, was not excused by his mistake of law, and that the defendant could take no credit for the work and labor bestowed upon the turpentine by the homesteader, but must answer for its value as manufactured products.

The fact that the instant case was brought in a court of equity does not keep the ruling in the cited case from being applicable. It is not disclosed that anything has occurred, which, in a court of equity, would deprive the plaintiff of the right to enforce whatever liability the defendants incurred by their wrongdoing. There is nothing to support a claim that it would be inequitable for the plaintiff to get what it would have been entitled to, if it had brought an action at law based upon the same wrongful conduct. The damages recoverable at law for such wrongdoing are equally recoverable in a court of equity. Guffey v. Smith, 237 U. S. 101, 35 Sup. Ct. 526, 59 L. Ed. 856, was a suit in equity for an injunction, discovery, and accounting, brought by the holder of an oil and gas lease against those who, under color of a later lease made by the owner, took oil and gas from the leas-

ed land. Part of the oil was taken while the defendants honestly believed that the lease they held was the only one on the premises, and part was taken after they were fully informed of the prior lease and of the complainant's claim based upon it. On the question of the liability of the defendants for oil taken after they were informed of the prior lease, it was decided that they were not entitled to a deduction of the amount of expenses incurred in getting that oil. The following was said in the opinion:

"But the expenses incurred after August 1, 1907, are upon a different footing. On that date Solley and his associates were actually and fully informed of the prior lease and of the complainants' purpose to insist upon the rights conferred by it and to obtain redress for the invasion of those rights, so what was done thereafter cannot be regarded as anything less than a willful taking and appropriation of the oil which was subject to the complainants' superior right."

[3]* As a trespasser's mistake of law does not, when he is sued at law, have the effect of entitling him to an allowance for the value of his labor expended in committing the trespass, and as the legal rule for measuring damages recoverable from a trespasser prevails in a court of equity, in the absence of anything making it inequitable for that rule to be enforced in favor of the party seeking equitable relief, the contention in question cannot be sustained, unless that result is required by the circumstance that the defendants acted in reliance on incorrect advice given by a lawyer. The circumstances attending the giving of that advice and the action of the defendants in pursuance of it are to be considered. The unlawful acts of the defendants in appropriating the land in question and taking valuable products therefrom were committed after the highest official of the executive department of the government charged with the custody and protection of the public lands, acting under an asserted right to do so, and in the belief that the land in question contained valuable oil and gas, which should be conserved, had publicly and formally adopted the policy of keeping that land in government ownership and conserving whatever of value it contained until Congress, after being informed of its value or lack of value for oil and gas, should determine the disposition to be made of it, and, in promulgating the order evidencing the policy adopted, had unequivocally given to that order the meaning, which the language was capable of expressing, of forbidding such an appropriation of that land and its contents as the defendants were guilty of. The trespass complained of was committed after warning given by the owner.

The defendants do not claim that they acted in excusable ignorance of that warning. If they did not actually know that the withdrawal order was intended to prevent any appropriation of the land or its mineral contents, it was because they intentionally or negligently failed to inform themselves of what was disclosed by official documents contained in the public files of the local land office. They either knew, or were negligent in not knowing, that the correctness of the legal advice under which they acted was controverted by the highest official representative of the public in the matter of protecting its rights in the land. They were not in the position of one who acts on the faith of legal

advice, the correctness of which he supposes to be acquiesced in by the party to be adversely affected by conduct in pursuance of it. The evidence is not inconsistent with the conclusion that the advice was sought with the disclosed purpose of finding an excuse for or justification of an already contemplated appropriation of the land, in disobedience of the withdrawal order as construed by the official who made it. It was given under conditions conducive to partisan bias and to the vitiating influence of selfish motives. It was acted on with knowledge, or ample opportunity to be informed, of the conflicting views as to the right or lack of right of the defendants to do what they did. It was not unwittingly that they took the chance of their conduct being condemned as wrong and unlawful in the to be anticipated possible event of the legal views expressed by their counsel not prevailing over inconsistent ones known to be entertained by high officials who had no personal interest to be affected.

We are not of opinion that, in the determination of the damages for which the defendants are liable because of their unlawful acts, the giving, under the circumstances disclosed, of the advice of counsel in pursuance of which they made mistakes of law, which they claim influenced their conduct, requires that those mistakes be given an effect or influence not accorded to the mistake of an occupant of public land included in his unperfected homestead entry, in making an unlawful use of that land when he thought there was no law against his doing what he did, and, so far as appears, was, unaware that any one thought otherwise, nor to the conduct of the holder of an oil lease in taking oil from the leased land after he was informed that right to that oil was claimed by another under a prior lease made by the owner. We think the evidence adduced required the conclusion that the wrongful acts complained of were committed under such circumstances as forbid their being regarded as anything less than a willful taking and appropriation of the plaintiff's property, with the result of depriving the wrongdoers of a right to be credited with the amount of expenses they incurred in taking the plaintiff's oil.

Such a valid conservation measure as the one in question could not be expected to be at all effective if the erroneous advice of a lawyer as to its validity or meaning is given the effect of enabling a trespasser, with knowledge or ample opportunity to know that the correctness of that advice is officially and publicly controverted, to take and convert the things of value sought to be conserved, and to contest the question of his liability without risking anything but the profit he would realize in the event of his being successful in the contest. A reason for the existence of the rule that ignorance of law does not excuse is that a different rule is incompatible with the regulation of human conduct by law. A mistake of law, made under the influence of advice of counsel, given and acted on under such circumstances as those disclosed by the evidence in this case, is within the reason of the rule mentioned, and is not within any recognized exception to or modification of that rule. To charge the government with the amount of expenses incurred by trespassers in taking oil from public land validly withdrawn from appropriation is incompatible with the enforcement of the policy evi-

denced by the withdrawal order. To allow the credit claimed in behalf of the defendants would amount to paying them for doing what was legally forbidden.

[4] A provision of the Louisiana Civil Code and decisions of the Supreme Court of that state are referred to in argument of counsel for the defendants in support of the contention that under the law of that state the defendants, in the circumstances disclosed, are liable only for the difference between the value of the oil produced and the cost of producing it. It is not necessary to determine the import of the state statutes and decisions relied on, as in this suit in equity by the government for redress for an alleged unlawful appropriation of part of the public domain the relief grantable is not determined by local laws or rules of decision, but by general principles, rules, and usages of equity having uniform operation in federal courts, wherever those courts are sitting as courts of equity. The public domain is not at the mercy of state legislation or decisions. Utah Power & Light Co. v. United States, 243 U. S. 389, 37 Sup. Ct. 387, 61 L. Ed. 791; Guffey v. Smith, supra.

[5] The amount for which the defendant corporation which got the oil became liable was not lessened by its payment of royalties to other defendants, who were liable as cotrespassers. Trespassers cannot, by dividing the fruits of their wrongdoing, convert their joint liability for the whole into a several liability of each of them for only the share or part he got or retained.

It was not error to allow interest from the date of the master's report on the amount he found to be due at that time. Interest from that date was compensation for the withholding of the amount after the date it was found to be due.

For reasons above indicated, the decree under review is affirmed in so far as it was in favor of the plaintiff, and is reversed in so far as it credited the defendants, or any of them, with the drilling and operating costs incurred, and the cause is remanded, with direction that the accounting and the decree be conformed to the views herein expressed.

Affirmed in part; reversed in part.

NORVELL et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. May 17, 1921.)

Nos. 3541–3547.

Nos. 3541, 3543:

Appeals from the District Court of the United States for the Western District of Louisiana.

Nos. 3542, 3544–3547:

Appeals and Cross-Appeals from the District Court of the United States for the Western District of Louisiana.

Separate suits in equity by the United States against W. W. Green and others, against Henry Hunsicker and others, against the Arkansas Natural Gas Company and others, against B. R. Norvell and others, against W. H. Matthews and others, against Dillard P. Eubank and others, and against Lydia Hanszen McMullen and others.

Nos. 3541, 3543:

Robert A. Hunter, Sp. Asst. Atty. Gen., of Shreveport, La., for the United States.

S. L. Herold and J. A. Thigpen, both of Shreveport, La., for appellees.

No. 3542:

Hampden Story, S. L. Herold, and J. A. Thigpen, all of Shreveport, La., for appellants and cross-appellees.

Robert A. Hunter, Sp. Asst. Atty. Gen., of Shreveport, La., for the United States.

Nos. 3544–3547:

S. L. Herold and J. A. Thigpen, both of Shreveport, La., for appellants and cross-appellees.

Robert A. Hunter, Sp. Asst. Atty. Gen., of Shreveport, La., for the United States.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. Each of these cases is so far like the case of Mason et al. v. United States (Circuit Court of Appeals, Fifth Circuit) 273 Fed. 135, that the opinion rendered in the cited case sufficiently discloses the grounds relied on to support the decisions now announced. The decree in each of these cases is affirmed in so far as it was in favor of the plaintiff below, and is reversed in so far as it credited the defendants below, or any of them, with drilling and operating costs incurred, and the cases are remanded, with direction that the accounting and the decrees be conformed to the views expressed in the opinion above referred to.

Affirmed in part; reversed in part.

MILLER et al. v. ESTABROOK et al.

(Circuit Court of Appeals, Fourth Circuit. April 2, 1921.)

No. 1792.

1. **Evidence ⟸178(3)—Abstract of destroyed records held admissible as best available evidence thereof.**

In ejectment action, evidence offered by plaintiff, to show that defendant M., in possession, derived title through one C., who had executed a disclaimer or quitclaim to the minerals on the land, consisted of evidence by an attorney that before destruction of the county records by fire he had made an abstract of the title to the land, which he produced; that his memory was not so refreshed by the abstract that he could testify to its correctness from memory; that his abstract showed the record of derivation of defendant M.'s title by successive deeds from C.; that it was witness' habit in making abstracts to note defects or limitations in the deeds; and that there were no notations that would affect the derivation of defendant's title from C. *Held*, that the evidence and the abstract itself were admissible as the best available evidence of the record; the evidence and abstract being admitted over the sole objection that the witness had no recollection of the record and that his memory was not refreshed by inspection of his abstract, and without objection that plaintiffs should have introduced the original deeds or proved their loss.

2. **Lost instruments ⟸8(3)—Evidence of contents must be clear and convincing.**

Evidence as to lost documents must be clear and convincing.

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

3. Appeal and error ⟸231(3)—Objections to evidence must be specific.

Objections to evidence, without acquainting the trial court of the grounds, will not be considered by the appellate court.

4. Appeal and error ⟸232(2)—Ground of objection, different from that below, not considered.

Where the objection, on trial, to an exhibit, the copy of a will, was that the copy did not show it was ever probated in the county in New York state where testator lived, the objection could not be made, on appeal, that there was no evidence that the will was ever probated in the county in West Virginia where the land sued for was located.

5. Evidence ⟸348(2)—Will, properly authenticated, admissible.

A copy of a will, properly authenticated under Rev. St. 905 (Comp. St. § 1519), was admissible in evidence.

6. Mines and minerals ⟸55(2)—Instrument held quitclaim of mineral rights in land; "release;" "disclaimer."

Under Code W. Va. 1913, c. 72, §§ 3, 11 (secs. 3780, 3790), an instrument, given by defendant in ejectment, in settlement of conflicting claims to the land, disclaiming all interest except in 95 acres, and, as to that, disclaiming title to the mineral title and rights, *held* a quitclaim, rather than a mere disclaimer; a "release" being the act or writing by which some claim or interest is surrendered to another person, the giving up or abandoning a claim or right to the person against whom the claim exists, or the right is to be exercised and enforced, and a "disclaimer" being technically a pleading alleging that the defendant has not any right or title, and that he does not claim the subject-matter of the suit.

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

7. Mines and minerals ⟸55(1)—Disclaimer of mineral rights held not too indefinite as to naming grantees to operate as quitclaim.

An instrument in an ejectment suit, disclaiming title to minerals, was not inoperative as a quitclaim to minerals on the ground that plaintiffs in the cause had parted with their title before the date of the instrument, where the surrender and relinquishment was to the plaintiffs and those claiming under them, and the persons claiming under plaintiffs at the time of the execution of the instrument were easily ascertainable, so that it was not necessary that they should be named.

8. Mines and minerals ⟸55(1)—Disclaimer or quitclaim of minerals not binding on parties claiming under disclaiming party without notice thereof.

A disclaimer or quitclaim deed of minerals would not be binding, as a severance of the surface and minerals, on those who purchased and held under the disclaiming party, unless they had actual or constructive notice of the disclaimer or quitclaim.

9. Mines and minerals ⟸55(1)—Quitclaim deed of minerals held so recorded as to be constructive notice; "well-bound book."

Under Code W. Va. 1913, c. 73, §§ 2, 7, 7a, 11 (secs. 3805, 3810, 3812), Id. c. 74, § 5 (sec. 3835), and Id. c. 76, § 5 (sec. 3862), the contention of defendants in ejectment that a disclaimer or quitclaim of minerals by their predecessor in title was not binding on them, because not properly recorded, in that, although not a release, it was recorded in the book provided by chapter 76, § 5 (sec. 3862), to be kept exclusively for the purpose of recording releases and deeds of release, could not be sustained, where the book in which the instrument was recorded was not a book set apart exclusively for the record of releases and deeds of release, but contained other records; for the only requirement of chapter 73, § 7 (sec. 3810), as to the book for recording deeds, is that it be a "well-bound book," which does not exclude such a book as was used, and if the clerk recorded the instrument in one of two or three such books, preserved and indexed as required by the statute, so that the books and

contents were readily accessible, this would be a substantial compliance with the law.

10. Vendor and purchaser ⟸231(7)—Grantee protected by delivering deed for record.

Even if a West Virginia quitclaim deed was recorded in a wrong book, the grantees and their successors were protected when they lodged the deed with the clerk for record, and he certified to them on the instrument that it had been properly recorded; and an unsigned memorandum on the back of the deed, "Release Docket A," would not charge the grantees with notice that the deed had been recorded in a book used exclusively for releases, where there was no such book, in view of the clerk's duty to record it in the proper book.

11. Judgment ⟸710—Determination as to rights under tax deed not binding on one not party.

In ejectment suit to obtain title to minerals, where, to show common source of title and to defeat claim of adverse possession, plaintiffs gave evidence of deed from E. to defendants' predecessor, conveying the surface and reserving the minerals, the court properly excluded a decree, offered by defendant, to the effect that a tax deed to E. was to defraud the state of taxes for prior years, and that E.'s purchase was really for the benefit of S., the prior owner, and operated only as a redemption from the taxes for which the land was sold; defendant's predecessor having purchased from E. before the decree, and not being a party to the suit, and not bound by it, and there being no showing that the prior taxes were not afterwards paid, and there being no decree divesting the title of S., the owner, so that the tax deed to E. was in any event good against him.

12. Taxation ⟸319(2), 728, 776—Tax deed did not convey minerals, where party whose title was thereby divested owned no minerals; sale carries both surface and minerals unless separately assessed; presumed that law was complied with in making assessment.

Defendant's title to the minerals was not shown by a deed to defendant for delinquent taxes of one to whom the surface had been conveyed by deed reserving the minerals, for the tax deed conveyed only whatever title the person taxed had, and, although a sale of land for taxes will carry both surface and minerals, unless they are separately assessed, the statute requires a separate assessment when there has been a severance, and where there has been a severance the presumption is that the law was complied with and a separate assessment made.

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

Action by George L. Estabrook and another, trustees of the Lincoln County Land Association, against Joseph D. Miller and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

E. L. Hogsett, of Huntington, W. Va., and D. E. Wilkinson, of Hamlin, W. Va., for plaintiffs in error.

W. C. W. Renshaw and Cary N. Davis, both of Huntington, W. Va. (J. S. Clark and H. A. McCarthy, both of Philadelphia, Pa., and Vinson, Thompson, Meek & Renshaw and Fitzpatrick, Campbell, Brown & Davis, all of Huntington, W. Va., on the brief), for defendants in error.

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

WOODS, Circuit Judge. In this action of ejectment, instituted by George L. Estabrook and Sabin W. Colton, Jr., trustees, against a

number of defendants, the defendant Joseph D. Miller disclaimed title except to one tract of 40 acres, and the defendant Jane Miller disclaimed title to all but three tracts of 42 acres, 14½ acres, and 10 acres. On trial of the title to these tracts the District Judge directed a verdict in favor of the plaintiffs for all the minerals on 38½ acres of the 40-acre tract claimed by Joseph D. Miller, and on the 14½ acres claimed by Jane Miller, and in favor of Jane Miller for the tract of 10 acres and 42 acres claimed by her. The defendants Joseph D. Miller, Jane Miller, and Jennings Oil Company, their lessee, assign error in the admission and exclusion of testimony, and in the direction of a verdict in favor of the plaintiffs for minerals on the two tracts of 38½ acres and 14½ acres.

The plaintiffs traced their title to the two tracts of 38½ and 14½ acres from a grant to James Carnohan, dated November 13, 1786, for 30,000 acres, and a grant to Samuel Smith, dated June 29, 1797, which overlapped. The title under the two grants became united in Henry McFarlan in 1854, and from him plaintiffs derive their title. The plaintiffs also undertook to show common source and their superior title under it. The defendants' adverse possession would defeat plaintiffs' title, unless the District Judge was right in holding that the possession of the defendants and their predecessors in title was limited to the surface by reason of the severance of the surface and minerals.

We consider first the proof of title to the tract of 38½ acres, and of the severance of the surface and minerals. The vital point in plaintiffs' case is whether there was a severance of the surface and minerals, of which defendants and their predecessors in title had due notice. They claim that a severance was effected in 1888 in the course of plaintiffs' title by the following instrument, termed a disclaimer, which recites in full the circumstances under which it was executed by A. C. Chaney then in possession of the land:

"Whereas, certain actions of ejectment are now pending in the District Court of the United States for the District of West Virginia, in favor of 'Henry McFarlan and others against Lewis Adkins and others,' 'John P. Yelverton and others against Jeremiah Witcher and others,' 'Gustavus A. Sacchi against James A. Holley and others,' 'Gustavus A. Sacchi against John M. Reece and others,' 'Gustavus A. Sacchi against A. J. Barrett and others,' for the recovery of a tract of land heretofore conveyed by Henry McFarlan and others, trustees of the Guyandotte Land Company to Gustavus A. Sacchi by deed bearing date on the 27th day of June, 1865, and recorded in the office of the recorder of Cabell county, in Book A (new series), page 104; and

"Whereas, Alex C. Chaney is in possession and claiming title to a portion of said land, so sought to be recovered, and is desirous of settling any and all conflicting claims to lands so occupied and claimed by him:

"Now, therefore, the said Chaney, in consideration of the premises and of being released from all liability for costs in relation to lands sought to be recovered as aforesaid, doth hereby disclaim all right, title, claim, demand, or interest in and to all and any land set out and described in said declarations in said actions of ejectment, except a piece or parcel of land situate, lying and being a survey made by Samuel Harris on the 28th day of September, 1855, for 95 acres. But the said Chaney hereby disclaims all title to or interest in all coal (except so much as shall be required for domestic purposes) and iron ore, hydrocarbon oils, salt brine, natural gas, and all other minerals in, upon or under the said tract of land herein excepted, with the exclusive right to the plaintiffs and those claiming under them for the rights of

way for tram, rail, and wagon roads through said land so excepted, and to dig for and mine coal, iron ore, bore for oil or natural gas, and the necessary conveniences on said land for storing oil and coal, and the transmission of the same by the best and most convenient means to market.

"And the said Chaney further agrees that the plaintiffs in either of said actions may take judgment against him in ejectment, for the interest by him herein disclaimed, and to that end he empowers any attorney of said court to appear for him in either of said actions, and consent that judgment be entered and that this disclaimer be filed as part of the record in such case.

"Given under my hand and seal this 18th day of September, 1888.

"A. C. his X mark Chaney. [Seal.]"

[1, 2] 1. It was stipulated that the courthouse of Lincoln county, where the land was located, and all the records, were destroyed by fire in November, 1909. As evidence that the defendant Joseph D. Miller derived title through Chaney the District Judge admitted the evidence of Mr. Pendleton L. Williams, an attorney, to the effect that before the destruction of the records he had made an abstract of the title to the land embraced in the Smith grant, including the land in dispute, which he produced; that his memory was not so refreshed by the abstract that he could testify to its correctness from memory; that his abstract showed the record of derivation of defendant Joseph D. Miller's title by successive deeds from A. C. Chaney; that it was his habit in making abstracts to note any defect or limitation in the deeds; and that there were no notations that would effect the derivation of the defendants' title from Chaney. This evidence and the abstract itself were admitted over the sole objection that the witness had no recollection of the record and that his memory was not refreshed by inspection of his abstract. There was no objection on the ground that the plaintiffs should have introduced the original deeds or proved their loss. We think the abstract was clearly admissible as the best available evidence of the record. 10 R. C. L. 909, and authorities cited. There was no evidence in conflict with the abstract of Mr. Williams. On the contrary, the evidence of the defendant Miller as to the source of his title and possession strongly confirmed it. Taking all the evidence together, it met the requirement that evidence as to the existence of lost documents must be clear and convincing.

[3-5] 2. Error is assigned "in admitting in evidence for the plaintiffs the title papers filed as Exhibits 1 to 50, inclusive, and in admitting each of them." There was a general objection made at the trial to the admission of all of plaintiffs' exhibits, but no grounds were stated except as to Exhibits 1, 4, 21, and 25. Objections to evidence, without acquainting the trial court of the grounds, will not be considered by the appellate court. The objections to Exhibits 1, 4, and 25 were not pressed in this court. The objection made to Exhibit 21, copy of will of William G. Sands, in the trial court, was that "the copy of the will offered in evidence does not show that it was ever probated in the county of Chenango, N. Y., where William G. Sands lived." The only objection pressed here is that there was no evidence that the will was ever probated in Lincoln county, W. Va.

"Where a party excepts to the admission of testimony, he is bound to state his objection specifically, and in a proceeding for error he is confined

to the objection so taken. If he assign no ground of exception, a mere objection cannot avail him." Burton v. Driggs, 20 Wall. 125, 22 L. Ed. 299; Noonan v. Caledonia Mining Co., 121 U. S. 393, 400, 7 Sup. Ct. 911, 30 L. Ed. 1061.

Besides, the copy of the will, being properly authenticated under R. S. § 905 (Comp. St. § 1519), was admissible in evidence.

[6] 3. This brings us to the question: Was the instrument above quoted, called a disclaimer, in effect a quitclaim deed from Chaney, so that his possession thereafter would be limited to the surface alone?

In Woodall v. Clark, 254 Fed. 526, 166 C. C. A. 84, we held a paper in almost identical language to be in effect a quitclaim deed. Careful reconsideration has strengthened that conclusion. It is true an ordinary disclaimer is merely a pleading in a case to escape costs, but it may be much more. In Prescott v. Hutchinson, 13 Mass. 440, the court said as to a disclaimer by a tenant:

"At common law such a disclaimer was never considered as a bar to the action. So far from showing that the defendant had no right to the demanded premises, it was an acknowledgment of his title. It operated, in some respects, as a release by the tenant. If two tenants were jointly sued, a disclaimer by one of them generally vested the whole in the other co-tenant. So, if only one were sued, and disclaimed, whatever estate he had was, in effect, passed to and vested in the defendant. He might immediately enter, and would become seised according to the title set forth in his writ; and the tenant would be afterwards estopped from disputing that title. A disclaimer, instead of being a plea to the action, resembles so far a release or conveyance of the land, that, in general, no person could disclaim, who was incapable of conveying the land." Kentucky Union Co. v. Cornett, 112 Ky. 677, 66 S. W. 728.

The Code of West Virginia of 1913 provides:

"Sec. 2780. *Form of Release.* Whenever, in any deed, there shall be used the words, 'The said grantor (or the said ———) releases to the said grantee (or the said ———) all his claims upon the said lands,' such deed shall be construed as if it set forth that the grantor (or releasor) hath remised, released, and forever quitted claim, and by these presents doth remise, release, and forever quitclaim unto the grantee (or releasee) his heirs and assigns, all right, title, and interest whatsoever, both at law, and in equity, in or to the lands and premises granted (or released) or intended so to be, so that neither he nor his personal representative, his heirs or assigns, shall, at any time thereafter have, claim, challenge, or demand the said lands and premises, or any part thereof, in any manner whatever."

"Sec. 3790. *Deeds Not Conforming to Prescribed Form—Validation.* Any deed, or part of a deed, which shall fail to conform to the provisions of this chapter, shall nevertheless be as valid and effectual, and shall bind the parties thereto, as far as the rules of law and equity will permit, as if it had so conformed."

A release is "the act or writing by which some claim or interest is surrendered to another person." Anderson Law Dict. It is "the giving up or abandoning a claim or right to the person against whom the claim exists or the right is to be exercised and enforced." Bouvier's Law Dict. Technically a disclaimer is a pleading "alleging that the defendant has not any right or title and that he does not claim the subject matter of the suit." Daniell's Ch. Prac. 808.

Applying these definitions, it is evident that the instrument here under consideration is more than a mere plea of disclaimer. So far

from alleging the absence of interest in the land, Chaney asserts that it is made for the purpose of settling conflicting claims to the land occupied and claimed by him. Part of its consideration was the settlement of these claims. The suit which the instrument was intended to settle was for the recovery of possession of the land, both surface and minerals. The instrument is in its essence a contract to settle the suits for the lands claimed by both parties on the terms that the plaintiffs should have all the land claimed except 95 acres, and that of the 95 acres Chaney should have the surface, and the plaintiffs and those claiming under them should have the minerals and the rights necessary to the use of them. It was signed, sealed, and acknowledged by Chaney, and accepted by the plaintiffs, and was therefore binding on all parties. This being the evident purpose of the instrument, it makes no difference that no technical words of conveyance were used. What Chaney meant to say was that he relinquished and surrendered all claim to the land then in controversy, in consideration of being relieved of costs and having his claim confirmed to the extent of the surface of the 95 acres. Under the modern doctrine of giving effect to the intention in deeds as well as in wills, this was in effect a quitclaim deed. Numerous instances in which this doctrine has been applied to informal instruments and nontechnical words will be found in the textbooks. See 18 C. J. 178.

[7] 4. The objection is made that the disclaimer could not operate as a deed, because the plaintiffs in the cause in which the disclaimer was made had parted with their title long before September 18, 1888, the date of the instrument. The argument is forceful, but we do not think it can prevail. Surrender and relinquishment of Chaney's claim to the minerals was to the plaintiffs and those claiming under them. The persons claiming under the plaintiffs in that suit, at the time of the execution on September 18, 1888, were easily ascertainable, and it was not necessary that they should be named. Webb v. Den, 17 How. 576, 15 L. Ed. 35; 18 C. J. 174.

[8] 5. But this deed of Chaney, severing the surface and minerals, would not be binding on those who purchased and held under Chaney, unless they had actual or constructive notice. The other vital question, then, is whether there was such a record of the deed as to charge those deriving title from Chaney, so that their adverse possession of the surface would be ineffectual to defeat plaintiff's claim to the minerals.

[9] The provisions of the Code of West Virginia as to recording, at the date of this instrument, were:

Chapter 73, § 2: "The clerk of the county court of any county in which any deed, contract, power of attorney, or other writing is to be or may be recorded, shall admit the same to record in his office as to any person whose name is signed thereto, when it shall have been acknowledged by him or proved by two witnesses as to him, before such clerk of the county court."

Chapter 73, § 7: "Every such writing when admitted to record, shall, with all certificates of acknowledgment, and all plats, schedules and other papers thereto annexed or thereon indorsed, be recorded by, or under the direction of the clerk of the county court, in a well bound book, to be carefully preserved; and there shall be an index to such book as well in the name of the

grantee as of the grantor. After being so recorded, such writing may be delivered to the party entitled to claim under the same."

Chapter 74, § 5: "Every such contract, every deed conveying any such estate or term, and every deed of gift, or deed of trust or mortgage, conveying real estate or goods and chattels, shall be void as to creditors and subsequent purchasers for valuable consideration without notice, until and except from the time that it is duly admitted to record in the county wherein the property embraced in such contract or deed may be."

Chapter 76, § 5: "The clerk of the county court shall record and properly index all releases under this chapter, and deeds of release admitted to record in his office, in a well bound book to be kept exclusively for the purpose, and when any release or deed of release is recorded, he shall note the fact on the margin of the record or docket of the lien discharged thereby, with a reference to the book and page where the same is recorded."

Chapter 73, § 7a. 11: "Hereafter all deeds and other writings, except wills, admitted to record in the recorder's office of any county in this state, shall be indexed in said general index in the name of the grantor and grantee. (Acts 1871, c. 91.)"

The contention of defendants is that the instrument here involved was recorded in the book provided by section 5, chapter 76, of the Code, to be kept "exclusively" for the purpose of recording releases and deeds of release; that it was not a release and hence its record in that book could have no effect.

Woodall v. Clark, 254 Fed. 526, 166 C. C. A. 84, was a suit in equity to remove a similar instrument as a cloud on complainant's title. The appeal was from a decree dismissing the bill for lack of equity. The bill alleged that the instrument, held to be in effect a quitclaim deed, was recorded by direction of the grantees in a book provided by statute for the recording of releases and deeds of release exclusively; and that the clerk's certificate on the instrument showed that it was recorded in the wrong book. On the motion to dismiss these allegations were taken as true, and it was decided that the record, under those circumstances, of a quitclaim deed in a book provided exclusively for releases and deeds of release was no record. That decision is not controlling here. There is no evidence in this case that the plaintiffs or their predecessors in title directed the recording; and the clerk certified on the instrument that it had been properly recorded. Furthermore, the plaintiffs on the trial in this case introduced the record book, and the question now before us is whether it is one which section 5, chapter 76, required to be used exclusively for recording releases and deeds of release, or one provided and kept under section 7, chapter 73, for the recording of deeds and other similar instruments.

It could not have been the book required by section 5, chapter 76, to be used exclusively for the record of releases and deeds of release, for the use of this book began in 1867 and that statute was enacted in 1882. It contains the record of a number of releases of deeds of trust, but it contains also one record of assignment of notes, one assignment of note and deed of trust, a deed of bargain and sale in 1867, one quitclaim deed in 1872, one release deed of land in 1878, and a deed of conveyance of land in 1890.

The only requirement of section 7, chapter 73, as to the book for recording of deeds, is that it shall be a "well-bound book." This requirement does not exclude the recording of deeds in the book here

in question, which was clearly not set apart as the book to be used exclusively for the record of releases and deeds of release. Nor does this statute necessarily mean that the purpose and plan of the law would be defeated if the clerk kept more than one well-bound book for such records. We think, if the clerk recorded the instruments mentioned in one of two or three such books, preserved and indexed as required by the statute, so that the books and contents were readily accessible to all persons concerned with land titles and liens, this would be a substantial compliance with the law. From these considerations we cannot resist the conclusion that this instrument signed by Chaney was so recorded as to give constructive notice of its existence.

[10] 6. But, even if the instrument was recorded in the wrong book, the grantees and their successors in title were protected when they lodged the deed with the clerk for record. The clerk certified to them on the instrument that it had been properly recorded. The unsigned memorandum on back of the deed, "Release Docket A," could not be stretched to charge the grantee with notice that this paper had been recorded in a book used exclusively for releases, because there was no such book, and because it was the duty of the clerk, and not the grantee, to see that the record was in the proper book.

On the question whether, under a statute which requires a deed to be recorded before it can operate as constructive notice, a delivery of the deed to the recording officer for record operates as constructive notice to subsequent creditors and purchasers, although it may not be recorded at all, or recorded in the wrong book, the courts of last resort are in conflict, as, will be seen by reference to the cases collated in 96 Am. St. Rep. 398, 4 Ann. Cas. 561, Ann. Cas. 1913B, 68, and 23 R. C. L. 215. In West Virginia the rule is established that the grantee is protected from the time he delivers the deed to the proper officer for record. Troy Wagon Co. v. Hutton, 53 W. Va. 157, 44 S. E. 135; Virginia Building & Loan Ass'n v. Glenn, 99 Va. 460, 39 S. E. 136.

[11] 7. To show common source of title to the 14½ acres claimed by Jane Miller, and to defeat the claim of adverse possession, plaintiffs relied on the testimony of Mr. Williams to the effect that his abstract, made before the records were burned, showed a deed dated September 13, 1888, from Samuel Eddy to John L. Miller, under whom Jane Miller claimed, conveying the surface and reserving the minerals. Samuel Eddy had a deed from Hager, clerk, made under a tax sale of lands of William G. Sands for delinquent taxes.

The defendant Jane Miller contends that this deed could not operate as a severance of the surface and minerals, because this tax title to Samuel Eddy was adjudged to be in fraud of the state, and the purchase price paid by him was adjudged to be nothing more than a redemption. To support this contention she offered the record of the suit of the State of West Virginia against Samuel Eddy and others, which contained a decree adjudging that this sale was made for the taxes of 1883 and 1884 to defraud the state of its taxes for the years 1879, 1880, 1881, and 1882, and that the purchase by Eddy was really for the benefit of the owner, and operated only as a redemption of the land from the taxes of 1883 and 1884. The District Judge prop-

erly excluded this record for these reasons: Miller, who had purchased from Eddy before the date of the decree above recited, was not a party to the suit and not bound by it; the subsequent proceedings, if any, were not offered, and from anything that appeared the taxes from 1879 to 1882, inclusive, were afterwards paid; there was never any decree divesting the title of Sands, the owner, and the tax deed to Eddy in any possible view was good against him.

[12] 8. Jane Miller also claims under a deed to Joseph Miller from Robert Hager, clerk, dated July 31, 1900, for delinquent taxes of Joseph Miller. At that time the surface and minerals had been severed by the conveyance from Eddy to John L. Miller. The tax deed only conveyed whatever title Joseph Miller had. Sult v. Hochstetter Oil Co., 63 W. Va. 317, 61 S. E. 307. It is true that a sale of land for taxes will carry both surface and minerals, unless they are separately assessed. Wellman v. Hoge, 66 W. Va. 234, 66 S. E. 357. But the statute of West Virginia requires a separate assessment when there has been a severance; and we have recently held that, where there has been such a severance, the presumption is that the law was complied with and a separate assessment made. Dingess et al. v. Huntington Development & Gas Co., 271 Fed. 864, decided February 15, 1921.

It follows that this tax sale was ineffectual to convey the title to the minerals. We can find no error.

Affirmed.

WOODALL v. ESTABROOK et al. (two cases).

(Circuit Court of Appeals, Fourth Circuit. April 2, 1921.)

Nos. 1847, 1848.

Appeals from the District Court of the United States for the Southern District of West Virginia, at Huntingon; Benjamin F. Keller, Judge.

Suits by Alonzo Woodall and by T. J. Woodall against George L. Estabrook and another, trustees of the Lincoln County Land Association. From decrees for respondents in each case, complainants appeal. Affirmed.

E. L. Hogsett, of Huntington, W. Va. (D. E. Wilkinson, of Hamlin, W. Va., on the brief), for appellants.

Cary N. Davis, of Huntington, W. Va. (W. C. W. Renshaw, of Huntington, W. Va., J. S. Clark and H. A. McCarthy, both of Philadelphia, Pa., and Vinson, Thompson, Meek & Renshaw and Fitzpatrick, Campbell, Brown & Davis, all of Huntington, W. Va., on the brief), for appellees.

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

WOODS, Circuit Judge. These are suits in equity to have removed as a cloud on complainant's title a paper described as a disclaimer. The instrument is the same in character as that we have considered and held to be in effect a quitclaim deed in the opinion just filed in the ejectment suit of Joseph D. Miller v. George L. Estabrook and others, 273 Fed. 144. All the questions here made were involved in that case, and the decision in that case is conclusive of these.

The result is that the decrees of the District Court must be affirmed.

INTERNATIONAL RY. CO. v. DAVIDSON, Collector of Customs, et al.

(Circuit Court of Appeals, Second Circuit. April 20, 1921.)

No. 216.

1. **United States ⇐31—Regulations by executive department heads have force of law, regardless of form.**
Regulations by heads of executive departments, under Rev. St. § 161 (Comp. St. § 235), for the performance of the business of the department, have force of law, and need not be promulgated in any set form or in writing.

2. **Customs duties ⇐53—Regulations by Secretary of the Treasury detaining baggage of arrivals from Canada on Sundays and holidays held lawful.**
Even if Act Feb. 13, 1911, § 5, as amended by Act Feb. 7, 1920, relating to customs inspections at night and on Sundays and holidays, is limited to vessels and conveyances conveying cargo, the Secretary of the Treasury had authority, under Rev. St. § 161 (Comp. St. § 235), for the purpose of enforcing the statute regulating the importation of merchandise on the northern frontier adjacent to Canada, and Comp. St. § 5807 et seq., to adopt regulations providing that all baggage of passengers arriving across the international bridge by trolley or by other vehicles, and all such vehicles, except trolley cars, arriving on Sundays or holidays, should be detained for inspection until the next day, unless the owners of the bridge should agree to pay the compensation fixed by the Secretary for customs inspectors to be kept on duty at the bridge at night and on Sundays and holidays.

3. **Customs duties ⇐63—Government inspection is prerequisite to entry of nondutiable merchandise.**
Government inspection is an essential prerequisite to entry of imported goods, whether they are dutiable or not, since inspection is necessary to determine whether they are in fact nondutiable.

4. **Customs duties ⇐60—Bridge owner cannot question regulations as to inspection of baggage or vehicles coming across bridge.**
The owner of a bridge between United States and Canada has no standing in court to question the validity of regulations of the Secretary of the Treasury for the inspection of private conveyances or of personal baggage brought over the bridge.

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

Suit for injunction by the International Railway Company against George G. Davidson, individually and as Collector of Customs of the Port of Buffalo, and others. From a decree dismissing the bill for lack of equity (271 Fed. 313), plaintiff appeals. Affirmed.

Cohn, Chormann & Franchot, of Niagara Falls, N. Y. (Basil Robillard, of Niagara Falls, N. Y., of counsel), for appellant.

Stephen T. Lockwood, U. S. Atty., of Buffalo, N. Y. (J. T. Walsh, of Buffalo, N. Y., of counsel), for appellees.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. This is an appeal from a decree of the District Court of the United States for the Western District of New York, dismissing the plaintiff's bill for lack of equity. The international Railway Company owns and operates two public toll bridges across

the Niagara river between the United States and Canada, upon each of which it also operates a line of passenger trolley cars. The government had always maintained customs inspectors at the American end of the bridges, both day and night and on Sundays and holidays. Congress, by the Act of February 7, 1920, c. 61, 41 Stat. 402, amended section 5 of the Act of February 13, 1911, c. 46, 36 Stat. 901, so as to read:

"The Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime services of inspectors, storekeepers, weighers, and other customs officers and employees who may be required to remain on duty between the hours of five o'clock post meridian and eight o'clock ante meridian, or on Sundays or holidays, to perform services in connection with the lading or unlading of cargo, or the lading of cargo or merchandise for transportation in bond or for exportation in bond or for exportation with benefit of drawback, or in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unlading, receiving, or examination of passengers' baggage, such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock post meridian (but not to exceed two and one-half days' pay for the full period from five o'clock post meridian to eight o'clock ante meridian), and two additional days' pay for Sunday or holiday duty. The said extra compensation shall be paid 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 or on Sundays or holidays shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury: Provided, that such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual lading, unlading, receiving, delivery, or examination takes place or not. Customs officers acting as boarding officers and any customs officer who may be designated for that purpose by the Collector of Customs are hereby authorized to administer the oath or affirmation herein provided for, and such boarding officers shall be allowed extra compensation for services in boarding vessels at night or on Sundays or holidays at the rates prescribed by the Secretary of the Treasury as herein provided, the said extra compensation to be paid by the master, owner, agent, or consignee of such vessel: Provided, further, that in those ports where customary working hours are other than those hereinabove mentioned, the collector of customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed."

[1] Section 161, U. S. Revised Statutes (Comp. St. § 235), provides:

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

Regulations under this section have the force of law and need not be promulgated in any set form or in writing. Haas v. Henkel, 216 U. S. 462, 480, 30 Sup. Ct. 249, 54 L. Ed. 569, 17 Ann. Cas. 1112; Boske v. Comingore, 177 U. S. 459, 467, 20 Sup. Ct. 701, 44 L. Ed. 846. After the passage of this act the defendant Davidson, Collector of Customs for the Ninth Customs District, by direction of the Secretary of the Treasury, notified the plaintiff:

"That unless the complainant would pay two days' pay for each Sunday or holiday for each customs officer performing service in connection with the said company, importation of all merchandise on Sundays and holidays would be stopped, and sent the following instructions to the deputy collector at Niagara Falls:

"1. Trolleys may come in after full examination.

"2. Trolley passengers may come in after surrendering all baggage and effects, to be examined after 8:00 a. m. on the day succeeding each Sunday or holiday.

"3. Foot passengers may come in after surrendering all baggage and effects, to be examined after 8:00 a. m. on the day succeeding each Sunday or holiday.

"4. All vehicular passengers except trolley passengers may come in after surrendering all baggage and effects, to be examined after 8:00 a. m. on the day succeeding such Sunday or holiday. All such vehicles will not be allowed to enter the United States until after their examination on the day succeeding each Sunday or holiday.

"5. All outgoing traffic may proceed as usual.

"6. There must be no examination of incoming passengers' baggage, freight or merchandise, no matter how small, including autos, teams and other vehicles except trolleys.

"7. Any baggage left for examination by customs officers will be held at owner's risk.

"8. You will use all reasonable means to advise all persons leaving the United States by way of bridges that there will be no examination of passengers' baggage and vehicles other than trolley cars until the day succeeding each Sunday or holiday.

"9. You will understand that you are not to interfere with passenger traffic but must postpone all examinations until the day succeeding each Sunday or holiday.

"10. These instructions are not confidential and may be shown to any interested party, and that such instructions were issued under orders of the United States Treasury Department, and as collector of customs."

Thereupon the International Railway Company filed this bill, praying that the defendant be restrained from enforcing the regulations. Judge Hazel entered a decree dismissing the bill for want of equity.

[2] The plaintiff contends that the act of 1911 as amended by the act of 1920 contemplates only vessels and conveyances carrying cargo and that the Secretary of the Treasury has no authority under it to make the regulations in question applying to trolley cars, automobiles and other vehicles and passenger baggage. Assuming this to be so, we still think that the Secretary may make the regulations in question under section 161 of the Revised Statutes for the purpose of enforcing the statutes regulating the importation of merchandise on the northern frontier of the United States adjacent to Canada (sections 5807–5812, U. S. Comp. Stat.), which apply not only to cargo laden vessels and conveyances, but to all conveyances and passenger baggage.

It would, of course, be impossible to maintain custom inspectors day and night, Sundays, and holidays at every road crossing the northern frontier or at contiguous points along the shore of every lake. It is reasonable to maintain such inspection only where, in the discretion of the Secretary of the Treasury, the extent and character of the travel justify doing so. This may be wisely and effectively done at the American end of bridges like those involved in this case. But there is no obligation upon the part of the government to maintain such inspection at night or on Sundays and holidays. Regulations as to the

inspection of conveyances and personal baggage similar to those provided by the Act of February 7, 1920, even if not prescribed by that statute cannot be regarded as inconsistent with law.

[3] The appellant is quite wrong in saying that the Secretary of the Treasury compels it to pay for the cost of such inspection. He simply says that unless the plaintiff does agree to pay for it such inspection will not be maintained. We are also not at all persuaded by the argument that because nondutiable goods may be imported into the United States no inspection can be enforced in respect to them before entry. Government inspection is an essential prerequisite to entry. Only so can it be determined whether goods in point of fact are dutiable. U. S. v. Fifty Waltham Watch Movements (D. C.) 139 Fed. 291. Carriages, automobiles, and other conveyances and personal baggage may be reasonably detained to await such inspection. Otherwise a holiday would be afforded for smuggling. On the other hand, the regulations recognize that it is unnecessary to detain the plaintiff's passenger trolley cars, which run regularly forward and back on fixed tracks day in and day out throughout the year.

[4] The plaintiff has no standing to question these regulations, which do not apply to it, but to the owners of private conveyances and of personal baggage brought over the bridge.

The decree is affirmed.

NIAGARA FALLS INTERNATIONAL BRIDGE CO. et al. v. DAVIDSON, Collector of Customs.

(Circuit Court of Appeals, Second Circuit. April 20, 1921.)

No. 215.

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

Suit by the Niagara Falls International Bridge Company and another against George G. Davidson, Jr., as Collector of Customs. From an order denying plaintiff's motion for injunction pendente lite (271 Fed. 316), plaintiff appeals. Affirmed.

Signor & Signor, of Albion, N. Y. (Charles G. Signor, of Albion, N. Y., of counsel), for appellants.

Stephen T. Lockwood, U. S. Atty., of Buffalo, N. Y. (John T. Walsh, of Buffalo, of counsel), for appellees.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. This is an appeal from an order of Judge Hazel, sitting in the District Court of the United States for the Western District of New York, denying plaintiffs' motion for an injunction pendente lite restraining the defendant, Collector of Customs of the Ninth Customs District, from enforcing certain regulations of the Secretary of the Treasury in respect to automobiles, carriages, and other conveyances and personal baggage brought from Canada across the plaintiffs' toll bridge over the Niagara river.

The only difference between this suit and that of the International Railway Company (273 Fed. 153), in which we have handed down an opinion, is that the plaintiffs in this suit operate no trolley cars across the bridge. For the reasons stated in the Case of the International Railway Company, the order is affirmed.

KATZ et al. v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. May 12, 1921.)

No. 1466.

1. **Indictment and information ⊂=133(1)—Court cannot strike objectionable statement from indictment.**
   The District Court cannot strike from an indictment a statement therein objected to by defendant.
2. **Criminal law ⊂=1156(1)—Discretion in ruling in motion for new trial not reviewable.**
   The exercise of the District Judge's discretion in ruling on a motion for new trial cannot be reviewed; such ruling being reviewable only where he has refused to exercise his discretion, and to consider the motions or affidavits offered in support thereof.
3. **Criminal law ⊂=1186(4)—Amendment authorizing judgment on writ of error without regard to technical defects did not extend appellate powers.**
   The amendment of Judicial Code, § 269, by Act Feb. 26, 1919 (Comp. St. Ann. Supp. 1919, § 1246), so as to require the court on appeal or writ of error to give judgment without regard to technical errors or defects, did not, in criminal cases, extend the power of an appellate court beyond that which it had theretofore exerted and exercised.
4. **Conspiracy ⊂=43(1)—Indictment need not excuse failure to join all alleged conspirators.**
   It is not necessary to join in an indictment for conspiracy, all the alleged co-conspirators, or to explain why those omitted were not indicted.
5. **Criminal law ⊂=1116—Without testimony and instructions, statement in indictment that co-conspirators had been convicted is not shown to be prejudicial.**
   On writ of error to a conviction for conspiracy, where neither the testimony nor the charge is in the bill of exceptions, so that it must be assumed the evidence was sufficient to sustain the verdict and that correct instructions were given, the statement in the indictment that three of the co-conspirators of defendants were not indicted because they had been already convicted was not shown to be so prejudicial to defendants as to require a reversal of the conviction, in the absence of exception which presented that question for review, especially where the district attorney stated in argument without denial that those three conspirators testified for the government and admitted they were guilty.

In Error to the District Court of the United States for the District of Rhode Island; Arthur L. Brown, Judge.

Hyman Katz and others were convicted of conspiracy to steal from railroad cars goods which were being transported in interstate commerce, and they bring error. Affirmed.

Asa P. French, of Boston, Mass. (David R. Radovsky, of Fall River, Mass., on the brief), for plaintiffs in error.

Peter C. Cannon, U. S. Atty., of Providence, R. I., for defendant in error.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

JOHNSON, Circuit Judge. The plaintiffs in error were convicted in the District Court of Rhode Island on an indictment in which they were charged with having conspired, with three others, to commit an

offense against the United States, which was in substance to steal from railroad cars goods which were being transported in interstate commerce and to dispose of the same. The reason why the other three were not indicted was stated in the indictment to be "that they have been heretofore convicted of the offense charged in this indictment." The overt acts were set out with great particularity and the three persons who were not indicted were alleged to have broken into several cars and stolen woolen and cotton cloth and silverware which the defendants bought or assisted in selling.

The defendants in the court below moved to strike from the indictment the reason stated therein for the failure to indict the other alleged co-conspirators. This motion was denied and exception taken. At the close of the trial, which consumed five days, a motion for a new trial was filed, which was denied and exception taken. The errors assigned are the denial of these motions and also of a motion for a bill of particulars.

[1] The last assignment has not been argued. Counsel for the plaintiffs in error admit that none of the assignments of error are sufficient to justify a reversal of the judgment below. Clearly the refusal of the learned District Judge to strike the objectionable statement from the indictment is sustained by Ex parte Bain, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849.

[2] The granting of the motion for a new trial was within the discretionary power of the learned District Judge, and, having exercised his discretion, no exception can be sustained to his denial. It has only been in cases where the trial judge has refused to exercise his discretion, and to consider the motion or the affidavits offered in its support, that his ruling has been reviewed, as in Mattox v. United States, 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917, and Ogden v. United States, 112 Fed. 523, 50 C. C. A. 380 (C. C. A., Third Circuit).

There was no motion to quash the indictment, nor in arrest of judgment, nor was this allegation in the indictment assigned as one of the grounds in support of the motion for a new trial. Counsel for the defendants have asked us to reverse the judgment below upon the sole proposition that the defendants did not have and could not have had a fair and impartial trial, because the indictment contained the statement of the reason why the other co-conspirators were not indicted, claiming that, to cause the defendants to be tried upon an indictment containing such a statement, is reversible error of which we can take notice, though not assigned, by virtue of section 269 of the Judicial Code as amended by Act of February 26, 1919, c. 48, Comp. St. Ann. Supp. 1919, § 1246, which in part is as follows:

"On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

[3] This amendment has not, in criminal cases, extended the power in an appellate court beyond that which it had theretofore asserted and exercised. Wiborg v. United States, 163 U. S. 632, 659, 16 Sup. Ct.

1127, 1197, 41 L. Ed. 289; Clyatt v. United States, 197 U. S. 207, 221, 25 Sup. Ct. 429, 49 L. Ed. 726; Weems v. United States, 217 U. S. 349, 30 Sup. Ct. 544, 54 L. Ed. 793, 19 Ann. Cas. 705; Skuy v. United States, 261 Fed. 316; Holmgren v. United States, 217 U. S. 509, 522, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778.

[4] It is claimed on the part of the government that it was necessary to join all the co-conspirators in the indictment or to explain why any were not indicted; but this contention is without merit. Cohen v. United States, 157 Fed. 651, 85 C. C. A. 113; United States v. Miller, 26 Fed. Cas. 1255, No. 15,774; 2 Bishop's Cr. Proc. § 186.

In Holmgren v. United States, 217 U. S. 509, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778, an indictment with an indorsement upon it showing the conviction of the defendant at a former trial upon one of its counts and that a new trial was granted had been given to the jury. A motion for a new trial was filed, accompanied by affidavits to the effect that the jury had read the indorsement. The motion was denied by the trial court.

The Supreme Court, after stating the general rule that the allowance or refusal of a new trial rests in the sound discretion of the trial court, and after pointing out that in Mattox v. United States, supra, and Ogden v. United States, supra, the ruling of the court below was reviewed because it had refused to exercise its discretion, then states that the contention is made that it may notice a plain error not reserved in the record and said:

"Undoubtedly the court has this authority and does sometimes exercise it. But an examination of the record in this case does not satisfy us that we should exercise this right to review an error not properly reserved, and require the granting of a new trial, because of the indorsements upon the indictment sent to the jury, together with the forms of verdict. The record contains all the testimony, and is ample to sustain the conviction of the defendant without giving weight, to the effect of this indorsement. The indorsement itself shows that a new trial was granted upon the former conviction on the third count. This action of the court in setting aside what the jury had formerly done is quite as likely to influence the jury favorably to the accused, as was the fact of former conviction by the jury to work to his prejudice. * * *

"But, in this case we do not find in the record any reason for the exercise of the authority granted to us under the thirty-fifth rule to notice a plain error not properly reserved."

[5] In the case before us neither the testimony nor the charge of the presiding judge is included in the bill of exceptions, and we cannot therefore determine whether we should exercise authority to review an error not properly reserved. Where the testimony and the charge are not made a part of the bill of exceptions, it must be assumed that the evidence was sufficient to sustain the verdict and that correct instructions were given by the court. Durland v. United States, 161 U. S. 306, 312, 16 Sup. Ct. 508, 40 L. Ed. 709; Hansen v. Boyd, 161 U. S. 397, 16 Sup. Ct. 571, 40 L. Ed. 746; McCarty v. United States, 101 Fed. 113, 41 C. C. A. 242; Benson v. Commonwealth, 158 Mass. 164, 166, 33 N. E. 384.

In Holmgren v. United States, supra, the court had all of the testimony before it and were able to say that it was "ample to sustain the conviction without giving weight to the effect of this indorsement."

The district attorney stated in argument, without denial, that the three conspirators who were named in the indictment as having been convicted were witnesses for the government at the trial, and that their testimony was an admission that they were guilty of the offense charged in the indictment. If this were so, the statement in the indictment that they had been convicted became harmless error.

Without an examination of all the testimony and the charge of the presiding judge, we are unable to say that this statement in the indictment, which may be treated as surplusage, was prejudicial to the defendants, and that, because of it, they did not have a fair and impartial trial.

The entry must be—

Judgment affirmed.

THE NORD ALEXIS.

THE ARTHUR KILL.

(Circuit Court of Appeals, Second Circuit. March 9, 1921.)

No. 135.

1. **Salvage ⟸34—Where tug was unable to prevent steamer from being blown against another, resultant damages deductible from salvage.**
   Where tug, attempting to move to another pier a steamer which in a heavy wind had drifted to a ferry rack and there made fast to a pile, was unable to prevent the steamer from being driven against another steamer, the cost of injuries to such other steamer and also the cost of repairs to the steamer moved *held* deductible from salvage amounting to 5 per cent. of value of the steamer moved, although the tug, having exercised ordinary care and skill, would not be responsible to the claimant of the steamer moved, if his damages exceeded such sum, but she would be required to bear the cost of repairing her own injuries.

2. **Salvage ⟸26—Benefit conferred is primary consideration.**
   The primary consideration in salvage cases is the amount of benefit conferred.

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

Libels by the Morse Dry Dock & Repair Company against the steamer Nord Alexis; by Felix Mouton against the steam tug Arthur Kill, and by the Koninklijke West Indische Maildienst against the Nord Alexis and the Arthur Kill, tried together. From the decree, Mouton, owner of the Nord Alexis, alone appeals. Reversed, with directions.

Burlingham, Veeder, Masten & Fearey, of New York City (Chauncey I. Clark and Frederick Pennell, both of New York City, of counsel), for appellant.

Macklin, Brown, Purdy & Van Wyck, of New York City (P. M. Brown, of New York City, of counsel), for appellee Morse Dry Dock & Repair Co.

Haight, Sandford & Smith, of New York City, for appellee Koninklijke West Indische Maildienst.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. The Morse Dry Dock & Repair Company, owner of the tug Arthur Kill, filed a libel against the steamer Nord Alexis to recover for salvage services. Felix Mouton, claimant of the Nord Alexis, filed a libel against the tug Arthur Kill to recover damages for injuries sustained by the steamer while in tow of the tug. Koninklijke West Indische Maildienst, owner of the steamer Prins Frederik Hendrik, filed its libel against the Nord Alexis and the Arthur Kill to recover for injuries sustained by her in collision with the Nord Alexis while in tow of the Arthur Kill.

By agreement these three cases were tried together, and the District Judge at the close of the trial delivered an oral opinion. He entered a decree: (1) Awarding 5 per cent. of the value of the Nord Alexis and her cargo to the Morse Dry Dock & Repair Company, $10,250 as salvage and $180, with interest, to pay for injuries to the Arthur Kill; (2) dismissing the libel of Mouton against the Arthur Kill, with costs; (3) awarding to the Koninklijke West Indische Maildienst $1,396.56 against the Nord Alexis for injuries sustained by the Prins Frederik Hendrik, and costs to the Morse Dry Dock & Repair Company against the Koninklijke West Indische Maildienst. Mouton, owner of the Nord Alexis, alone appeals.

[1] February 26, 1918, the Nord Alexis was lying to her port anchor on 45 fathoms of chain on Red Hook Flats, within a quarter to a half a mile of the Brooklyn shore. A storm arose from the northwest, and at about 9 a. m. the master paid out to 70 fathoms on his port anchor and let the starboard anchor go with 45 fathoms of chain. At about 9:40 a. m. the chain of the port anchor jumped the wildcat and broke the shackle in the chain locker, which connected it with the chain of the starboard anchor. The weight of the starboard anchor chain on the shackle prevented the port anchor from getting more chain, and the shackle broke under the strain. The port anchor and chain were thus lost, and the sudden strain on the starboard anchor chain caused it to jump the wildcat, and it was also lost, with all its chain. At this time the wind was blowing some 69 miles an hour, with a maximum velocity of 75 miles at 9:30. The steamer's engines could not be used, because a bearing had been broken the day before, taken ashore to be repaired, and had not been returned. All she could do was to let go the kedge anchor, of about 750 pounds. Under the effect of the wind from the northwest, the ebb tide running south, and the drag of the kedge anchor, the steamer began to drift broadside to the wind toward the ferry rack at the foot of Sixty-Eighth street. She blew for assistance.

In front of her was the tug Arthur Kill, with a line to the bow of the tug Asa W. Bangs, which tugs were pulling on a hawser to the bow of the steamer Rondo, ashore at the foot of Sixty-Second street. The Arthur Kill dropped her line to the tug Bangs, and the Bangs stopped, so as to let her hawser to the Rondo drop, and let the Nord Alexis drift

over it. The starboard quarter of the Nord Alexis struck the south side of the ferry rack at the foot of Sixty-Eighth street lightly, and those on board threw a line to persons on the rack, which was there made fast to a pile. The steamer then lay with her starboard quarter against the south side of the rack, angling out into the bay. The slip between Sixty-Eighth street and Sixty-Fourth street is about 400 feet wide, and is occupied by the Long Island Railroad Company float bridges. The only danger the steamer was exposed to was that of being carried by the wind into the slip and into collision with a car float which was lying on the north side of the ferry rack or with the float bridges of the railroad or with the Prins Frederik Hendrik lying alongside the pier at the north of the slip at the foot of Sixty-Fourth street, bow in.

In this situation the Arthur Kill came up on the steamer's starboard bow with a view to holding it up against the wind. The master of the steamer asked the tug to take him up to the south side of the pier at the foot of Sixty-Fourth street and lay him alongside of the Prins Frederik Hendrik. This the tug undertook to do. The steamer cut her line to the kedge anchor, the line to the pile on the south rack parted, and the tug with the best possible disposition pushed the steamer's bow to the end of Sixty-Fourth street and there made fast. She then went between the starboard side of the steamer and the Prins Frederik Hendrik, but was unable for lack of power to hold up the steamer against the wind, and fearing to be crushed between the two, backed out, and the starboard side of the steamer swung under the starboard counter of the Prins Frederik Hendrik, sustaining and inflicting damage.

The storm was violent, but not at all unprecedented. Two such storms are usual in the course of the year. There was some danger to the tug, though, as she was operating on the starboard side of the steamer, she was protected from the storm, and the time of her service was a little over half an hour.

[2] The primary consideration in salvage cases is the amount of benefit conferred. In this case there was none. The only danger to the steamer was that of being carried against the car float on the north side of the south rack, or against the float bridges, or against the Prins Frederik Hendrik. The Arthur Kill, though doing all she could, was unable to prevent the steamer from being driven against the Prins Frederik Hendrik. If we adopt the money award of the District Judge of 5 per cent. on the value of the steamer and cargo, we must at least deduct from it the sum the claimant has to pay to the Prins Frederik Hendrik for her injuries and the cost of repairing her own damage. The tug, having exercised ordinary care and skill, will not be responsible to the claimant of the Nord Alexis, if his damages are more than the sum of $10,250; but she must bear the cost of repairing her own injuries.

The decree is reversed, and the lower court directed to enter a decree in favor of the Morse Dry Dock & Repair Company for so much of $10,250 as may exceed the cost of the repairs to the Nord Alexis and

also the amount payable to the claimant of the Prins Frederik Hendrik; awarding to the claimant of the Prins Frederik Hendrik the amount of its damages, with interest and costs; awarding to the Morse Dry Dock & Repair Company against the claimant of the Prins Frederik Hendrik its costs in that suit; and dismissing the libel of the claimant of the Nord Alexis against the Morse Dry Dock & Repair Company, with costs.

KELLEY et ux. v. WEST BRADDOCK BRIDGE CO.

(Circuit Court of Appeals, Third Circuit. May 9, 1921. Rehearing Denied June 13, 1921.)

No. 2668.

1. **Bridges ⇐15—Ordinance held to recognize right of bridge company to lease bridge.**
   A borough ordinance granting to a bridge company, its lessees, successors, and assigns, the right to enter upon the streets for the bridge and its approaches, gives to the company, in so far as the borough is concerned, the right to lease the bridge.
2. **Courts ⇐367—Decision of state court on powers of state corporation is controlling.**
   The question of the extent of the powers of a corporation organized under the laws of the state is peculiarly one for the courts of that state to adjudge, and a decision of the highest courts thereof on that question, which has become a rule of property, is binding on the federal court.
3. **Bridges ⇐15—Bridge company incorporated in Pennsylvania has authority to lease its bridge.**
   A corporation organized under Act Pa. June 12, 1879 (P. L. 173; Pa. St. 1920, § 5841), which empowers the company, with the assent of the holders of not less than two-thirds of its capital stock, to sell and dispose of its property, has authority to lease its bridge with the consent of its stockholders; the power to lease being included within the broader power to sell.
4. **Bridges ⇐35—Bridge company, which has leased its bridge, is not liable for injuries caused by negligence of lessee.**
   A bridge company, which had executed a valid lease of its bridge to a traction company and given the lessee exclusive possession thereof, is not liable for injuries to pedestrians resulting from the negligence of the lessee in permitting obstructions to remain on the approaches to the bridge.

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Action by Edward Kelley and wife against the West Braddock Bridge Company. Judgment for defendant on a directed verdict, and plaintiffs bring error. Affirmed.

J. P. Patterson, of Pittsburgh, Pa., and John J. Boyle and Charles Koonce, Jr., both of Youngstown, Ohio, for plaintiffs in error.

Clarence Burleigh and William A. Challener, both of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, Edward Kelley and his wife, citizens of Ohio, brought suit against the West Braddock Bridge Company, a corporate citizen of Pennsylvania. The suit was to recover damages for personal injuries sustained by Mrs. Kelley while passing along the foot passageway of an elevated roadway which was an approach to a bridge over the Monongahela river. The negligence alleged against the bridge company was in placing on the pedestrian footway of such approach a pile of planks from which one protruded and caused the plaintiff's fall and injury. The cause was tried by jury, and at the conclusion of the testimony the court gave binding instructions in favor of the defendant holding that:

"She cannot recover from the defendant here, because the defendant, under proper authority given by the state of Pennsylvania, made a lease of its bridge to the Consolidated Traction Company long before this injury to the plaintiff, and has never afterwards exercised any control over the property which was the subject of the lease of the bridge. The bridge was under the control of the Consolidated Traction Company and then passed by an operating agreement into the control of the Pittsburgh Railways Company."

On entry of judgment on this directed verdict, the plaintiffs sued out this writ of error.

The questions involved in the case are: First, the power of the Bridge Company to lease the bridge and its approaches to the Traction Company; and, second, if it has such authority, is the Bridge Company, which went out of possession, responsible for the subsequent negligent use of the bridge by the Traction Company.

Turning, first, to the right of the Bridge Company to lease, we note that it was chartered by the state of Pennsylvania, and that on October 24, 1898, the borough of Braddock, by ordinance, granted to it the right to construct this approach to its proposed bridge. By such ordinance the borough gave its consent "to the West Braddock Bridge Company, its lessees, successors, and assigns, to enter upon, use, and occupy for the purpose of its bridge approach the streets, avenues," etc., and stipulated that "said company shall provide and maintain a wagon way and foot walk over said approach for the use of the public," and "no toll whatever shall be charged on the foot and wagon ways," etc., and the bridge was to assume all damages arising "in the use thereof after construction."

[1] It will thus be seen that the locus in quo where the plaintiff was injured was a recognized roadway of the borough, and as between it and the Bridge Company the latter was to properly maintain it. As to what the liability of the borough would have been to a passenger, in case he was injured by negligence of the Bridge Company, or what the liability of the Bridge Company to reimburse the borough in case the latter were held liable for failure to afford a safe passageway, we are not now concerned, for no such question of such liability is here involved. The significance of the quoted language is that the ordinance expressly recognized that the rights of the Bridge Company, so far as the borough was concerned, were assignable; the ordinance being, as noted above, "to the West Braddock Bridge Company, its lessees, successors, and assigns."

[2] Such being the case, we next inquire whether the Bridge Company had power to lease the bridge and approach to the Traction Company. Both companies being Pennsylvania corporations, the question of their corporate powers is particularly one for the Pennsylvania courts to adjudge, and if the highest courts of that state have decided that question, and it has become a rule of property, their decision is binding upon the federal court sitting in Pennsylvania.

[3] Corporate authority on the part of the Bridge Company to lease its property to the Traction Company is alleged to exist by virtue of the Pennsylvania Act of June 12, 1879 (Pa. St. 1920, § 5841), quoted in the margin.[1] While that act, by its terms, only empowers a sale, we are warranted in assuming that, when it was passed, conferring power on corporations to sell, it was in the mind of the Legislature that such power carried with it the lesser power to lease, for this was the adjudged law of Pennsylvania in the case of Ardesco Oil Co. v. North American Co., 66 Pa. 381, where the Supreme Court in 1870 had held:

"If they can alienate absolutely, they may lease, which is but a partial or temporary alienation."

And this principle has been acted upon by the bar of Pennsylvania to such an extent that to now decide otherwise would unsettle, if not indeed destroy, investments of large value in corporate securities and ownership.

[4] Seeing that the Bridge Company had the consent of the borough to lease and the corporate power to exercise that consent, we next inquire whether, when the Bridge Company granted such lawful lease and gave to the Traction Company exclusive possession of the approach, the Bridge Company was liable for an injury to a passenger using the approach, which was caused, not by any defect in the structure, but in a negligent use by the Traction Company of the approach. As to the liability of the Traction Company to the plaintiff, no question is made, and in point of fact the plaintiffs had sued it and recovered a verdict for the very injury involved in the present case. But not only has the right of corporations to lease where they have statutory powers to sell been, as noted above, adjudged by the Supreme Court of Pennsylvania, but the nonliability of the lessor out of possession for the acts of a lessee in possession has also been adjudged by that tribunal. In that regard, it suffices to refer to Pinkerton v. Pennsylvania Traction Co., 193 Pa. 229, 44 Atl. 284 and Vadas v. Pittsburgh, etc., R. R. Co., 230 Pa. 42, 79 Atl. 166, where it was said:

"The settled principles of law and the decided right of authority are in favor of the rule that when a lease is duly authorized by law there is no further liability on the part of the lessor for negligence of the lessee in the operation of the road."

The judgment below is affirmed.

[1] "It shall be lawful for any bridge company, with the assent of the holders of not less than two-thirds of its capital stock, to sell or dispose of its property to any other corporation, and said corporation so purchasing shall have full power, in accordance with the purposes of its charter, to use the property so purchased for the purpose designated in the charter under which said property was built."

GRIMWOOD et al. v. MUNSON S. S. LINE.

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

No. 183.

1. **Shipping ⇐108—Shipper held not to have established damage caused by defendant's refusal to furnish ships under agreement.**
   In a suit for breach of contract to furnish ships to transport plaintiff's coal into Mexico, plaintiffs proved no legally recoverable damages, where they did not show that they had bought any coal for shipment into Mexico, or had sold coal there for importation from the United States, and even if they had coal to ship they were bound to get other tonnage, and could recover of the shipowner only the difference between the contract price and the price they had paid.
2. **Shipping ⇐108—Contract to furnish ship for transporting coal held not a requirement contract.**
   A contract whereby shippers agreed to send all their coal to Mexico by defendant's ships, but did not bind themselves to ship any coal at all, and their shipments were so variable that no reasonable estimate of their tonnage requirements could be made, does not fall within the exception of the general rule that executory agreements must be for ascertained quantities, which applies in case of established business whose future requirements may be reasonably estimated.
3. **Estoppel ⇐63—Shipowner cannot attack contract after assigning another reason for nonperformance.**
   A steamship company, which gave as the reason for refusing to furnish ships for transportation of coal to Mexico the unsettled conditions in Mexico, cannot, after suit for breach of contract is brought against it, defend on the ground that the contract was not a requirement contract, but a wish, will or want, contract, and therefore void.
4. **Shipping ⇐108—Previous breach by shipper is waived by assignment of another reason for refusal to furnish ships.**
   A previous breach by shipper of a contract to ship all its coal to Mexico by defendant's steamers is waived, where defendant assigned as its sole reason for refusing to supply ships to the shipper the unsettled conditions in Mexico.
5. **Shipping ⇐108—Failure to ship any coal is not breach of requirement contract.**
   A contract to ship all the coal required in plaintiff's business by defendant's vessels is not breached by the failure to ship any coal, if no shipments were needed in plaintiff's business, and none were shipped through other parties.

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

Suit by Adolfo Grimwood and another, copartners, doing business under the name of A. Grimwood & Co., against the Munson Steamship Line. Judgment for defendant, and plaintiffs bring error. Affirmed.

Kellogg, Emery & Cuthell, of New York City (Frederic R. Kellogg and Earle L. Beatty, both of New York City, of counsel), for plaintiffs in error.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City (John M. Woolsey, Edwin S. Murphy, and Theodore M. Hequembourg, all of New York City, of counsel), for defendant in error.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. This case has been here on a former occasion, 249 Fed. 722, 161 C. C. A. 632. The plaintiffs are engaged in the business of selling coal and coke in Mexico imported from the United States. January 31, 1912, they made a contract in writing with the defendant, whereby they agreed to ship all their coal and coke from the United States to Mexico between January 1, 1913, and December 31, 1915, by the defendant's steamers and the defendant agreed to furnish steamers to carry the same. The parties had been doing business together on these terms since 1909.

March 17, 1915, the plaintiffs called for a steamer which the defendant refused to furnish on the ground of the chaotic conditions in Mexico. November 4, 1915, the plaintiffs called for four steamers, which the defendant refused to supply because it "did not feel called upon to furnish steamers for Mexico at present, owing to the unsettled conditions which prevail there." November 18, plaintiffs modified their demand in certain immaterial particulars, and the defendant, November 23, replied that it did not consider that it was under any obligation to furnish the steamers. No new reason being assigned, it stood upon the reason theretofore given.

Thereupon the plaintiffs brought this suit. The defendant in its answer denied that the contract set up in the complaint was a valid and binding contract, and pleaded in defense that, if it were, the plaintiffs had themselves broken the contract by not shipping any coal between June, 1913, and March, 1915, a period of some 20 months.

[1] Judge Mayer, assuming, without deciding, that the contract was valid, held that the plaintiffs had proved no legally recoverable damages, because they had not shown that they had bought any coal in the United States for shipment to Mexico, or that they had sold any coal in Mexico to be imported from the United States. This was quite in accord with our former decision that the agreement for transportation was an incident of the plaintiffs' actual business of selling coal in Mexico and that they were not speculating in tonnage as a commodity. If they had no coal to ship, they were not damaged by the defendant's refusal to supply tonnage. On the other hand, if they had coal to ship, they were bound to get other tonnage, and recover of the defendant the difference between the contract price and the price they had to pay. The measure of their damages would not be the loss of profits from their coal business in Mexico, but the extra price which they had to pay for the tonnage not furnished. An admirable discussion of the precise question is to be found in Irvine v. Midland Great Western Railway Co., 6 Law Reports (Ireland) Common Law (1880). See, also, The Oregon v. Pittsburgh & L. A. Iron Co., 55 Fed. 666, 5 C. C. A. 229; Hughes v. Coal Co., 269 Fed. 589.

[2] The further question has been argued whether the contract was binding at all. This depends upon whether it was a requirement contract, or a wish, will, or want contract. While the plaintiffs agreed to send all the coal and coke they shipped from the United States to Mexico by the defendant's steamers, they did not bind themselves to ship any at all. How very variable their shipments were is to be seen from the fact that in the year January 1, 1909, to January 1, 1910, they

shipped 49,520 tons; June 1, 1910, to June 1, 1911, 133,400 tons; June 1, 1911, to December 31, 1911 (seven months), 21,114 tons; January 1, 1912, to December 31, 1912, 63,517 tons; January 1, 1913, to December 31, 1915, 66,441 tons.

After June 28, 1913, they shipped no coal at all to Mexico. With these facts in mind, how can it be said that the plaintiffs' business was one in which a reasonable estimate of its tonnage requirements could be made? The contract does not fall within the exception to the general rule that executory agreements of purchase and sale must be for ascertained quantities which applies in case of established businesses whose future requirements may be reasonably estimated.

[3] However, as the defendant gave, as the only ground for refusal to furnish the tonnage, the chaotic state of affairs in Mexico we think that it could not, after suit brought, defend on the ground that the contract was not a requirement contract, but a wish, will, or want contract. Ohio & M. R. Co. v. McCarthy, 96 U. S. 258, 267, 24 L. Ed. 693; Luckenbach Co. v. Grace & Co., 267 Fed. 676.

[4, 5] The defendant argues that this principle does not apply, because the plaintiffs themselves first broke the contract by not shipping any coal at all for some 20 months. If, however, the agreement is a requirement contract, this would not be a breach, if the plaintiffs did not need the tonnage in their business. Even if it were, the defendant waived the breach by basing its refusal to furnish tonnage solely on the chaotic conditions in Mexico. If during this period the plaintiffs had shipped coal and coke to Mexico through other parties, the case would be more like Loudenback Fertilizer Co. v. Phosphate Co., 121 Fed. 298, 58 C. C. A. 220, 61 L. R. A. 402, on which the defendant relies. In it the plaintiff's business involved manufacturing acid phosphate from crude phosphate rock, and it contracted to buy all the phosphate rock it needed from the defendant. For two years the plaintiff ceased manufacturing phosphate, because it found it cheaper to buy it. When, however, the price for it rose, it called upon the defendant for a large quantity of crude phosphate rock. The court held that buying the manufactured acid phosphate from other parties was a breach of the contract, and the defendant, not having waived the breach, was under no obligation to furnish the crude phosphate rock.

The judgment is affirmed.

HINES, Director General of Railroads, v. MEIER.

(Circuit Court of Appeals, Eighth Circuit. May 4, 1921.)

No. 5502.

Master and servant ⇐361—Director General of Railroads subject to state Workmen's Compensation Law; "employer."

Under South Dakota Workmen's Compensation Law, providing that all employers and employees, not engaged in interstate or foreign commerce, shall be bound by its provisions unless they affirmatively exempt themselves therefrom; that "employers" shall include the state, its municipal

corporations, and other political subdivisions, and that all employers, except the state and such subdivisions, shall procure insurance, furnish acceptable proof of solvency or make a guaranty deposit, the Director General of Railroads, who by presidential order was made subject to "all statutes and orders of regulating commissions of the various states," in operating lines in South Dakota and with respect to employees injured or killed in his service and not employed in interstate commerce, *held* subject to the provisions of such statute, being, as the representative of the federal government, like the state and its subdivisions, exempt from the requirement to procure insurance, give proof of solvency or make a deposit.

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

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

Action at law by Cecilia Meier against Walker D. Hines, Director General of Railroads. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Ed. L. Grantham, of Aberdeen, S. D. (C. O. Newcomb, of Aberdeen, S. D., on the brief), for plaintiff in error.

Harry A. Brenner, of Mobridge, S. D., for defendant in error.

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

HOOK, Circuit Judge. This was an action by Cecilia Meier, administratrix, against the Director General of Railroads, operating the Chicago, Milwaukee & St. Paul Railroad, to recover for the negligent killing of Ludwig Meier. The deceased was in the service of the Director General as a blacksmith's helper at Mobridge, S. D. He was run over and killed by a train January 3, 1918, while crossing the tracks of the railroad yards at that place in going from his home to the blacksmith shop where his duties were performed. There was a verdict and judgment for the plaintiff, and the Director General prosecuted this writ of error.

The "South Dakota Workmen's Compensation Law," approved March 10, 1917 (Laws 1917, c. 376), has an important bearing on the case. It provided (section 2) that every employer and also every employee (not engaged in interstate or foreign commerce, section 17,) should be presumed to have accepted its provisions for the payment and acceptance of compensation for personal injury or death by accident in the course of employment. They were bound by the provisions of the act unless they affirmatively exempted themselves from it. Every employer subject to the act was required (section 4) to insure the payment of compensation to his employees in the manner provided (section 46), in some corporation, association, or organization approved by the state department of insurance. A refusal or neglect of the employer to obtain the insurance or to do what was equivalent as hereafter mentioned made him liable in case of injury to the workmen in his employ "under part one (1) of this act"—part 1 being sections 1 to 19 inclusive. The employer was authorized (section 54) to omit

the insurance upon furnishing proofs satisfactory to the Insurance Department and the State Industrial Commissioner of his solvency and financial ability to pay the compensation and benefits provided, or by depositing satisfactory security in lieu thereof. The term "employer" included (section 55) the state, its municipal corporations and other political subdivisions; but those public bodies were not (section 16) subject to sections 3, 9, and 10. Every employer who elected not to operate under the act was deprived (section 9) of certain common-law defenses, including that of contributory negligence, in any suit by an employee who had accepted the act. The rights and remedies granted an employee subject to the act on account of personal injury or death by accident in the course of employment were (section 5) exclusive of all other rights and remedies of such employee, his personal representatives, etc. A graduated schedule of compensation was prescribed (section 20 et seq.); and the compensation provided and the provisions of the act constituted (section 27) the measure of the employer's responsibility for injuries or death of employees subject to the act. The administration of the act was committed (section 27 et seq.) to the State Industrial Commissioner, and extensive powers were conferred upon him. The judgment recovered by the plaintiff largely exceeded the maximum compensation authorized by the act.

According to the proclamation of the President of December 27, 1917, taking over the operation of the railroads, the Director General was subject to "all statutes and orders of regulating commissions of the various states" until and except as otherwise ordered by him. The purposes of the South Dakota Act were of a humanitarian character; they were beneficial to both employers and employees. They were not inconsistent with the powers and duties of the Director General in the conduct of the railroad business on government account, and not having exempted himself from the operation of the act he should be assumed to have accepted it in a general sense, so far as its terms were applicable. The deceased did not exempt himself and was also subject to its terms. As the accident occurred during government control, the fact that plaintiff's action was first brought against the railway company and afterwards continued as to the Director General is unimportant. As a blacksmith's helper the deceased was not engaged in interstate commerce, a character of service that was excepted from the act in question. See New York Central R. Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629. The question whether the accident occurred in the course of the employment of the deceased was submitted to the jury and we accept their finding that it did. The trial court charged the jury that the circumstances of the accident showed as matter of law the deceased was guilty of contributory negligence. But as the Director General had not procured the liability insurance (section 4 and section 46), and had not in lieu thereof furnished proof of solvency and financial ability or given security (section 54) he was denied that defense.

The above brings us to the real question in the case. Was the Director General required to insure his liability, or, in lieu thereof, to furnish proof of solvency and financial ability or deposit security? As new conditions arise, and it becomes necessary to allot them a place in existing general legislation, they should be put with those most nearly of their kind. If the state statute did not operate upon an agency of the federal government, it was manifestly erroneous to hold it in default and deny it the defense of contributory negligence. On the other hand, if it did apply, and we think it did, the Director General, as the representative of the federal government should have been regarded in the same light as the state itself. When the state statute was enacted, government control and the position of Director General were not in existence; but when they came into being they were in their relations to their employees who were not engaged in interstate commerce within the spirit of its general intent. As a federal agency for the performance of important functions the Director General was not on a lower plane than the state and its subordinate political subdivisions. We think he was not required to insure his liability or to make proof of solvency and financial ability or deposit security to obtain the benefits of the state statute.

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

THE HANNA NIELSEN.

(Circuit Court of Appeals, Second Circuit. April 13, 1921.)

No. 185.

1. **Seamen ⟸3—Remedies for breach of contract are governed by law of vessel's nationality.**
   A seamen's contract is a contract governed by the law of the vessel's nationality, regardless of the place where libelant shipped or reshipped.

2. **Admiralty ⟸20—Seamen ⟸3—Has no jurisdiction to allow recovery for injury to seaman, unless tort is maritime.**
   An admiralty court has no jurisdiction over a suit in tort for injuries to a seaman, unless the tort were maritime, in which case the lex loci delicti applies.

3. **Evidence ⟸37—Cannot allow recovery under British law, without proof of that law.**
   The admiralty courts of this country cannot allow recovery under the British law for a maritime tort committed in British waters, without proof of the British law relating to that subject, since it cannot take judicial notice that the law of Great Britain in that respect is the same as that of the United States.

4. **Seamen ⟸3—Right to cure and maintenance is contractual, and governed by law of vessel's nationality.**
   The right of a seaman to cure and maintenance by the vessel after receiving injuries on board is a contractual right, governed by the law of

the vessel's nationality, so there can be no recovery for such care and maintenance, where the ship has complied with all requirements of the law of her nationality.

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

Libel by Ole Tolo against the steamship Hanna Nielsen, of which B. Stolt-Nielson & Co., Incorporated, was claimant. From a decree granting libelant only an allowance for cure and maintenance (267 Fed. 729), libelant appeals. Decree modified, so as to dismiss the libel.

Libelant was an oiler on the Norwegian ship Nielsen. He arrived at Portland, Me., on the steamer as a regular member of the crew. At that port he demanded and received an increase in pay and signed articles accordingly. From Portland the steamship went to Gibraltar, and while in that harbor libelant was injured by the explosion of a steam gauge. It may be assumed (but need not be found) that the gauge was dangerous, and in such a condition or of such a kind as to give libelant a right to indemnity under the maritime law of the United States as formulated in The Osceola, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760.

Libelant, who is a Norwegian subject, returned to this country on the steamship and as a member of the crew. On arrival here he filed this libel in rem. The libel alleges the nationality of the steamship, but is otherwise framed almost as if to recover indemnity and/or cure and maintenance from an American vessel.

By interrogatories before trial libelant was required to state under what law he sought to recover, and then declared that "the law of the kingdom of Norway does not apply"; but "libelant bases his cause of action upon the British and American maritime laws which are identical so far as his cause of action is concerned." He further averred, as the reason for the nonapplication of Norwegian law, that when his injury was received the Nielsen "was wholly within British territorial waters."

Libelant offered no evidence at trial as to British law; claimant proved the Norwegian law; the court dismissed the libel for indemnity, but granted an allowance for cure and maintenance. Libelant appealed; but in this court claimant asserts that libelant was at all times given proper care, and that no ground exists for any allowance whatever.

Frederick R. Graves, of New York City (Martin A. Schenck, of counsel), for appellant.

Duncan & Mount, of New York City (Thomas J. Healy and Warner C. Pyne, both of New York City, of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] If the claim advanced herein be regarded as in contract, the breach being the shipowner's failure properly and reasonably to provide for the safety of libelant, Norwegian law, and that alone, governs the right of recovery; for "whoever engages voluntarily to serve on board a foreign ship necessarily undertakes to be bound by the law of the country to which the ship belongs." The Belgenland, 114 U. S. 365, 5 Sup. Ct. 860, 29 L. Ed. 152. The seaman's contract in this instance was a Norwegian contract, and so remained throughout. The place where libelant shipped or reshipped is of no moment whatever. For other cases see Wilson v. The John Ritson (D. C.) 35 Fed. 663.

[2] If the suit be regarded as sounding in tort, then the trial court had no jurisdiction, unless the tort were maritime, and the lex loci

delicti applies. Whether the locus is to be regarded as on a Norwegian ship, and therefore Norwegian, or in Gibraltar harbor, and therefore British, is a question into which it is not necessary to go, further than to note that under no circumstances shown here can the law of the United States apply. The sole function of our courts is to furnish a remedy while enforcing by comity the substantially applicable law. As pointed out above, libelant repudiates Norwegian law as furnishing any ground for recovery; that he was right in so doing the evidence conclusively proved.

[3] The question remains whether he can recover under British law without proving it. The argument made (and outlined in answer to interrogatories) is that we must presume, or know by judicial cognizance that in respect of the claim here presented the law of Great Britain and that of the United States is the same. For this no authority is produced or can exist. The remarks in The Osceola, supra, 189 U. S. at page 171, 23 Sup. Ct. 483, 47 L. Ed. 760, lay down no such rule. The court there referred to the seamen's contract and its nature; but, as above pointed out, if this claim is for breach of contract, no other law but the Norwegian can apply.

So far as judicial cognizance goes, we may notice the decisions of our own courts, which are far from recognizing uniformity in the laws of the two countries in respect of seamen's rights and remedies for torts on shipboard. Thus it has been pointed out in The Lamington (D. C.) 87 Fed. at 755, that for injuries received on shipboard the British seaman has no right of action in rem, nor has he any claim to cure and maintenance, except such substitute as is provided by the Merchant Shipping Act. Sullivan v. Nitrate, etc., Co. (C. C. A.) 262 Fed. 371.

But the fundamental objection to libelant's recovery under British law is that such foreign law is a fact to be proved if material, and libelant never attempted to prove it. The reason for this rule is set forth in Slater v. Mexican, etc., Co., 194 U. S. at 126, 24 Sup. Ct. 581, 48 L. Ed. 900. A tort is the violation of some obligation or duty, but—

> "The source of this obligation is the law of the place of the act, and it follows that that law determines not merely the existence of the obligation, but equally determines its extent."

It was therefore incumbent on libelant to prove the nature and extent of his right under British law if he deemed that applicable. He did not do so, and therefore his libel in that respect was properly dismissed.

[4] We can see no power in the District Court to grant an award for cure and maintenance. The right to that relief grows out of the nature of the seaman's contract, as we pointed out in The Bouker No. 2, 241 Fed. 831, 154 C. C. A. 533, and is in its nature contractual. It was proven that the ship complied with all the obligations of the Norwegian law which governs the contract; while, even if the British law had applied, that system gives no right except under the Shipping Act, and no lien. Cases supra.

The decisions relied upon on this point do not apply. In The Santa Clara (D. C.) 205 Fed. 179, the court refused leave to plead by way of

amendment that the steamer was British, while in The Van der Duyn (C. C. A.) 261 Fed. 887, the point was not raised or considered.

The decree appealed from is modified, so as to dismiss the libel in toto. There will be no costs in this court or in the court below.

HURST v. LEDERER, Internal Revenue Collector.

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

No. 2634.

1. **Internal revenue ⇐38—In suit to recover back payment, plaintiff has burden to show previous payment.**
   In a suit to recover back taxes claimed to have been illegally collected, in that they had been previously paid, the burden of showing such previous payment rested on plaintiff.
2. **Internal revenue ⇐22—Collector not responsible for taxes paid deputy not assigned to particular portion of district.**
   Under Act March 1, 1879, c. 125, § 2 (Comp. St. § 5849), providing that every deputy collector of internal revenue shall have the same authority as the collector to collect taxes levied or assessed within the portion of the district assigned to him, etc., the collector was not responsible for taxes, even if paid to a deputy, where he was not the deputy assigned to the portion of the district in which the taxes were levied or assessed.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Action by Marriott Hurst against Ephraim Lederer, Collector of Internal Revenue for the First District of Pennsylvania. Judgment for defendant, and plaintiff brings error. Affirmed.

James J. Breen, Louis L. Tafel, and James B. McGrane, all of Philadelphia, Pa., for plaintiff in error.

Edward S. Kremp, Sp. Asst. U. S. Atty., and Charles D. McAvoy, U. S. Atty., both of Philadelphia, Pa. (Carl A. Mapes, Solicitor of Internal Revenue, and Walter G. Moyle, Sp. Atty., Bureau of Internal Revenue, both of Washington, D. C., of counsel), for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

BUFFINGTON, Circuit Judge. In this case, Marriott Hurst, a taxpayer, sued Ephraim Lederer, collector of internal revenue, to recover back some $2,000 of taxes, alleged to have been illegally collected from him under protest and by duress of a warrant, distraint, and threat of sale. The alleged illegality consisted in the fact, asserted by Hurst, that he had already paid the tax to the collector by a payment thereof made to one Wright, a deputy collector of Lederer, the collector.

On the trial, the court directed a verdict and judgment in favor of Lederer, and thereupon Hurst sued out this writ and assigned as error the direction of a peremptory verdict. Accordingly the questions

involved are, first, whether there was proof to go to the jury on the issue of whether Hurst did actually pay the money to Wright, the deputy collector; and, second, whether the latter had authority to collect the money.

Assuming, for present purposes, that there was evidence of actual payment to the deputy collector, and that that question should have been submitted to the jury, there yet remains the underlying and decisive question of the authority of the deputy collector to receive it, and thereby bind Lederer, who, in point of fact, never did receive it. The proofs in the case show that, on the last day the taxes were payable, Hurst telephoned to Lynch, a friend of his in the Post Office Department, which was in the same building with the collector's office, and inquired about the number of people who were then crowding that office to pay their delayed taxes. Lynch told him it was large, but that, if he would come down, he (Lynch) would get him inside the railings. Hurst came down, and, instead of taking a place with the people going up to the cashier's window and paying the cashier, Lynch and Hurst went inside, where the public was not admitted, and went to the desk of Wright, a deputy collector.

There was a conflict in the testimony at this point as to whether Hurst counted out his money to Wright, and the latter took it and carried it away, or whether Hurst counted it out to Lynch, the post office messenger, who carried it over and put it in the desk drawer of Betts, another deputy, who was a field deputy in the district where Hurst lived. Hurst testified he had not known and never saw Wright before that day. Wright, who was called by Hurst as a witness, testified he was a deputy collector; that he did not take Hurst's money, and had no authority to take it. He said he was taking affidavits, and took Hurst's; that he saw some money; that Lynch took it, and put it in an envelope; that Lynch asked for Betts, who was the deputy "in charge of the district where Hurst's place was"; that he walked toward Betts' desk, when told where it was; and that he started toward it with the envelope in his hand. Lynch's testimony was substantially to the same effect. He said he himself took the money and left it in Betts' desk drawer. No receipt was given by any one to Hurst for the money. No testimony was adduced by Hurst as to the authority of Wright to receive the money, and the only statutory authority cited to the court was the Act of March 1, 1879, chapter 125, section 2 (Comp. St. § 5849), printed in the margin.[1]

On the part of the defendant, the collector, Lederer, testified that Betts, the district deputy, "had the northeast section of the city, in which Mr. Hurst's saloon was located." He testified the general rule

[1] "That each collector of internal revenue shall be authorized to appoint, by an instrument in writing under his hand, as many deputies as he may think proper: * * * Provided, however, * * * each such deputy shall have the like authority in every respect to collect the taxes levied or assessed *within the portion* of the district assigned to him which is by law vested in the collector himself; but each collector shall, in every respect, be responsible, both to the United States and to individuals, as the case may be, for all moneys collected, and for every act done or neglected to be done, by any of his deputies while acting as such."

of the office was that "money paid in must be paid to the cashier"; that on the previous week the cashier had called his attention to the fact that parties were coming to the office and trying to have the deputies deviate from the order, and he had made a positive order reaffirming the rule.

[1, 2] This suit being to recover taxes illegally collected, the burden of showing a previous payment rested on the plaintiff, and inasmuch as the proof was that Lederer had never received the money, and had never authorized Wright to receive it for him, it is apparent Hurst has not made out a case against Lederer, unless the law itself makes Lederer's appointment of Wright deputy collector carry with it the right and authority to collect money. And it is here that, in light of the proofs, the plaintiff's case fails, for he cannot justify his alleged payment to Wright by the terms of the statute. That statute provides:

"Each such deputy shall have the like authority in every respect to collect taxes levied or assessed within the portion of the district assigned to him which is by law vested in the collector himself."

But the proofs show that Betts was the deputy to whom alone it could be contended this language applied, and that Betts was the man Lynch and Hurst meant to reach. Unfortunately, they did not find Betts, and in his absence the cashier was the only person to whom Hurst could pay his money, so as to bind Lederer.

Taking the most favorable view of the plaintiff's proofs as to what followed, it is apparent that Lederer was not in fault in any way, and that the loss that resulted to Hurst arose, not from anything Lederer did, or failed to do, but wholly from what Hurst did, or failed to do, and, where one or two innocent men suffer wrong, he must suffer whose acts or omissions caused the injury.

We are of opinion the record shows no error in giving binding instructions for the defendant.

THE BRANDON. THE FLORENCE OLSEN. ADAMS et al. v. HUTTON.

(Circuit Court of Appeals, Fourth Circuit. April 2, 1921.)

No. 1860.

1. Collision ⇐102—Both vessels held at fault.

Where vessels B. and O. collided when passing at night near nets laid in wartime for interception of submarines, both *held* at fault; the B., outward bound, being on the wrong side of the channel and undertaking to pass on the starboard side of the O., coming in, without making sure that the O.'s two-blast signal was for the B., and not for a patrol boat stationed at the nets, and the O. being negligent, in that the lookout thereon had left his post, and its pilot and master failed to observe the B.'s course and signals with care, which would have disclosed that the B. and a pilot boat preceding the O. had passed starboard to starboard, and that the B.'s course indicated her understanding the O. had signaled a like passage.

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

2. Collision ⇐76—Immediate stopping required, where signals not understood.

When proper observation would show to the master or pilot of a vessel in proximity to another that his signals have been misunderstood, he should immediately stop and reverse, until he ascertains that his signals are understood and assented to.

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

Libel by Charles F. Adams and others, trustees, etc., doing business under the name of the New England Fuel & Transportation Company, owner of the American steamship Brandon, against the steamship Florence Olsen, William E. Hutton, master and claimant, in which William E. Hutton filed a cross-libel. From a decree in favor of the Olsen, libelants appeal. Modified.

Edward E. Blodgett, of Boston, Mass. (Blodgett, Jones, Burnham & Bingham, of Boston, Mass., Floyd Hughes and Hughes, Vandeventer & Eggleston, all of Norfolk, Va., and Albert T. Gould, of Boston, Mass., on the brief), for appellants.

Leon T. Seawell, of Norfolk, Va. (Hughes, Little & Seawell, of Norfolk, Va., on the brief), for appellee.

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

WOODS, Circuit Judge. On the night of September 22, 1918, the steamships Brandon and Florence Olsen collided off Old Point Comfort. A libel was filed by the owners of the Brandon and a cross-libel by the master of the Olsen. On depositions and testimony taken before the court, the District Court held the Brandon solely at fault, and rendered a decree in favor of the Olsen.

The Brandon, loaded with coal, was outward bound. The Olsen, light, was inward bound. Both vessels were properly lighted. The Olsen was navigated by a Virginia pilot. The master of the Brandon had a pilot's license and was navigating his own vessel. The collision was near the nets laid by the government for interception of submarines. A patrol boat, the Dempsey, was stationed at these nets to speak and identify both inward and outward bound vessels. Coming in were the Relief, a pilot boat, and behind her the steamer Olsen. The Brandon and the Olsen sighted each other when about a mile and a half apart, and each thereafter had full opportunity to observe the lights, and thus ascertain the location and course, of the other, and to take all precautions against collision.

[1] In our view, the officers of both vessels convict themselves of plain violation of the rules of navigation, and if the rules had been observed on either vessel the collision would not have occurred. The Brandon was on the wrong side of the channel, and this fault was all the greater, when it should have been obvious to her master that there were three vessels on that side, two of them incoming vessels with the right of way. Indeed, the master seems to have been confused

as to his proper position and course. His excuse for taking the wrong course was that he mistook the pilot boat Relief for a tug and tow of the N. Y., P. & N. Railroad, and his contention is that safe navigation required him to take the course he did in order to allow the supposed tug and tow to take the course usually taken by such craft. Assuming all that he says to be true, he had no excuse for not knowing that the Relief was not a tug and tow, for the presence of tug and tow would have been plainly indicated to him by lights on the barges or other craft in tow. Contrary to the rule, the master of the Brandon undertook to pass the Olsen starboard to starboard, relying on a two-blast signal from the Olsen, to which he answered assent, as a signal intended for him. In this he was negligent, for he saw the patrol boat Dempsey, and he should have expected the Olsen and the Dempsey to exchange signals, indicating the side on which the Dempsey would cross the bow and come alongside the Olsen. He therefore was clearly at fault in undertaking the unusual starboard passage with the Olsen without making sure that the Olsen's signal was for the Brandon and not the Dempsey.

No less obvious was the fault of the Olsen. The pilot saw the lights of the approaching Brandon a mile and a half away. After that first sight of the lights, neither the pilot nor any one else on the Olsen paid the least attention to the Brandon or her signals. The evidence leaves no doubt that the Olsen was moving at the rate of at least three or four knots an hour; the Brandon was moving toward her at a still greater speed. The Olsen's lookout had left his post and was doing some other work. Her master and pilot had their attention diverted at the same time by conversation with officers of the patrol boat Dempsey, which had come up on her starboard. Neither of them observed the movements or regarded the signals of the Brandon until almost at the very moment of collision. The excuse for all this negligence is that the Olsen had the right to expect the Brandon to pass port to port. The excuse is not good.

There were four vessels navigating near each other at night. The Olsen had signaled, either proposing or assenting to the Dempsey's approaching her starboard to starboard. Her pilot and master should have known that the master of the Brandon might take the starboard signal as intended for him, and should have observed the Brandon's course and signals with the utmost care. Had they observed at all, or if the lookout had been at his post, it would have been seen in ample time to prevent the collision that the Brandon and the Relief had passed starboard to starboard, and that the Brandon was taking a course indicating that her master had understood the Olsen to signal a like passage.

[2] When proper observation would show to the master or pilot of a vessel in proximity to another that his signals have been misunderstood, he should immediately stop and reverse until he ascertains that his signals are understood and assented to. The absence of a lookout, uncompensated for by watchfulness of the pilot or master, was inexcusable, and clearly a proximate cause of the collision. We have stated the rule and cited some of the authorities in Standard Oil Co. v. Davies, Master, 272 Fed. 67, decided February 14, 1921. While the

facts of that case are somewhat similar, on the vital points against the Olsen they are different.

We think the Brandon and the Florence Olsen both clearly at fault for the collision, and a decree will be entered accordingly.

Modified.

FICKLEN et al. v. HARDING.

(Circuit Court of Appeals, Second Circuit. April 13, 1921.)

No. 173.

Patents ⊜328—1,098,792, for street pavement, void for prior use.

The Ficklen patent, No. 1,098,792, for street pavement, *held* void for prior public use of a pavement having all essential elements of that of the patent.

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

Suit in Equity by William E. Ficklen and Fred J. Klein against J. Horace Harding. Decree for defendant, and complainants appeal. Affirmed.

Suit is upon patent to Ficklen (application filed August 21, 1909, issued June 2, 1914), No. 1,098,792, for a "street pavement." Plaintiffs rely on claims 1, 2, 3, 6, and 7, of which the third claim describes the subject-matter with great particularity and is as follows:

"3. A pavement comprising an earth roadbed, a crust supported directly on said roadbed and comprising a plurality of concrete sections of relatively large area, separated from each other by expansion joints extending from the top of the pavement to the roadbed, and reinforcing means imbedded in and carried by and continuing along the concrete section at the joints which require reinforcement; said reinforcing means consisting of metal strips set into the upper surfaces of the concrete sections along the expansion joints."

After seeing and hearing numerous witnesses the trial court dismissed the bill; the final decree declaring merely that the letters patent in suit "are void." The opinion of Mayer, District Judge, found a prior use on the part of one Baker, such use consisting in the construction (for Wayne county, Mich.) of about a mile of concrete road on Woodward avenue, near Detroit, in April–June, 1919. He therefore did not consider any other defense, although several were urged below and are presented on this appeal.

W. H. C. Clarke and George H. Gilman, both of New York City, for appellants.

W. F. Guthrie, of Youngstown, Ohio, for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). Counsel for Ficklen present in argument the following description of the subject-matter of the patent in suit:

"A loose-foundation, expansion-jointed, creeping-section, single-course untopped concrete road having self-setting, substantially-component, soft-wearing reinforcements out of contact with the roadbed at the upper edges of those joints which require reinforcement."

For purposes of discussion only we accept this collection of laudatory phrases as the best that can be said for Ficklen's patent, as it issued, after a very stormy career in the Office. We may, however, state our opinion that Ficklen's disclosure, as filed in 1909, could not have merited from even the most friendly critic such a description as we have just quoted. If the patent has ever taken a form which justifies the claims now made for it, the transformation occurred only when the present claims were advanced; i. e., after 1912.

As for the disclosures and proposed claims as filed, we agree with the summary disposition of them made by the primary Examiner who rejected them as showing no invention over Coignet, 98,033. It may be true that Mr. Ficklen, or his solicitors, did not watch the rapidly advancing art, and amend claims and specification so as to capture some portion of it; but it is plainly true that he did not describe in specification or define in claims that for which he now demands protection until long after his filing date.

We have mentioned this only because the public use found by the court below occurred so soon before Ficklen filed his application. With the findings of fact made by the lower court we entirely agree, and it would serve no good purpose to rehearse the evidence. The result is that, several months before Ficklen filed any application, and several years before he described substantially that which is now said to infringe, the commissioners of Wayne county had and the public used a road substantially as described in the claim first above quoted.

It is said that this road, or so much of it as embodied what is said to be Ficklen's idea, was either an abandoned experiment or an experimental use. As to the law on these points, we need add nothing to our decision in Eastman v. Mayor, 134 Fed. 844, 69 C. C. A. 628.

But it is always true that the question whether a given use is experimental or not is one of fact, and we are of opinion that Baker's or Wayne county's use of the road in question had ceased to be an experiment before Ficklen's filing date. Whatever value there was in it was apparent, and favorably apparent, before that time; that it has not proved important is of no moment, and that it may have been superseded by later and better devices does not render the original use experimental, nor make out of it an abandoned experiment.

Appellant much relies upon the case of Warren v. Owosso, 166 Fed. 309, 92 C. C. A. 227. That case is to be read in conjunction with the subsequent decision of the same court in Young v. Burley, 200 Fed. 258, 118 C. C. A. 368. So read, they do hold that a use of paving for foot passengers was a distinct use from that of the same paving for vehicular traffic. We express no opinion on the foregoing doctrine, other than to point out that the Wayne county use of 1909 was in kind as well as in degree exactly that for which Ficklen's pavement was and is intended.

The decree appealed from is affirmed, with costs.

FRAZIER v. INTERSTATE R. CO.

(Circuit Court of Appeals, Fourth Circuit. April 2, 1921.)

No. 1875.

Master and servant ⊂=236(15)—Injury to brakeman stepping on track held due to his own negligence.

Evidence that a brakeman on a freight train, which had stopped to cut out a bad-order car, was killed when he stepped on the adjoining track in front of another freight train, which he knew was following his train, and which he could have seen approaching, if he had looked, *held* to warrant court in instructing a verdict for defendant, though the other train had a car in front of the engine, which cut off the view of the headlight, but it was running slowly and ringing the bell, and had two men with lanters posted on the car.

In Error to the District Court of the United States for the Western District of Virginia, at Big Stone Gap; Henry C. McDowell, Judge.

Action by Lou Frazier, as administrator of James L. Frazier, deceased, against the Interstate Railroad Company. Judgment for defendant on a directed verdict, and plaintiff brings error. Affirmed. Certiorari denied 255 U. S. —, 41 Sup. Ct. 624, 65 L. Ed. —.

William H. Werth, of Tazewell, Va., for plaintiff in error.

J. F. Bullitt, of Philadelphia, Pa. (James L. Camblos, of Norton, Va., and Bullitt & Chalkley, of Big Stone Gap, Va., on brief), for defendant in error.

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

WOODS, Circuit Judge. Under a former writ of error a judgment sustaining a demurrer to the declaration was reversed; this court holding that the facts alleged concerning the death of plaintiff's intestate, James L. Frazier, if proved, would warrant a verdict that his death was due to the negligence of the defendant. Frazier v. Interstate R. Co. (C. C. A.) 264 Fed. 96. The evidence on the trial failed to sustain the allegations of the complaint, and we think the court was right in instructing the jury to find for the defendants.

The case before the jury was this: James L. Frazier was regularly employed by defendant, Interstate Railroad Company, as car inspector; but he was familiar with the duties of a brakeman, and when called on served in that capacity. On the night of November 28, 1917, he was called to act as brakeman on freight train No. 8, and with alacrity undertook the service. For the purpose of cutting out a bad-order car, train No. 8 went into the defendant's Andover yard; the engine heading west. In the yard were the main line and a number of switching tracks. No. 8 was on the track next to the main line. Frazier, acting as head brakeman, rode on the pilot of the engine, out of view of the engineer, to the point where the car was to be cut out. There he went to the bad-order car, uncoupled it, walked a few paces to and upon the

main line, and was run over and killed by a car on freight train No. 5, also running west on that track.

The crew on No. 8 knew that No. 5 was just behind, headed in the same direction, and that it would probably approach and pass while they were engaged in cutting out the bad-order car. It was therefore incumbent upon Frazier, as one of the crew of No. 8, to be on the lookout for No. 5. He was not advertent to this duty, for after uncoupling the bad-order car he walked over to the main line track, where he should have expected No. 5, looking in the opposite direction. Had he even glanced to the east, he would have seen the approaching car.

On the other hand, the engineer and crew of No. 5 had a right to expect the crew on No. 8, which had just passed them and stopped, to be on the lookout for the approach of their train. It is true that there was a freight car in front of the engine of No. 5, which obscured the headlight; and when the warning of the headlight is absent such a movement at night requires precaution for the protection of men working in the yard. But in this instance all reasonable precautions were taken. The train was going only 3 or 4 miles an hour, the bell was ringing, and two men with lanterns were stationed as lookouts on top of the moving car, as near to the end as they could stand with safety. They did not see Frazier, probably because he stepped on the track so near to the car as to be behind their angle of vision. It may be that the sound of escaping steam prevented Frazier from hearing the bell. Yet the conclusion cannot be escaped that he would have heard the signals, and seen the lights and the approaching train, if he had been the least advertent to the presence and probable approach of train No. 5. His death was plainly due to this inadvertence on his part, and not to any negligent act or omission of the defendant.

The proof distinguishes this case from the authorities cited in the opinion on the demurrer in 264 Fed. 98, and brings it clearly within the principle of Aerkfetz v. Humphreys, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758, and many like decisions.

Affirmed.

REGAL DRUG CORPORATION v. WARDELL, Internal Revenue Collector.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1921.)

No. 3536.

Internal revenue ⊜28—Suit to enjoin collection of taxes assessed on withdrawal of liquors from bond cannot be maintained, even if in nature of penalty.

If, under Const. Amend. 18, National Prohibition Act, tit. 2, §§ 3 and 35, and Act Feb. 24, 1919, §§ 600(a) and 611 (Comp. St. Ann. Supp. 1919, §§ 5986e, 6110g), so-called taxes and assessments levied by the Commissioner of Internal Revenue on one withdrawing liquors from bond, on the theory that it was guilty of violations of the statute, were in the nature of penalties, a suit to restrain their collection was nevertheless not maintainable, in view of Rev. St. § 3224 (Comp. St. § 5947), prohibiting suits

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

to restrain the assessment or collection of any tax; there being a remedy at law under sections 3220 and 3226 (sections 5944, 5949), providing for refunds, and for appeals to the Commissioner, and for suit to recover the tax after such appeal.

Appeal from the District Court of the United States for the Southern Division of the Northern District of California, Second Division; William H. Sawtelle, Judge.

Suit by the Regal Drug Corporation against Justus S. Wardell, United States Collector of Internal Revenue for the First District of California. From a decree dismissing the bill, plaintiff appeals. Affirmed.

John W. Preston and Robert Duncan, both of San Francisco, Cal., for appellant.

Frank M. Silva, U. S. Atty., and E. M. Leonard, Asst. U. S. Atty., both of San Francisco, Cal., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge. This is an appeal from the decree of the District Court dismissing a bill in equity filed by the Regal Drug Corporation, of San Francisco, Cal., against Justus S. Wardell, collector of internal revenue of the First district of California, to enjoin the collection of certain taxes and penalties assessed against the plaintiff by the Commissioner of Internal Revenue under the provisions of section 35 of title 2 of the National Prohibition Act (41 Stat. 305, 317). The bill was dismissed by the District Court pursuant to the prohibition contained in section 3224 of the Revised Statutes (Comp. St. § 5947), providing that:

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

It is alleged in plaintiff's amended complaint that the appellant is a California corporation having a large drug store at 1110 Market street, San Francisco, and has been engaged in the business of selling drugs at said location and maintaining on said premises a large stock of drugs, medicines, and sundries, other than intoxicating liquors; that said stock was worth about the sum of $15,000; that on the 28th of October, 1919, plaintiff was the holder of a permit authorizing the plaintiff to sell intoxicating liquors and distilled spirits for nonbeverage purposes; that said permit was issued to the plaintiff by the proper officials of the government in accordance with the provisions of the National Prohibition Act; that plaintiff continued to be the holder of said permit until some time in the month of June, 1920, and during that time said permit was in full force and effect; that during the time plaintiff was the holder of such permit he purchased and withdrew from bonded warehouses under the supervision of officials of the United States government distilled spirits to the amount of about 17,900 gallons; that during such time he also purchased and withdrew from such bonded warehouses sweet wines containing not over 21 per cent. of alcohol, amounting to about 450 gallons, and during such time plaintiff purchased dry wines containing not over 14 per cent. of alco-

hol, amounting to about 20 gallons; that all taxes and assessments against said distilled spirits, intoxicating liquors, sweet and dry wines, which were levied and could be levied thereon by the United States government in every form, were fully paid by the plaintiff in advance; that during said time, and when said permit was in full force and effect, said plaintiff disposed of all of said distilled spirits, intoxicating liquors, sweet and dry wines, and the same were sold and disposed of by said plaintiff under said permit, and under and in accordance with the provisions of the National Prohibition Act; that plaintiff, upon receiving said permit, caused to be filed with the proper United States authorities in accordance with law a bond in the sum of $100,000 in the form required by said law, respecting the sale or use of distilled spirits, intoxicating liquors, and wines for other than beverage purposes, and the said bond is still in full force and effect, and the surety on said bond is fully able to respond to the full amount thereof; that on or about the month of June, 1920, the Commissioner of Internal Revenue arbitrarily levied against said plaintiff a so-called assessment or tax at the rate of $6.40 per gallon, amounting to $115,092.50, upon the distilled spirits which had been withdrawn by said plaintiff from said bonded warehouses between the 20th of October, 1919, and the time when the permit of said plaintiff to sell and dispose of said distilled spirits was revoked in June, 1920; that said Commissioner also arbitrarily levied a so-called tax or assessment against the plaintiff at the rate of 40 cents per gallon on all sweet wines purchased and disposed of by plaintiff during such time, amounting to $153.80; that said Commissioner also levied against the plaintiff a so-called tax or assessment on all dry wines purchased and disposed of by plaintiff at the rate of 16 cents per gallon, amounting to the sum of $3.20; that none of said levies were either taxes or assessments, but were in fact fines and penalties attempted to be imposed on plaintiff; that the plaintiff had already paid taxes on all of said articles amounting to the sum of $39,656.89; that the Commissioner of Internal Revenue claimed and claims that there was due from plaintiff a further sum of $75,592.61 as a so-called tax or assessment on such distilled spirits, intoxicating liquors, and wines, over and above the amount already paid by the plaintiff; that said Commissioner of Internal Revenue also levied against plaintiff a penalty in the sum of $500 for retailing and selling distilled spirits, intoxicating liquors, and wines in violation of the law, and also levied against plaintiff a penalty in the sum of $93.75 for having conducted the business of a rectifier, and also levied against plaintiff a penalty in the sum of $1,000 for having manufactured distilled spirits or intoxicating liquor in violation of law; that all taxes and assessments which could be properly levied upon all of said distilled spirits, intoxicating liquors, and wines had been and were fully paid at the time the same were purchased and withdrawn by plaintiff from bonded warehouses; that prior to the levy of said so-called taxes, assessments, and penalties all of the said distilled spirits, intoxicating liquors, and wines had been sold and disposed of by plaintiff; that the said Commissioner of Internal Revenue did not, nor did his assistants, deputies, or agents, hold or conduct any hearing in regard to the matter, or give

any notice thereof to plaintiff or to its officers or agents in regard thereto, or that the same was proposed to be levied or assessed against the plaintiff; that on the 19th day of July, 1920, the collector of internal revenue took possession of plaintiff's drug store, and of the entire stock of drugs and goods therein, and was proceeding to and threatening to sell the same to satisfy the claim for the so-called taxes, assessments, and penalties; that plaintiff has established a good business and trade at his said store, and unless the collector of internal revenue is restrained and enjoined from remaining in possession of said stock the business of plaintiff will be entirely ruined and the good will of said business entirely destroyed, and that the damage done to plaintiff thereby will be irreparable.

The defendant interposed a motion to dismiss the complaint on the ground that it did not state facts sufficient to entitle plaintiff to any relief and that plaintiff had a plain, speedy, and adequate remedy at law. The court granted the motion on the ground that section 3224 of the Revised Statutes provided that:

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court"

—and the government had provided a complete system of corrective justice in regard to all taxes imposed by the government founded upon the idea of appeals within the executive departments.

Section 600 (a) of the Act to "provide revenue, and for other purposes," approved February 24, 1919 (40 Stat. 1057, 1105 [Comp. St. Ann. Supp. 1919, § 5986e]), provides:

"That there shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, except such distilled spirits as are subject to the tax provided in section 604, in lieu of the internal revenue taxes now imposed thereon by law, a tax of $2.20 (or, if withdrawn for beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage, a tax of $6.40) on each proof gallon, or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law."

Section 611 of the act (section 6110g) provides:

"That upon all still wines * * * which on the day after the passage of this act [February 25, 1919] are on any winery premises or other bonded premises or in transit thereto or at any custom house, there shall be levied, collected, and paid, in lieu of the internal revenue taxes now imposed thereon by law, taxes at rates as follows, when sold, or removed for consumption or sale: On wines containing not more than 14 per centum of absolute alcohol, 16 cents per wine gallon, the per centum of alcohol taxable under this section to be reckoned by volume and not by weight; on wines containing more than 14 per centum and not exceeding 21 per centum of absolute alcohol, 40 cents per wine gallon."

Section 35 of title 2 of the act (41 Stat. 317) provides:

"All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This act shall not relieve any one from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor.

No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person from any liability, civil, or criminal, heretofore or hereafter incurred under existing laws."

The National Prohibition Act took effect and was in force from and after the date when the Eighteenth Amendment to the Constitution took effect. 41 Stat. 307–322. The amendment was ratified January 28, 1919, and took effect January 29, 1920. It provided that:

"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 territories subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

Section 3 of title 2 of the National Prohibition Act (41 Stat. 307, 308) provides:

"No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

This act was in full force and effect when the Commissioner of Internal Revenue levied the tax, the collection of which the plaintiff seeks to enjoin by this action. The appellant states the question in controversy as follows:

"Where a person has legally withdrawn intoxicating liquor from a bonded warehouse for nonbeverage purposes, and at the time of withdrawal has paid all taxes thereon, and has then sold such liquor, has the Commissioner or collector of internal revenue any power or warrant, under section 35, title 2, of the National Prohibition Act, after said liquor has been sold and said Commissioner and collector of internal revenue surmises that some of said liquor has been sold for beverage purposes in violation of law, to levy, assess, or collect from such person a further sum under the guise of a tax, as though the liquor had been withdrawn in the first instance for beverage purposes?

"Another question to be determined is: Can such Commissioner or collector proceed to levy and collect from such person a $500 penalty for selling liquor in violation of law, and a further penalty in the sum of $1,000 for manufacturing in violation of law, and a further penalty in the sum of $93.75 for rectifying in violation of law, and can they do all these things without any hearing granted to that person?"

The appellant adds:

"All of the facts involved here took place after the National Prohibition Act was enacted, which was on October 28, 1919. At that time and since, complete prohibition of the sale of intoxicating liquor for beverage purposes has been in effect."

The appellant contends that, as the Eighteenth Amendment and the statute passed for its enforcement prohibits absolutely the manufacture and sale of intoxicating liquors and wines for beverage purposes, the provisions of the prior law inconsistent with the constitutional en-

actment and the enforcing statute have been repealed, and there can be no tax assessed or imposed on such liquors and wines; in other words, there can be no legal tax, so it is contended, upon that which cannot be legally manufactured or sold, and that if manufactured or sold illegally, the liability of the offender is for a penalty, and not for a tax, and if it is for a penalty its collection must be enforced by proceedings in court and not by the summary proceedings of an assessment. Conceding that the tax is in the nature of a penalty, it does not follow that its collection can be restrained by a suit in equity, if there is a speedy and adequate remedy at law. That there is such a remedy at law cannot be seriously controverted.

Section 3220 of the Revised Statutes (Comp. St. § 5944) provides:

"The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected."

Section 3226 (section 5949) provides:

"No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein: Provided that if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the Commissioner at any time within the period limited in the next section."

It does not appear from the amended bill of complaint, nor is it otherwise claimed, that the plaintiff has appealed to the Commissioner of Internal Revenue for the abatement of the tax assessed against him in this case. That this suit cannot be maintained has been conclusively determined by the Supreme Court of the United States in Cheatham v. United States, 92 U. S. 85–88, 23 L. Ed. 561, State Railroad Tax Cases, 92 U. S. 576–613, 23 L. Ed. 663, and Dodge v. Osborn, 240 U. S. 118, 36 Sup. Ct. 275, 60 L. Ed. 557. In the latter case, the Supreme Court, quoting from Snyder v. Marks, 109 U. S. 189, 193, 194, 3 Sup. Ct. 157, 160 (27 L. Ed. 901), says:

"The inhibition of Rev. Stat. § 3224, applies to all assessments of taxes, made under color of their offices, by internal revenue officers charged with general jurisdiction of the subject of assessing taxes against tobacco manufacturers. The remedy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given is exclusive, and no other remedy can be substituted for it. * * * Cheatham v. United States, 92 U. S. 85, 88. And again in State Railroad Tax Cases, 92 U. S. 575, 613, it was said by this court, that the system prescribed by the United States in regard to both customs duties and internal revenue taxes, of stringent measures, not judicial, to collect them, with appeals to specified tribunals, and suits to recover back moneys illegally exacted was a system of corrective justice intended to be complete, and enacted under the right belonging to the government to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection

of its revenues. In the exercise of that right, it declares, by section 3224, that its officers shall not be enjoined from collecting a tax claimed to have been unjustly assessed, when those officers, in the course of general jurisdiction over the subject-matter in question, have made the assignment [assessment] and claim that it is valid."

The judgment of the District Court is affirmed.

UNITED STATES v. FREIDERICKS et al.

(District Court, D. New Jersey. May 17, 1921.)

1. **Indictment and information ⟸108—Indorsement of statute under which drawn no part of indictment.**
   The indorsement on an indictment of the statute under which it is drawn is no part of the indictment, which is sufficient if it charges an offense under any statute.
2. **Internal revenue ⟸2—Statutory provisions not repealed by National Prohibition Act.**
   Under the settled rules that repeals by implication are not favored, and that where the provisions of an earlier and a later statute are not absolutely irreconcilable and no purpose to repeal the earlier is expressed or clearly implied in the later, effect will, if possible, be given to both, Rev. St. § 3296 (Comp. St. § 6038) and Act Aug. 27, 1894, c. 349, §§ 51, 59 (Comp. St. §§ 6058, 6065), relating to bonded warehouses, and prohibiting the removal of any liquor therefrom without payment of the tax, or in the absence of the storekeeper, *held* not repealed by the National Prohibition Act, and an indictment for violation of said sections sustained.
3. **Internal revenue ⟸2—Offense of unlawful removal of spirits from warehouse not same as illegal transportation.**
   The removal of distilled spirits from a government warehouse without payment of the tax thereon, or in the absence or without the knowledge of the storekeeper, contrary to Rev. St. § 3296, and Revenue Act Aug. 27, 1894, §§ 51, 59, though in a sense the transportation of the spirits, is not the same offense as the illegal transportation of intoxicating liquor contrary to National Prohibition Act, tit. 2 and 3, as respects the question of implied repeal.
4. **Internal revenue ⟸39, 40—Removal of spirits from warehouse without payment of tax, etc., not warranted by permit under National Prohibition Act.**
   A permit under the National Prohibition Act for the removal of distilled spirits from a government warehouse will not justify such removal without the payment of the tax imposed thereon, or in the absence or without the knowledge of the storekeeper, in violation of Rev. St. § 3296, and Revenue Act Aug. 27, 1894, §§ 51, 59.

Criminal prosecution by the United States against Oscar C. Freidericks and others. On demurrer to indictment. Overruled.

Isaac Gross, Asst. U. S. Atty., of Jersey City, N. J.
Samuel Kessler, of Newark, N. J., for defendant Freidericks.

RELLSTAB, District Judge. The indictment contains three counts, to which the defendant Freidericks demurs. In substance, and so far as pertinent to the present inquiry, they charge:

First Count. That on or about September 12, 1920, the defendants, with unknown others, intending to commit an offense against the United States, fraudulently, etc., conspired to unlawfully remove from the La Breque Company, Incorporated, warehouse at 600 Ogden street, in the city of Newark, New Jersey—a United States government bonded warehouse for spirits authorized by law—a quantity of distilled spirits, to wit, 400 gallons of Overholt and Glenmore whisky, on which the tax had not been paid, and that to effect the object of said conspiracy, the named defendants, on or about that date, placed the whisky into empty barrels and cans theretofore taken by them to the La Breque warehouse, and did remove the whisky on which the tax had not been paid from that warehouse to a place on Ferry street, near Wilson avenue, in said city.

Second Count. The unlawful removal of the liquor on which the tax had not been paid from the La Breque warehouse to the Ferry street location.

Third Count. The unlawful removal of the liquor from the La Breque warehouse to the Ferry street location, in the absence, and without the knowledge of the storekeeper in charge of the warehouse, and by breaking and tampering with its locks.

The greater number of the grounds of demurrer filed are too general and vague for consideration, and were not argued, either orally or in the brief. Those argued are to the effect that section 3296, R. S. (Comp. Stat. § 6038), and section 51 of the Act of August 27, 1894, 28 Stat. 565 (Comp. Stat. § 6058), indorsed on the indictment as the sections violated, as well as sections 600 and 604 of the Act of February 24, 1919, 40 Stat. 1105 (Comp. St. Ann. Supp. 1919, §§ 5986e and 5986j), were repealed by the National Prohibition Act (41 Stat. 305), hereinafter called the Enforcement Act.

The reported federal court decisions dealing with like contentions differ greatly as to the effect of the Enforcement Act upon such earlier laws. Except that later decisions take the opposite view from that reached in United States v. Turner (D. C. W. D. Va.) 266 Fed. 248, which held on reasons which to my mind are convincing that R. S. § 3296, was not repealed by the Enforcement Act, I should have been content to overrule this demurrer on a mere citation of that case. However, in view of such differing opinions, and particularly of that in Reed v. Thurmond (C. C. A. 4) 269 Fed. 252, said by the demurrant to overrule the Turner Case, I am constrained to give the matter a more extended consideration.

[1] The indorsements constitute no part of the indictment, and it will be upheld if there is any act in force which can sustain it, whether any act is specifically mentioned therein, or if a different one is indorsed thereon. Williams v. United States, 168 U. S. 382, 389, 18 Sup. Ct. 92, 42 L. Ed. 509; United States v. Nixon, 235 U. S. 231, 35 Sup. Ct. 49, 59 L. Ed. 207; United States v. Wood (D. C. N. J.) 168 Fed. 438. However, in my judgment, the sections so indorsed furnish a legal basis for the challenged indictment.

[2] The Enforcement Act does not expressly repeal these sections.

The contention is that it does so by necessary implication. The question to be considered, therefore, is simply one of statutory interpretation.

"Where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, and no purpose to repeal the earlier act is expressed or clearly indicated, the court will, if possible, give effect to both." Frost v. Wenie, 157 U. S. 46, 15 Sup. Ct. 532, 39 L. Ed. 614; United States v. Lee Yen Tai, 185 U. S. 213, 22 Sup. Ct. 629, 46 L. Ed. 878; Franke v. Murray (C. C. A. 8) 248 Fed. 865, 160 C. C. A. 623, L. R. A. 1918E, 1015, Ann. Cas. 1918D, 98; United States v. Sacein Rouhana Farhat (D. C. S. D. Ohio, E. D.) 269 Fed. 33.

Manifestly this act was not intended to prescribe the only rules which should govern the manufacture of and traffic in intoxicating liquor. Neither in title nor provision is there warrant for the contention that this act was to supplant in toto the earlier laws dealing with the general subject of manufacture of and traffic in intoxicating liquor. True, it was a prohibitory enactment; but the prohibitions did not go beyond those ordained by the Eighteenth Amendment, which were limited to the manufacture of and traffic in intoxicating liquor for beverage purposes. On the contrary, the act (sections 3, 6, and 12, title 2) contemplates the manufacture of and traffic in alcoholic liquors for nonbeverage purposes. In section 3 it is declared that all the provisions of the act were to "be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented." And section 35 of the same title declares:

"All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This act shall not relieve any one from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve any one from criminal liability, nor shall this Act relieve any person from any liability, civil or criminal, heretofore, or hereafter incurred under existing laws."

This section gives legislative emphasis and sanction to the well-supported canon of interpretation of statutes, viz. repeals by implication are not favored, and may be inferred only if the later statute is so repugnant to or inconsistent with the earlier one that it is clear that the legislative body must have so intended. Wood v. United States, 41 U. S. (16 Pet.) 342, 10 L. Ed. 987; Arthur v. Homer, 96 U. S. 137, 24 L. Ed. 811; Witte v. Shelton (C. C. A. 8) 240 Fed. 265, 153 C. C. A. 191. The word "traffic," as used in section 35, must be given its larger significance. It is a generalization of the more specific terms used in the other parts of the act, such as "sell," "purchase," "barter," "storage," "transport," "import," "export," "prescribe," "deliver," and "furnish" (see sections 3, 6, 7, 10, 13, 14, 26, 33, and 37), and includes every step taken in the commerce in liquor from the man-

ufacturer to its ultimate destination. There is no mistaking the legislative purpose expressed in the quoted section. It is to continue in force all previous legislation not inconsistent with its provisions.

Therefore, as the question of repeal in the instant case is limited to whether the cited sections of the earlier laws are inconsistent with the Enforcement Act, these sections, as well as the pertinent ones of the later act, need to be stated. Section 3296, R. S., a re-enactment of section 36 of the Act of July 20, 1868, 15 Stat. 140 (Comp. Stat. § 6130), inter alia, denounces as crimes the removal, or aiding the removal, of distilled spirits "on which the tax has not been paid to a place other than the distillery warehouse provided by law," and the removal, or aiding the removal, of such spirits "from any * * * warehouse for distilled spirits authorized by law, in any manner other than is provided by law."

Section 51 of the Revenue Act of August 27, 1894, 28 Stat. 564 (Wilson Tariff Act; Comp. Stat. § 6058), authorizes the Commissioner of Internal Revenue, upon terms, to establish bonded warehouses for the exclusive "storage of spirits distilled from materials other than fruit," and provides that such warehouses shall be in charge of a storekeeper and be kept securely locked, and not be unlocked or opened except in the presence of the storekeeper. Section 59 of this act (Comp. Stat. § 6065) denounces as crimes violations of the provisions of section 51, and also the taking from any such warehouse of any distilled spirits deposited therein, without a full compliance with that act.

Sections 600 (a) and (b) and 604 of the Revenue Act approved February 24, 1919, 40 Stat. 1057, 1105 (Comp. Stat. Ann. Supp. 1919, §§ 5986e, 5986f, and 5986j), impose a tax on distilled spirits then in bond, or that have been, or thereafter may be, produced in or imported into the United States; a distinction being made in the amount of tax between that held for beverage purposes and that held for other purposes. The tax imposed under section 600 is to be paid on withdrawal of the liquor and is to be in lieu of all internal revenue taxes theretofore imposed.

The Enforcement Act has three main divisions. Title 1 deals exclusively with the enforcement of the war-time prohibition acts. See list in United States v. Turner (D. C.) 266 Fed. 248, 249, supra. These were emergency measures, and were to be in operation only during the period of the war and until the termination of demobilization. The remaining divisions—titles 2 and 3—are respectively entitled "Prohibition of Intoxicating Liquors" and "Industrial Alcohol." The main purpose of the legislation grouped under title 2 is the enforcement of the prohibitions of the Eighteenth Amendment, which, as noted, by its own limitations, applies only to intoxicating liquors for beverage purposes. The sections found under title 3 apply only to the production of industrial alcohol, and regulate its manufacture, storage, and distribution.

The referred to sections of the revenue laws, like other provisions of the internal revenue laws, at the time of their enactment, had no other purpose than to secure to the government the taxes imposed upon

intoxicating liquors. These, other than sections 600 and 604 of the Act of February 24, 1919, were passed at a time when the government was not required to observe any distinction as to the ultimate purpose of such liquors; i. e., whether for beverage or other uses. However, the last two mentioned sections were passed while the war-time prohibition acts were in force and after the Eighteenth Amendment had been adopted.

One of these war-time prohibition acts, that approved August 10, 1917 (40 Stat. 276; Comp. Stat. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛*l*), forbade the use of food materials in the production of distilled spirits for beverage purposes, but expressly authorized such production for other than beverage purposes. Section 15. The other of such acts, that approved November 21, 1918 (40 Stat. 1045; Comp. Stat. Supp. 1919, § 3115$^{11}/_{12}$f), provided that during the war, and until demobilization had been effected, it should be "unlawful to sell for beverage purposes any distilled spirits, and during said time no distilled spirits held in bond [should] be removed therefrom for beverage purposes except for export." Section 1, par. 4.

Therefore, when sections 600 and 604 of the Act of February 24, 1919 (called the Revenue Act of 1918), were enacted, Congress had before it the distinction made by law between distilled spirits to be used as beverages and those to be used for other purposes, and in the passage of such later enactment it provided a different rate of tax based on such difference in use. It also knew that distilled spirits then held in bond under the war-time prohibition acts could not be removed for beverage purposes except for export; also that because of the adoption of the Eighteenth Amendment the time would soon be when liquor for such purposes could not be even exported. With this knowledge, by the last-named sections, it imposed a tax on the distilled spirits then in bond, regardless of the uses for which they were held, or whether any tax had been previously paid thereon. It also expressly provided therein that, in case the tax theretofore imposed by law had not been paid, the new tax (in lieu of the old) was to be paid when the distilled spirits were withdrawn, and that such tax was to be "collected under the provisions of existing law." Section 600a.

With this clearly manifested legislative purpose to continue to tax all distilled spirits (sections 600 and 604, supra), and to penalize any one who should remove from a bonded warehouse those upon which the tax had not been paid (R. S. § 3296), or who should remove them from such warehouse in the absence of the duly appointed storekeeper (sections 51 and 59 of the Act of August 27, 1894), what is there in the Enforcement Act that is so repugnant to these earlier acts as to require a judicial determination that all of them were impliedly abrogated or repealed by it? In answering this inquiry it should be constantly kept in mind that none of the counts in the indictment charges a violation of the revenue laws relating to the manufacture or sale of intoxicating liquor. They each charge a violation of certain provisions of those laws pertaining to the removal of distilled spirits from authorized warehouses, which provisions are intended to secure to the

government the taxes imposed upon such liquors. The Enforcement Act imposes no taxes on intoxicating liquors, except as a penalty, and has no provisions designed to secure the payment to the government of any taxes imposed on such liquors. However, it distinctly reasserts the government's purpose of continuing to tax these liquors in its proviso that—

"This act shall not relieve any one from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor." Title 2, § 35, cl. 2.

The penalty taxes referred to in the later act apply only to the cases of illegal manufacture or sale of liquor, and are to be "in double the amount now provided by law." Id. cl. 3. This act prescribes no penalties for removing the liquors from warehouses without having paid the taxes imposed thereon, but it expressly declares that the act shall not relieve any person from any liability "civil or criminal, heretofore or hereafter incurred under existing laws." Id. last cl. Furthermore, section 37 of this title is a legislative admission that there was still a legitimate property and traffic in intoxicating liquor manufactured before this act went into effect, and that it was taxable under existing laws. The first paragraph of that section provides:

"Nothing herein shall prevent the storage in United States bonded warehouses of all liquor manufactured prior to the taking effect of this act, or prevent the transportation of such liquor to such warehouses or to any wholesale druggists for sale to such druggist for purposes not prohibited when the tax is paid, and permits may be issued therefor."

In other parts of that section the existence of bonded plants and warehouses for the holding of malt and vinous liquors containing more than the prescribed alcoholic content was recognized and authorized to be utilized "for the purpose of having the alcohol extracted therefrom."

In title 3 of the act, devoted to regulating the production and distribution of "industrial alcohol," the definition of which is the same as given in R. S. § 3248 (Comp. Stat. § 5982), we have further manifestation that the sections of the revenue law underlying the present indictment were intended to be kept in force. This title expressly authorizes the manufacture of alcoholic liquor. It contains provisions intended both to prevent the traffic in liquors for beverage purposes and to regulate its production, storage, and distribution for industrial purposes.

It takes cognizance of the storage in bonded warehouses of distilled spirits "fit for beverage purposes," and authorizes any such liquor "remaining in any bonded warehouse" on or before the going into effect of the Eighteenth Amendment, under regulations, to be "withdrawn therefrom either for denaturation at any bonded denaturing plant or for deposit in a bonded warehouse established under this act." Id. § 6. It provides that "industrial alcohol plants and bonded warehouses established under the provisions of this title" shall be exempt from the requirements of 41 specified sections of the Revised Statutes (not including 3296) and 15 designated sections of the Act of August 27, 1894, including sections 51 and 59 of that act. (Id. § 9). So far as R. S. § 3296, is concerned, its exclusion from the sections

declared to be not applicable establishes that at least for the purposes of title 3 such section is still in force. Furthermore—and this with reference to all of the excepted sections—it is to be noted that those not applicable are declared to be inapplicable only to the plants and warehouses established under that title of the act. Id. § 9. And it is not overemphasizing such limitations to suggest that the enumeration of the sections inapplicable to specified purposes indicates that they were legislatively considered consistent with even the provisions of title 3, because, if they had not been so considered, they would have been embraced within the repealing provisions of section 19 of that title, which provides:

"All prior statutes relating to alcohol as defined in this title are hereby repealed in so far as they are inconsistent with the provisions of this title."

That the provisions of the internal revenue acts relative to the taxing of alcoholic liquors, as well as the penalties denounced for violating them, were to remain in force is evidenced by sections 5, 13, 15, 16, and 18.

[3] Is the removal denounced by the sections underlying the present indictment a transportation within the meaning of the Enforcement Act? There are a number of sections in this act (sections 3, 6, 9, 10, 13, 14, 15, 26, 29, 34, and 37 of title 2, and sections 4, 6, 11, and 14 of title 3) in which the word "transportation" or its equivalent is used. These, the demurrant contends, indicate a legislative purpose to cover the entire subject of transportation, and that, therefore, the sections of the revenue law drawn into question have been superseded. This brings us to the question which in the last analysis is the one to be decided.

A perusal of these enumerated sections shows that none of them deals specifically with the subject-matter of the present indictment, viz. a removal of taxed distilled spirits from a government authorized warehouse without the payment of the tax. They carry no intent to supersede any of the earlier provisions designed to secure to the government the payment of revenue taxes. They are all intended to detect and prevent violations of the Eighteenth Amendment, and may be consistently treated as supplementary to such earlier laws. While the removal of liquors from a government warehouse, in a sense, is a transportation, these sections are not inconsistent with the earlier provisions covering removals from government warehouses. There is no repugnancy between them, and the later enactment must be held, as legislatively declared in the Enforcement Act (title 2, § 35) to be "in addition to existing laws."

Finally, it is contended that the lesser maximum sentence which the Enforcement Act authorizes for the illegal transportation of intoxicating liquors evinces a legislative purpose to supersede the earlier laws. Undoubtedly, if the offenses charged in the indictment are the same as denounced in the Enforcement Act, it, and not the earlier acts, would fix the limit of the punishment that could be imposed, and the earlier acts would be superseded to that extent. But none of the acts of transportation forbidden by the Enforcement Act are the same as denounced by these earlier laws and charged in the present indictment.

"The test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense, where two are defined by the statutes." Morgan v. Devine, 237 U. S. 632, 641, 35 Sup. Ct. 712, 59 L. Ed. 1153, and cases cited.

To transport liquor without the required permit (title 2, § 3), failure to make a permanent record of the amount and kind of liquor transported and the name and address of consignor and consignee, etc. (Id. § 10), failure to state on the containers the specified information (Id. § 14), and to transport such containers on which there is a known false statement (Id. § 15), are all made crimes and punishable under the Enforcement Act. However, the requirements of the Enforcement Act are not substitutional, but additional. All these might be fulfilled, and yet present no defense to the crimes charged in the indictment.

Failure to pay the tax on the liquor before removing it from the bonded warehouse, or to remove it during the absence of the storekeeper or without his knowledge, which are denounced by the earlier act, are a different class of offenses from those of transporting liquor without a permit, or without complying with the other requirements of the Enforcement Act, relative to transportation. And a conviction or acquittal of any or all of one class would not exempt the defendant from prosecution or conviction of any or all of the other class. Carter v. McClaughry, 183 U. S. 367, 22 Sup. Ct. 181, 46 L. Ed. 236; Gavieres v. United States, 220 U. S. 338, 31 Sup. Ct. 421, 55 L. Ed. 489; Diaz v. United States, 223 U. S. 442, 32 Sup. Ct. 250, 56 L. Ed. 500, Ann. Cas. 1913C, 1138; Ebeling v. Morgan, 237 U. S. 625;[1] Morgan v. Devine, 237 U. S. 632, 35 Sup. Ct. 712, 59 L. Ed. 1153, supra; United States v. Butt, 254 U. S. 38, 41 Sup. Ct. 37, 65 L. Ed. —, decided November 8, 1920; Bens v. United States (C. C. A. 2) 266 Fed. 152; United States v. Turner (D. C. W. D. Va.) 266 Fed. 248, supra; United States v. Sacein Rouhana Farhat (D. C. S. D. Ohio, E. D.) 269 Fed. 33, supra.

[4] No permit authorized to be given under the Enforcement Act would justify the removal of distilled spirits from a government warehouse without paying the tax imposed on such liquor—the crime denounced by R. S. § 3296, and made the basis of counts 1 and 2. Neither would the permit justify the removal of such liquors in the absence, etc., of the storekeeper in charge of such warehouse—the crime denounced by the pertinent sections of the act of 1894 underlying the third count. Back of the required permit, and of all the other requirements of the Enforcement Act relative to transportation, is the question (crucial in this case): Was the liquor removed from the government warehouse without paying the tax imposed thereon, etc.?

Turning, now, to the cases cited by the demurrant as authorities for a different conclusion from that here reached, United States v. Windham (D. C. E. D. S. C.) 264 Fed. 376; United States v. Yuginni (D. C. Or.) 266 Fed. 746; United States v. Puhac (D. C. W. D. Pa.) 268 Fed. 392; United States v. Stafoff (D. C. E. D. Mo. E. D.) 268 Fed. 417; The Goodhope (D. C. W. D. Wash. N. D.) 268 Fed. 694;

[1] 35 Sup. Ct. 710, 59 L. Ed. 1151.

United States v. Fortman (D. C. W. D. Okl.) 268 Fed. 873; United States v. One Haynes Automobile (D. C. S. D. Fla.) 268 Fed. 1003; also Ketchum v. United States (C. C. A. 8) 270 Fed. 416 (not mentioned by demurrant)—are cases deciding that sections of the Revised Statutes (revenue laws) other than those involved in the instant case were repealed by the Enforcement Act, viz. section 3242 (Comp. Stat. § 5965), carrying on liquor business without payment of tax; section 3257 (Comp. Stat. § 5993), distilling without payment of tax; section 3258 (Comp. Stat. § 5994), failure to register stills; sections 3260 (Comp. Stat. § 5997) and 3281 (Comp. Stat. § 6021), failure to bond distillery; section 3061 (Comp. Stat. § 5763) et seq. and 3450 (Comp. Stat. § 6352), forfeiting vessels, etc., used in violating law; section 3279 (Comp. Stat. § 6019), failure to place sign on distilleries; and section 3282 (Comp. Stat. § 6022), unlawfully making mash, etc.

The cases reaching a different conclusion concerning some of the same sections are United States v. Sohm (D. C. Mont.) 265 Fed. 910; United States v. Turner (D. C. W. D. Va.) 266 Fed. 248, supra; United States v. Sacein Rouhana Farhat (D. C. S. D. Ohio, E. D.) 269 Fed. 33, supra; United States v. Phillips, 270 Fed. 281. For other cases on cognate subjects, see Ex parte Ramsey (D. C. S. D. Fla.) 265 Fed. 950; United States v. One Essex Touring Automobile (D. C. N. D. Ga.) 266 Fed. 138; Corneli v. Moore (D. C. E. D. Mo. E. D.) 267 Fed. 456; Ketterer v. Lederer (D. C. E. D. Pa.) 269 Fed. 153, 1010; United States v. Kraus (D. C. S. D. N. Y.) 270 Fed. 578, 582; United States v. Holt (D. C. N. D. W. D.) 270 Fed. 639; Abbate v. United States (C. C. A. 9) 270 Fed. 735; Regal Drug Corporation v. Wardell, Collector, 273 Fed. 182; 31 Opinions of Attorneys General, 442.

In the Windham Case, as well as in Reed v. Thurmond (C. C. A. 4) 269 Fed. 252, supra, the principal reliance of demurrant, R. S. § 3296, was held to have been repealed by the Enforcement Act. In the former case that section was not directly involved, but was referred to as underlying other indictments then on the calendar for prosecution, and was used in the court's opinion as illustrating an earlier statutory denunciation which was superseded by the Enforcement Act.

In the Reed Case the indictment was laid on that section. From the opinion in that case it appears that Reed had in concealment, in a freight room of a railroad station, a quart of "contraband" whisky, on which no tax had been paid, and which a day or so previous to his arrest he "had obtained * * * 'from a man coming along changing trains' who had it in a suit case." From this recital it is clear that Reed was guilty of offenses fully covered by the Enforcement Act, viz. unlawfully obtaining and possessing whisky. But something more than that would have to be shown to bring his conduct within the grasp of section 3296, R. S.; for possession of liquor thus obtained raised no presumption that Reed removed, or knowingly aided the removal of the liquor from a bonded warehouse without the payment of the tax imposed thereon, or that he was guilty of any of the other denunciations of that section.

While these last two named cases clearly show that the learned judges who decided them were of the opinion that this section was repealed by the Enforcement Act, for the reasons given, I am constrained to hold otherwise.

The demurrer is overruled.

MARCONI WIRELESS TELEGRAPH CO. OF AMERICA v. DUFFY, Collector of Internal Revenue.

(District Court, D. New Jersey. May 31, 1921.)

Internal revenue ⇐19(1)—Tax on shares of corporation as transferred held proper.

Where plaintiff corporation, in furtherance of a consolidation, transferred assets to the R. corporation, in consideration of issuance by the R. Corporation of a certain number of shares of its stock to shareholders in plaintiff corporation, and such stock was issued and properly stamped, a further stamp tax, as in effect on a transfer from the plaintiff to its shareholders, was properly charged against plaintiff under Revenue Act 1918, subd. 4, Schedule A (Comp. St. Ann. Supp. 1919, § 6318p), taxing "right to subscribe for or to receive such shares."

At Law. Action by the Marconi Wireless Telegraph Company against Charles V. Duffy, Collector of Internal Revenue. On motion to strike the petition. Sustained.

Griggs & Harding, of Paterson, N. J. (John W. Griggs, of Paterson, N. J., of counsel), for plaintiff.

Wayne Johnson, of Washington, D. C. (John M. Sternhagen, of New York City, of counsel), for defendant.

RELLSTAB, District Judge. The plaintiff sues to recover $5,000 claimed to have been unlawfully exacted from it by the defendant, as stamp tax on certain issues of certificates of stock. The defendant moves to strike out the petition. The question thus raised is whether the transactions disclosed by the petition are subject to tax under the Revenue Act of 1918 (40 Stat. 1057, 1919 Supp. Comp. Stat. p. 1284), and calls for the interpretation of subdivision 4 of Schedule A of that act.

The transactions set out in the petition, in brief, are: The plaintiff, for the purpose of consolidating its property and business with certain properties and businesses of the General Electric Company, contracted to transfer its assets, with minor exceptions, to the Radio Corporation of America (hereinafter called Radio), in exchange for 2,000,000 shares each of Radio's preferred and common stock; that in the original agreement it was provided that "changes in form and procedure" were left to counsel of plaintiff and Radio, and that if they proposed "a definite method for the union of the two interests their recommendation * * * be carried out"; that before any of such stock had been issued to plaintiff "in pursuance of the reservation of authority to modify or change the said agreement" as plaintiff's board

of directors might propose, and upon their resolution so authorizing, it was agreed between plaintiff and Radio that Radio should issue its stock directly to such stockholders of plaintiff as desired to receive it, Radio to be credited as though the shares had been issued directly to plaintiff; that in accordance with such modified agreement Radio issued to sundry stockholders of plaintiff, who had surrendered their certificates of stock in the plaintiff company, Radio stock aggregating 238,095 shares each of its preferred and common stock, attaching to such shares the revenue stamps required by law; and that subsequently plaintiff was required by defendant to pay an additional tax upon the shares so issued direct to plaintiff's stockholders, amounting to the sum of $5,000, the stamps for which, upon the defendant's directions, were affixed to plaintiff's minute book, and canceled by the defendant despite the plaintiff's protest.

The pertinent part of the Revenue Act under which this disputed tax was imposed is:

"Capital stock, sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares of certificates of stock or of profits or of interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each $100 of face value or fraction thereof, 2 cents. * * * That in case of sale where the evidence of transfer is shown only by the books of the corporation the stamp shall be placed upon such books."

In considering the question at issue we must not ignore the substantial difference between a corporation and its stockholders. Gibbons v. Mahon, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. Ed. 525; Peterson v. Chicago, Rock Island & Pac. Ry. Co., 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 841; Lynch v. Hornby, 247 U. S. 339–344, 38 Sup. Ct. 543, 62 L. Ed. 1149; Eisner v. Macomber, 252 U. S. 189, 214, 40 Sup. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570. The property sold to Radio was the plaintiff's property, and could be sold only by it. To effect the sale the consent of the stockholders was necessary; but it, and not the stockholders, held the legal title, and it alone could vest such title in the purchaser. The stockholders eventually would share in the consideration of the sale, but this could be brought about only by means of dividends or similar methods of distribution. The stock issued by Radio to the plaintiff's stockholders was the consideration for the property sold to it by the plaintiff. Had the plaintiff received the stock, as seemingly was originally contemplated, and disposed of it, whether to its stockholders or to other parties, a tax such as was here imposed would have had to be paid. Undoubtedly it was within the power of plaintiff, upon obtaining the necessary authority, to direct Radio to issue the stock to its (plaintiff's) stockholders. But this authority—resolution of the plaintiff's board of directors—was nothing less than a transfer of plaintiff's rights to such shares of stock, and is covered by one of the quoted methods of transferring shares or cer-

tificates of stock taxable under subdivision 4, viz. a transfer of "rights to subscribe for or to receive such shares."

The case of McClain v. Fleshman, 106 F. 880, 46 C. C. A. 15, decided by the Circuit Court of Appeals of this circuit, is not, as contended by plaintiff, an authority for a different conclusion. In that case agreements to buy and sell stock on margin were considered in relation to the stamp schedule of the War Revenue Act of 1898. The memoranda evidencing the agreements to buy or sell had proper tax stamps attached thereto. These agreements did not call for or contemplate a delivery or resale of the stock. The transactions were purely speculative. The parties were to settle by paying the difference between the price agreed upon and the market price at the time of settlement, and the settlement was to be effected by the surrender of the agreements. The Commissioner of Internal Revenue contended, as appears from the court's opinion (106 Fed. 881, 46 C. C. A. 16), "that these settlements necessarily involved agreements to resell the stock"; that "new memoranda, bearing tax stamps, should have been issued"; and thereupon exacted the additional tax made the basis of that suit. The court held that these settlements did not involve agreements for a resale of the stock, and that no agreement to that effect could be inferred for the purpose of extending the provisions of the Revenue Act, so as to justify the additional tax.

That case differs radically from the instant one. In that case no transfer at all was contemplated or took place. In the present case the stockholders could not have received the stock without transfers from the plaintiff. Such transfers having been effected, the challenged tax was justified, and the stamps were properly affixed to the plaintiff's minute book, as it evidenced the transfer.

The motion is sustained.

MIDDLETON & CO. v. UNITED STATES.

(District Court, E. D. South Carolina. May 19, 1921.)

Courts ⇐271, 274—Suit by alien or foreign corporation against United States may be brought in any district.

Under Act March 9, 1920, providing for suits in admiralty against vessels of the United States, and that an election to proceed in rem shall not preclude the libelant from obtaining relief in personam in the same suit, the provision of section 2, that "such suits shall be brought in the District Court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found," does not apply to a suit by an alien or a foreign corporation having no place of business in the United States, in which case the libelant may be considered, for the purposes of the suit, to reside in any district.

In Admiralty. Suit by Middleton & Co., for themselves and as agents for the Teikoku Menkwa Kabushiki Kaisha, a Japanese corpora-

tion, against the United States. On motion to dismiss libel for want of jurisdiction. Denied.

E. Willoughby Middleton, and Miller, Huger, Wilbur & Miller, all of Charleston, S. C., for libelants.

J. Frank Staley, Sp. Asst. Atty. Gen., of Washington, D. C., and J. Waties Waring, Asst. Dist. Atty., of Charleston, S. C.

SMITH, District Judge. The libel in this case was filed in this court on the 25th of February, 1921, by Middleton & Co., for themselves and as agents for and on behalf of Teikoku Menkwa Kabushiki Kaisha, a Japanese corporation. The answer has been filed to the libel, and a motion has now been made, on behalf of the United States, upon the face of the libel and answer and the statements in the affidavit of Charles F. Middleton, filed May 18, 1921, styled "Jurisdictional Question Supporting Affidavit," to dismiss the libel for want of jurisdiction.

The libel is filed under the terms of the act of Congress approved March 9, 1920 (41 Stat. 525), styled:

"An act authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions and for other purposes."

The motion to dismiss is made upon the ground that it is provided in section 2 of said act that the suits thereby permitted must be brought in the District Court of the United States for the district in which the parties so suing or any of them reside, or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found.

The motion to dismiss is based upon the ground that the only real party in interest stated as libelant is the Japanese corporation, and as that corporation is not a resident, and has no place of business in any district of the United States, and certainly not in the Eastern district of South Carolina, any suit must be brought in the district in which the vessel or cargo charged with liability is found. It is claimed in addition that, the libelants having expressly declared in the libel that they elected that the suit should proceed in accordance with the principles of libels in rem, the suit in such case can only be brought in a district in which, if the suit had been brought in rem, the vessel could have been seized, and as none of the vessels mentioned in the libel as being responsible for the damages claimed in the libel are within the district of South Carolina, suit could only be brought, if brought in rem, in some district in which the vessel could be seized.

The bill of lading attached to the libel, which is the contract constituting the basis of the rights claimed in this case, is executed by the American Shipping Corporation, signing as agents for the owners, to wit, the United States. Neither the character, location, or place of residence of this corporation is alleged in the libel, nor the existence of its agency to bind the United States, which, under the allegations of the libel, was the owner of the ships mentioned. If duly authorized to bind the United States, then a suit could be brought under the contract by

means of a libel either in personam or in rem, under the provisions of the second section of the act mentioned.

In this case the libelants have expressly elected that the suit shall proceed as if it were a proceeding in rem. At the same time, by section 3 of the act, it is provided that an election so to proceed shall not preclude the libelants in any proper case from seeking relief in personam in the same suit. If Middleton & Co. have any interest under the libel, then, as they reside and have their principal place of business in the Eastern district of South Carolina, the libel is well filed in that district, and it may be that that should be determined by the claim of the libelant, notwithstanding the ultimate decision may be against such claim.

Assuming, however, that the Japanese corporation is the party alone interested, then, inasmuch as it neither resides nor has any principal place of business in any district in the United States, it would be impossible for it to sue, under the construction placed upon the act by the counsel for the government, in any district in the United States, save one in which the vessels might be found. If no vessel can be found within the United States, then no matter how meritorious the claim of the alien may be, whether in rem or in personam, it would be impossible for him to sue.

This would not appear to be in accordance with the intention of the statute. Under the principles to be deduced from preceding decisions of the federal courts in analogous cases, it would appear that, where the provision of the act is that the suit must be brought in the district of the residence of one of the parties, then in the case of an alien defendant such restriction does not apply, as that would mean that, unless the alien sued should be found capable of service in the district of the residence of the citizen desiring to sue him, he could not be sued at all. The principle would seem to be that an alien may be considered for the purposes of jurisdiction, if he enters the United States, or is brought into it, for the purposes of suit, to reside in any district.

If this is a proceeding in personam, brought on behalf of the Japanese corporation alone, an alien corporation, under the principles of these decisions it would appear that it could sue in any district in the United States.

Again, the language of the act is that the suit shall be brought in the District Court for the district in which the parties so suing, or any of them, reside. If Middleton & Co. are authorized to sue on behalf of the Japanese corporation, it would seem that they are the parties suing, although they may be suing on behalf of the Japanese corporation.

The motion to dismiss for want of jurisdiction is accordingly refused, but without prejudice to the defendant to renew it at the trial upon the testimony submitted to the court.

At the same time, leave is hereby given to the libelants, if they see fit, within five (5) days from the date of this order, to amend their libel so as by proper allegations to make it a proceeding in personam as well as in rem, serving within the time limited a copy of the libel in full as amended upon the United States Attorney for this district.

SILVEY et al. v. COMMISSIONERS OF MONTGOMERY COUNTY, OHIO, et al.

(District Court, S. D. Ohio, W. D. June 1, 1921.)

No. 29.

1. **Navigable waters ⊂=26(½)—One not injured in a manner different from the general public cannot complain of construction of dam without authority of Congress or Secretary of War.**
   Though storage dams constructed over the Great Miami river under the Ohio Conservancy Law were not authorized by act of Congress or Secretary of War, the United States only or some individual injured differently from the general public in degree and kind, can complain that the erection was in violation of Act March 3, 1899, § 10 (Comp. St. § 9910), on theory the river was navigable.

2. **Constitutional law ⊂=233, 290(1)—Conservancy Law held not to deprive taxpayer of property without due process, or deny equal protection.**
   The Conservancy Law of Ohio does not, as to a taxpayer of the city of Dayton, work a deprivation of property without due process of law, or deny equal protection of the law.

3. **Constitutional law ⊂=61—Ohio Conservancy Law, providing for organization and membership of common pleas court in district including more than one county, not an unlawful delegation of legislative power.**
   The Ohio Conservancy Law, by providing for the organization and membership of the common pleas court in a district embracing territory within more than one county, and conferring jurisdiction and authority on such court to establish conservancy districts, is not invalid under the state and federal Constitutions as unlawfully delegating legislative power to such court.

4. **Courts ⊂=366(30)—Propriety of authorizing local court to frame conservancy district is state question.**
   The propriety of delegating authority to a local court to frame a conservancy district is a state question.

5. **Constitutional law ⊂=127—Conservancy Law, intended to prevent floods, not a violation of home rule charter.**
   Though the city of Dayton, in 1913, prior to the passage of the Conservancy Law, and pursuant to Const. Ohio, art. 18, § 7, adopted a home rule charter, the powers conferred upon the city in view of section 3, article 18, are not only purely local and municipal, but are purely governmental, and the charter is not a contract which would render the subsequently enacted Conservancy Law, designed to prevent floods in that district, invalid as violating the contract.

6. **Municipal corporations ⊂=79—By granting home rule charter, state does not deprive itself of the right to exercise its police power.**
   In view of Const. Ohio, art. 18, § 3, the state does not, as to municipalities adopting, pursuant to section 7, a home rule charter, lose its right to exercise police and sanitary regulations; section 3 merely allowing the municipality to enforce local, police, and sanitary regulations not in conflict with the general law.

7. **Statutes ⊂=35½—An emergency act is not subject to referendum.**
   The Ohio Conservancy Law, declared to be an emergency act, necessary for the immediate preservation of public health and safety, by protecting cities, villages, farms, and highways from inundation, is not subject to the referendum authorized by Const. Ohio, art. 2, § 1e, or the charter of the city of Dayton or Const. art. 2, § 1d, recognizing the necessity of exempting emergency acts from referendum.

8. Constitutional law ⊂=254, 290(1)—Provisions of Ohio Conservancy Law for appointment of officers or assessment are not invalid under Fourteenth Amendment.

Const. U. S. Amend. 14, does not deprive the state of Ohio of the power of determining whether officers of the conservancy district shall be appointed or elected by the people, or prescribing the duties to be performed, nor does such amendment invalidate a tax levy, or an assessment lawfully made by such officers for a duly authorized improvement.

9. Courts ⊂=284—Suit for injunction, based on federal question decided by previous decisions, will be dismissed.

Following the familiar practice of the Supreme Court, for the purpose of discouraging frivolous appeals and writs of error dependent on the existence of a federal question, to dismiss the same without consideration of the merits, if the question has been explicitly foreclosed by previous decisions, so as to leave no room for controversy, a suit for injunction involving only frivolous federal questions will be dismissed.

10. Courts ⊂=262(4)—Where it was doubtful whether officers of district were state officials, application for temporary injunction, under Judicial Code, § 266, will merely be dismissed.

It being doubtful whether officers of an Ohio conservancy district were state officials, in such a sense as to justify a hearing or an application for temporary injunction, pursuant to Judicial Code, § 266, the federal District Court as constituted under such section, consisting of at least one Circuit and two District Judges, will merely deny an application for temporary injunction, and though complainant appeared entitled to no relief, will leave the question of the denial of the bill for determination of the judge of the district.

In Equity. Suit by William L. Silvey and others against the Commissioners of Montgomery County, Ohio, and others. On application for temporary injunction. Denied.

Alexander R. Hawthorne, of Troy, Ohio, for plaintiffs.

John A. McMahon and O. B. Brown, both of Dayton, Ohio, for defendants.

Before DENISON, Circuit Judge, and SATER and PECK, District Judges.

PER CURIAM. The plaintiff, a taxpayer of the city of Dayton, Ohio, and a citizen of Ohio, for himself and others similarly situated, assails the constitutionality of the Conservancy Law of Ohio, entitled:

"An act to prevent floods, to protect cities, villages, farms and highways from inundation, and to authorize the organization of drainage and conservation districts." 104 O. L. 13.

The city of Dayton, Ohio, certain of its officers, the Miami Conservancy District, and several railroad corporations are made defendants. A hearing on the plaintiff's application for a temporary injunction has been had in accordance with the requirements of section 266 of the Judicial Code (Comp. St. § 1243).

[1] The claim is vaguely made that the construction of storage dams by the Miami Conservancy District across the Great Miami river and its tributaries and the Miami and Erie Canal has not been affirmatively authorized by Congress, that no plans were submitted to or recommended by the Chief of Engineers or authorized by the Secretary

of War for the building of such dams, and that therefore their erection is in violation of section 10 of the Act of March 3, 1899, 30 Stat. 1151 (section 9910, Comp. Stat.). In Koehne v. City of Dayton, 97 Ohio St. 341, 119 N. E. 651, it was held that the Great Miami river is not a navigable stream at any of the points at which dams are in process of erection, and that neither such dams nor the public works incident to future protection against floods in any wise impede or impair navigation; but, aside from the conclusion thus reached by the state court, the fact still remains, if the plaintiff's contention be true, that the only party entitled to complain of the action taken is the United States, unless the plaintiff is individually injured differently from the general public in degree and kind. Mayor of Georgetown v. Alexandria Canal Co., 12 Pet. 91, 98, 9 L. Ed. 1012; Carver v. San Pedro, L. A. & S. L. R. Co. (C. C.) 151 Fed. 334. The plaintiff has not brought himself within the prescribed exception.

The act in question is charged to be obnoxious in 6 different respects to the Constitution of the United States and to some 37 provisions of the Constitution of Ohio. Most of the objections urged are unimportant and even frivolous. Only those will be considered which are deemed worthy of notice.

[2] The bill charges that the act deprives the plaintiff and other similarly situated property owners of their property without due process of law and denies them the equal protection of the law. The fallacy of this claim has been conclusively settled by Miami County v. Dayton, 92 Ohio St. 215, 110 N. E. 726, Orr v. Allen (D. C.) 245 Fed. 486 (a three-judge case), and Orr v. Allen, 248 U. S. 35, 39 Sup. Ct. 23, 63 L. Ed. 109. See, also, O'Neill v. Leamer, 239 U. S. at page 253, 36 Sup. Ct. 54, 60 L. Ed. 249.

[3, 4] The averment is made that the Conservancy Act, by providing for the organization and membership of the common pleas court in a district embracing territory within more than one county, and by conferring jurisdiction and authority on such court to establish conservancy districts, delegates legislative power to such court, and thereby violates both the state and the federal Constitution. This contention was decided adversely to plaintiff in Snyder v. Deeds, 91 Ohio St. 407, 110 N. E. 1068, and Miami County v. Dayton, 92 Ohio St. 215, 234, 235, 110 N. E. 726. Drainage or conservancy districts may, like school districts, be established by legislative sanction. The power conferred on the court of common pleas is not unlike that delegated to township trustees, county commissioners, and other bodies, authorizing them to organize districts for the construction of public improvements and for taxing or assessing the lands benefited thereby. Such enactments have almost uniformly been held to be a delegation of legislative power, not prohibited by the organic law. The propriety of delegating authority to a local court to frame a conservancy district is, in any event, a state question. O'Neill v. Leamer, 239 U. S. at pages 247, 248, 253, 36 Sup. Ct. 54, 60 L. Ed. 249.

[5] On August 12, 1913, prior to the passage of the Conservancy Law, the city of Dayton, by virtue of section 7, art. 18, of the state

Constitution, providing for home rule by municipalities, adopted a charter securing to itself local self-government. The plaintiff claims that by the adoption of such charter the city and the state of Ohio became bound in contract, whereby there were vested in the city's officers all matters of local improvements and taxation, and that legislative enactments involving the exercise of the police power, and seeking to guard the public health, safety, convenience, and welfare, are without application to such municipality. It is averred that the officials charged with the execution of the provisions of the Conservancy Act are appropriating property of and within the city and availing themselves of funds realized by the taxation of such property, and in so conducting themselves are impairing the obligations of the contract existing between the city and the state, and consequently violating both the state and the federal Constitutions. If the officials of the conservancy district are abusing the power conferred on them by statute, that fact cannot be considered as action of the state forbidden by the federal Constitution. It is also clear that the home rule provisions of the Ohio Constitution authorize and the adoption of the Dayton charter thereunder constitutes governmental and not contractual action. Section 3 of article 18 provides that—

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary, and other similar regulations, as are not in conflict with general laws."

The powers conferred upon chartered cities by the provisions of sections 3 and 7, art. 18, are not only purely local and purely municipal, but purely governmental. State v. Cooper, 97 Ohio St. 86, 91, 119 N. E. 253; State v. French, 96 Ohio St. 172, 184, 117 N. E. 173, Ann. Cas. 1918C, 896; State v. Lynch, 88 Ohio St. 71, 102 N. E. 670, 48 L. R. A. (N. S.) 720, Ann. Cas. 1914D, 949. These cases cannot be reconciled with the theory of a contractual relation between the city and the state. Prior to the decision of Miami County v. Dayton, the Supreme Court not only knew that the city of Dayton had adopted a charter in pursuance of the home rule provisions of the Constitution, but had considered certain features of such charter. State v. Edwards, 90 Ohio St. 305, 107 N. E. 768. In the Dayton Case the court found no inconsistency in the coexistence and contemporaneous operation of the Conservancy Act and the home rule method of government that may have been adopted by any municipality within the bounds of the conservancy district, and expressly held, in 92 Ohio St. at page 236, 110 N. E. 732, that the home rule doctrine in no wise applies to the creation of drainage or conservancy districts where the power to be exercised is peculiarly a state, sovereign, police power.

[6] The state could not bargain with or deprive itself of the right properly to exercise its police power, nor could the city of Dayton bind itself by a contract which is or might become injurious to the peace, order, health, or welfare of its people. Telephone Co. v. Cleveland, 98 Ohio St. 358, 365, 121 N. E. 701; Stone v. Mississippi, 101 U. S. 814, 819, 25 L. Ed. 1079. The general laws referred to in sec-

tion 3 of article 18 are those relating to police, sanitary, and other similar regulations, which operate uniformly throughout the state. The enactment of such general laws still rests in the Legislature. They provide for the peace, health, welfare, and convenience of all the people, entirely separate and distinct from and without reference to any of the state's political subdivisions. Fitzgerald v. Cleveland, 88 Ohio St. 338, 359, 103 N. E. 512, Ann. Cas. 1915B, 106.

[7] The act, as is permitted by section 1d, art. 2, of the Constitution of Ohio, was declared to be an emergency act, necessary for the immediate preservation of the public health and safety (section 79), and was not, therefore, as claimed by the plaintiff, subject to a referendum authorized either by section 1e, art. 2, or by the charter of the city of Dayton. The reasons given in section 79 of the act for declaring it an emergency law were held sufficient in Snyder v. Deeds, 91 Ohio St. 407, 408, 110 N. E. 1068. In view of such declaration, the ill-defined insistence that the law should have been submitted to a referendum is without merit. In adopting the initiative and referendum feature of government, the state recognized the absolute necessity of exempting therefrom laws of an emergency nature involving the general health, peace and safety. Shryock v. Zanesville, 92 Ohio St. 375, 385, 110 N. E. 937; Billings v. Railway Co., 92 Ohio St. 478, 484, 485, 111 N. E. 155.

[8] The Fourteenth Amendment to the federal Constitution does not deprive the state of the power of determining whether the officers of the conservancy district shall be appointed or be elected by the people, or the duties to be performed by them; nor does it invalidate a tax levy or an assessment lawfully made by such officers for a duly authorized improvement, or deprive the district as a political subdivision of the power to levy and collect taxes or assessments to pay the amount charged against property or political subdivisions, such as municipalities, counties, or townships, within such district. Soliah v. Heskin, 222 U. S. 522, 32 Sup. Ct. 103, 56 L. Ed. 294.

Without entering upon a further detailed consideration of the case, it may be said that every substantial objection now urged against the Conservancy Act and depending upon the federal or state Constitution or laws has been decided adversely to the plaintiff, as will appear from Miami County v. Dayton, 92 Ohio St. 215, 110 N. E. 726; Snyder v. Deeds, 91 Ohio St. 407, 110 N. E. 1068; Orr v. Allen (D. C.) 245 Fed. 486, affirmed 248 U. S. 35, 39 Sup. Ct. 23, 63 L. Ed. 109; Koehne v. City of Dayton, 97 Ohio St. 341, 119 N. E. 651, and from the unreported cases of County of Miami v. Deeds, No. 15,347, Koehne v. Miami Conservancy District, No. 15,779, Blevins v. Miami Conservancy District, No. 15,965, Hawthorne v. City of Troy, No. 16,653, and State ex rel. Silvey and Blevins v. Miami Conservancy District, No. 16,699, 130 N. E. 943, all decided by the Supreme Court of Ohio. Rarely has a law been found which has been assailed with such frequency or from so many angles. It has withstood every test. The Ohio courts for some time past, as evidenced by many cases, have treated its constitutionality as settled beyond controversy, some

of which cases are Koehne v. City of Dayton, 97 Ohio St. 341, 119 N. E. 651; Miami Conservancy District v. Mitman, 100 Ohio St. 315, 125 N. E. 875; Miami Conservancy District v. Bowers, 100 Ohio St. 317, 125 N. E. 876; State ex rel. Silvey v. Conservancy Dist. Co., 100 Ohio St. 483, 128 N. E. 87; State v. Valentine, 94 Ohio St. 440, 114 N. E. 947; County of Miami v. Deeds, 5 Ohio App. 408; Miami Conservancy District v. Mitman, 11 Ohio App. 106; Brady v. Miami Conservancy District, 11 Ohio App. 240; Miami Conservancy District v. Shade, 12 Ohio App. 169; Miami Conservancy District v. Bowers, 12 Ohio App. 405.

[9] The views above expressed require a denial of injunctive relief, because the bill not only fails to state a case warranting the same, but the claims of federal jurisdiction therein set forth are frivolous. It is familiar practice for the Supreme Court, for the purpose of discouraging frivolous appeals and writs of error which depend on the existence of a federal question, to dismiss the same without considering the merits of the question, if it has been so explicitly foreclosed by previous decisions as to leave no room for real controversy. Leonard v. Vicksburg, etc., R. R. Co., 198 U. S. 416, 422, 25 Sup. Ct. 750, 49 L. Ed. 1108; Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 311, 23 Sup. Ct. 123, 47 L. Ed. 190; Blythe v. Hinckley, 180 U. S. 333, 338, 21 Sup. Ct. 390, 45 L. Ed. 557; Chanute City v. Trader, 132 U. S. 210, 10 Sup. Ct. 67, 33 L. Ed. 345.

[10] Owing to the existence of a serious doubt as to whether the conservancy district officers are state officers in such a sense as to justify a hearing under section 266, Judicial Code, the court as constituted under this section will not go further than to deny an injunction. If the motion to dismiss the bill is to be granted, so as to make a final order, the hearing of such motion and the making of such order will be for the judge of the district.

Petition of EASURK EMSEN CHARR.

(District Court, W. D. Missouri, W. D. April 16, 1921. On Rehearing, June 6, 1921.)

No. 2453-M.

1. Aliens ⟸61—Korean is not a "white person," within naturalization laws.

Generally speaking, free white persons, within the naturalization laws, are members of the white or Caucasian race, as distinct from the black, red, yellow, and brown races, and it clearly does not include a Korean, who is admittedly of the Mongol family.

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

2. Aliens ⟸65—Purpose of 1918 amendment to Naturalization Act was to relieve service men from delays in procedure.

The primary purpose of the amendment of Act June 29, 1906, § 4, subd. 7, which dealt with procedure for naturalization, not with eligibility, by Act May 9, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4352 [7]).

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authorizing naturalization of Filipinos and Porto Ricans who had served in United States forces, and providing that any alien serving in such forces during the present war could be naturalized without the preliminary declaration, was to reward aliens who had entered the service by admitting them to citizenship without many of the slow processes, formalities, and strictness of proof required by the existing naturalization law.

3. Aliens ⟸65—**Amendment of naturalization Act in 1918 did not authorize naturalization of Korean, who served in army.**

Act May 9, 1918, amending Act June 29, 1906, § 4, subd. 7 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4352 [7]), so as to authorize naturalization of Filipinos and Porto Ricans who served in the military forces of the United States, and permitting naturalization of all aliens who had so served, without compliance with many formalities required of others, section 2 (section 4352aa) of which amending statutes repealed inconsistent acts, with the proviso that it should not repeal or enlarge Rev. St. § 2169 (Comp. St. § 4358), limiting naturalization to free white persons and persons of African descent, except as specified in subdivision 7, did not enlarge the right to naturalization, except in the cases of Filipinos and Porto Ricans, and therefore did not authorize the naturalization of a Korean, who had been honorably discharged after service in the United States army during the World War.

4. Aliens ⟸61—**Naturalization Act of 1916 did not impliedly repeal restriction of naturalization to white persons.**

Rev. St. § 2169 (Comp. St. § 4358), restricting the right of naturalization to free white persons and persons of African descent, was not impliedly repealed by Act June 29, 1906, authorizing admission to citizenship of persons, not citizens, who owe allegiance to the United States, which was enacted to permit the naturalization of citizens of the Philippine Islands and of Porto Rico, who could not theretofore be naturalized, because the naturalization laws applied only to aliens and required a renunciation of former allegiance.

5. Aliens ⟸65—**Selective Service Act not intended to include aliens not eligible to naturalization, and induction into service did not create eligibility.**

The draft law did not contemplate the incorporation into the forces of the United States those not eligible to citizenship, and the fact that such may have been inducted into the service through voluntary enlistment or inadvertence of draft boards cannot affect the purpose of Congress to permit naturalization only of those previously eligible by the amendment of a naturalization act relating to those who had served in the United States forces during the World War.

On Rehearing.

6. Aliens ⟸65—**Appropriation Act of 1919 did not authorize naturalization of Korean who had served in army.**

Provision of Sundry Civil Appropriation Act July 19, 1919, giving to any alien who served in the forces of the United States during the World War the benefits of Act June 29, 1906, § 4, subd. 7, as amended by Act May 9, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4352 [7]), which subdivision authorized naturalization of aliens who had served during the World War without many of the formalities required of other aliens, was not intended to and did not relax the provision of prior amendment, under which naturalization was limited to Filipinos and Porto Ricans in addition to free white persons and Africans, and therefore did not authorize the naturalization of a Korean who served in the army.

In the matter of the petition of Easurk Emsen Charr for naturalization. Petition denied.

Cameron L. Orr, of Kansas City, Mo., for petitioner.

M. R. Bevington, of St. Louis, Mo., and C. A. Ramsey, of Kansas City, Mo., for the United States.

VAN VALKENBURGH, District Judge. The petitioner is a native of Korea, owing allegiance to and a subject of the Mikado of Japan, a resident of Parkville, Mo., as a student of Park College. He was drafted into the United States army, serving therein from April 15, 1918, to December 28, 1918, receiving an honorable discharge from such service. His service was at military training camps within the United States. His educational qualifications, character, and record of military service are good. His naturalization is not opposed on personal grounds, but upon the contention that all members of his race are barred from naturalization under the provisions of section 2169 of the Revised Statutes of the United States (Comp. St. § 4358). He seeks to be naturalized under the provisions of subdivision 7 of section 4 of the Act of June 29, 1906, as amended by the Act of May 9, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4352[7]), and by the subsequent Act of July 19, 1919 (41 Stat. 222). Section 2169, imposing limitations upon eligibility for naturalization, reads as follows:

"The provisions of this title [of naturalization] shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent."

The applicant is admittedly neither of African nativity nor of African descent. The question at issue is whether he is a white person within the meaning of this section, and, if not, whether he is still entitled to citizenship because of the alleged exceptions made by the acts of Congress to which reference has been made.

[1] The meaning of section 2169 has become so far clarified by late judicial decisions that we are confronted by no embarrassment in determining the question of color in so far as that controls. In ex parte Dow (D. C.) 211 Fed. 486, and In re Dow (D. C.) 213 Fed. 355, it was held that the words do not mean a person white in color, nor do they designate racial distinction, meaning Caucasian or Indo-European, but are to be construed rather as a geographical term, referring to the peoples who were commonly known in the United States as those inhabiting Europe, and whose descendants, at the time of the passage of the act of 1790 (1 Stat. 103), formed the inhabitants of the United States, excluding Africans. In those cases, a Syrian from the Lebanon district—that is to say, from that part of the Mediterranean coast in Asia occupied in ancient times by the Phœnicians—was denied admission to citizenship upon the ground that he was not a free white person within the meaning of section 2169. The holding in those cases was rejected by the Circuit Court of Appeals for the Fourth Circuit in the same entitled case. 226 Fed. 145, 140 C. C. A. 549. In accordance with numerous holdings the term includes, as commonly understood, all European races and those Caucasians belonging to the races around the Mediterranean Sea, whether they are considered as fair whites or dark whites, and though certain of the eastern and southern European races are technically classified as of Mongolian or Tartar origin. Generally

speaking, "free white persons" includes members of the white or Caucasian race as distinct from the black, red, yellow, and brown races.

Whether or not historically the term "Caucasian" is accurate as a designation of the white race, it is a term which appeals to common understanding and to that of the lawmakers with practical definiteness, and the term "white person" may now be said to have a well understood meaning. In the case at bar we are not troubled by close refinements of definition, either as to race, color, or geographical location. The petitioner is a Korean, admittedly of the Mongol family. Whatever their precise shade of color may be defined to be, they are confessedly not white persons, either in fact or in accordance with common understanding, and they are about as far removed from Europe and the Mediterranean Sea as could well be imagined. If, then, the applicant is eligible to be admitted to citizenship in this country, it must be because of the provisions of the amendatory acts to which reference has been made.

So much of subdivision 7 of section 4 of the Act of June 29, 1906, as amended by the Act of May 9, 1918, as is material to this discussion, reads as follows:

"Any native-born Filipino of the age of twenty-one years and upward who has declared his intention to become a citizen of the United States and who has enlisted or may hereafter enlist in the United States Navy or Marine Corps or the Naval Auxiliary Service, and who, after service of not less than three years, may be honorably discharged therefrom, or who may receive an ordinary discharge with recommendation for reenlistment; or any alien, or any Porto Rican not a citizen of the United States, of the age of twenty-one years and upward, who has enlisted or entered or may hereafter enlist in or enter the armies of the United States, either the regular or the volunteer forces, or the national army * * * may, on presentation of the required declaration of intention petition for naturalization without proof of the required five years' residence within the United States; * * * 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; * * * 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 hereby required before filing his petition for naturalization in the office of the clerk of the court."

Section 2 of the Act of May 9, 1918 (section 4352aa) provides that:

"All acts or parts of acts inconsistent with or repugnant to the provisions of this act are hereby repealed; but nothing in this act shall repeal or in any way enlarge section twenty-one hundred and sixty-nine of the Revised Statutes, except as specified in the seventh subdivision of this act and under the limitation therein defined. * * * That as to all aliens who, prior to January first, nineteen hundred, served in the armies of the United States and were honorably discharged therefrom, section twenty-one hundred and sixty-six of the Revised Statutes of the United States shall be and remain in full force and effect, anything in this act to the contrary notwithstanding."

[2] The purpose of this act is well understood. It was to reward those aliens who had entered the military or naval service of the United States, as therein described, by admitting them to citizenship without

many of the slow processes, formalties, and strictness of proofs which were rigidly provided and enforced under the law affecting naturalization as it existed then, and as it exists now. The amendments made were not to the title as a whole, but primarily to section 4 of the Act of June 29, 1906, 34 Stat. 596. This section deals, not with persons eligible to become naturalized, but with the procedure to be taken and the showing to be made by those elsewhere defined to be eligible. This in itself is significant in its bearing upon the specific interpretation we are required to make.

However, in the act of May 9, 1918, it was provided that any native-born Filipino of the age of 21 years, who has declared his intention to become a citizen of the United States, and any Porto Rican not a citizen of the United States of the age of 21 years and upward, who had enlisted, or might thereafter enlist, generally speaking, in the military or naval service of the United States, might become naturalized in the manner therein prescribed. It makes no other reference to the racial or geographical status of any person contemplated by the amendment. The act also provides that "any alien" who might thus enlist or enter the military or naval service of the United States may be naturalized in like manner. Section 2 of the amending act, as we have seen, expressly provides that—

"Nothing in this act shall repeal or in any way enlarge section twenty-one hundred and sixty-nine of the Revised Statutes except as specified in the seventh subdivision of this act and under the limitation therein defined."

The government contends that this limits the privilege to those races otherwise eligible to naturalization, while the petitioner claims that the privilege embraces all aliens of whatever race provided they have rendered the military or naval service specified.

[3] The question, in some of its aspects, at least, and in those which I believe control the decision in this case, is not a new one. Section 2166 of the Revised Statutes of 1878 was a provision of the same general purpose and import. Its scope was unlimited in terms; but standing, as it did, in the same title with section 2169, it was ruled to be limited by the sweeping provisions of the latter section. In re Buntaro Kumagai (D. C.) 163 Fed. 922. A statute of like import was passed by Congress, and approved July 26, 1894 (28 Stat. 124). A Japanese alien asked to be admitted as a citizen of the United States under the provisions of this act. The application was denied. Bessho v. United States, 178 Fed. 245, 101 C. C. A. 605.

[4] Incidentally it has been urged that section 2169 was repealed, by implication, by the act of June 29, 1906 (34 Stat. 596). The contention has uniformly been rejected, and, notably, in cases involving Filipinos. In re Alverto (D. C.) 198 Fed. 688; In re Rallos (D. C.) 241 Fed. 686; In re Lampitoe (D. C.) 232 Fed. 382; United States v. Balsara, 180 Fed. 694, 103 C. C. A. 660. The act of June 29, 1906, provided that the naturalization laws shall apply to authorize the admission to citizenship of all persons not citizens who owe allegiance to the United States, and who may become residents of any state or organized territory of the United States, on certain conditions. This was done

to make possible the naturalization of citizens of the Philippine Islands and of Porto Rico, who were theretofore generally excluded because, first, the naturalization laws of the United States applied only to aliens, and, second, they required a renunciation of former allegiance. It was contended that this provision of the act of 1906 removed the inhabitants of those islands from the limitation of section 2169. A native of the Philippine Islands applied for citizenship upon that ground. Ethnologically he was found to be one-fourth white and three-fourths brown or Malay. His application was denied for the reason that he was not a white person, and section 2169 controlled and limited the provisions of the act of 1906 as part of the general naturalization statute of the United States. In re Alverto, supra.

It should be borne in mind that the policy of our law, from 1802 down to the present time, has had in view the prevention of all aliens, not free white persons, from becoming citizens. The first exception was introduced by the act of July 14, 1870 (Comp. St. § 4358), at which time persons of African nativity and African descent were included, in view, as has been stated, of the peculiar situation of inhabitants in this country of that race. The revisers of the laws of the United States, at the first session of the Forty-Third Congress from 1873 to 1874, inadvertently omitted the words "free white persons" from section 2169; but this was immediately corrected, upon discovery, by Act of February 18, 1875, entitled "An act to correct errors and to supply omissions in the Revised Statutes of the United States," and the language of that section was restored to its present reading. The repealing section of the act of 1906 did not include section 2169, and the present act of 1918 expressly preserves it in force, "except as specified in the seventh subdivision of this act and under the limitation therein defined." The history of legislation upon this subject convincingly demonstrates the purpose of Congress to limit applicants for naturalization to free white persons and those of African nativity and descent.

We have, then, to consider the meaning of the language last quoted. What are the specifications referred to in the seventh subdivision, and what is the limitation therein defined? As has been said, the only reference to race contained in that section was as to Filipinos and Porto Ricans. For this reason, it may well have been deemed necessary, or at least expedient, to reaffirm the binding force and effect of section 2169. It has already been shown that Filipinos, in certain cases, have been adjudged inadmissible to citizenship because of racial disqualification. Some citizens of Porto Rico may be conceived to present similar disabilities. Congress, in passing this law, must be presumed to have acted with knowledge of all previous legislation and of its interpretation by the courts. The exceptions referred to must have been the races especially mentioned in the seventh subdivision, and the limitation was the military or naval service performed. In other words, under the general law, neither a Filipino nor a Porto Rican could necessarily have been admitted to citizenship. Under this subdivision, he may be, irrespective of race, if he has performed the service specified.

If, as contended by the petitioner, the exception reserved was in-

tended to mean *any* alien who should perform military service, it is difficult to perceive why the provision as to the continuing force of section 2169 was necessary at all; the limitation of military or naval service being sufficient to preserve that section intact in all its general features. This view is corroborated and emphasized by the fact that, throughout the original title 30, Revised Statutes of 1878, the term "any alien" is used repeatedly without qualification, the limitation to free white persons and those of African nativity and descent being raised entirely from section 2169; and the same is true of section 2166 and other acts conferring special privileges upon soldiers and sailors. Moreover, as has been previously stated, the Act of May 9, 1918, was chiefly intended to modify section 4 of the Act of 1906 as to procedure merely, shortening the time and smoothing the way to citizenship. Section 2169 has to do only with racial qualification, and out of abundance of caution it was expressly reaffirmed.

[5] It may be added that the provisions of the draft law clearly did not contemplate the incorporation of those not eligible to citizenship into the land and naval forces of the United States. That such may have been inducted into the service through voluntary enlistment or inadvertence of draft boards cannot affect the purpose of Congress. It must be remembered that:

"Naturalization creates a political status which is entirely the result of legislation by Congress, and, in the case of a person not born a citizen, naturalization can be obtained only in the way in which Congress has provided that it shall be granted, and upon such showing of facts as Congress has determined must be set forth." In re Alverto (D. C.) 198 Fed. 688; In re Knight (D. C.) 171 Fed. 299.

The objection to this applicant is not founded upon any personal consideration. On the contrary, recognition of his educational qualifications and character is supplemented by appreciation of his military service. It may very well be conceded that that service should be appropriately rewarded, but the privilege of citizenship rests with Congress, and with Congress alone, and the courts have no power to alter or extend the provisions of law to that end.

The petition is accordingly denied.

On Rehearing.

[6] On petition for rehearing the attention of the court has been urgently called to the provision of the subsequent Act of July 19, 1919, to which reference was made, but which was not discussed in brief or argument at the former hearing. The provision referred to reads as follows:

"Any person of foreign birth who served in the military or naval forces of the United States during the present war, after final examination and acceptance by the said military or naval authorities, and shall have been honorably discharged after such acceptance and service, shall have the benefits of the seventh subdivision of section 4 of the Act of June 29, 1906, Thirty-fourth Statutes at Large, part 1, page 596, as amended, and shall not be required to pay any fee therefor; and this provision shall continue for the period of one year after all of the American troops are returned to the United States."

Because of the importance of the question involved and the earnestness of counsel, the court has made further investigation of the proceedings in Congress attending this legislation, in order, if possible, to ascertain the intent and purpose of that body in view of the claimed ambiguity in the language employed. This enactment appears in the naturalization section of the Sundry Civil Act, Public No. 21, 66th Congress. It is not mentioned in the report on the bill, and a search of the Congressional Record discloses that it was not mentioned in any of the debates either in the House or Senate, and therefore there is nothing in the records of Congress to show the intent of Congress as to this particular section. It is worthy of note in this connection that a bill of similar purport, H. R. 6804, entitled "A bill to facilitate the naturalization of persons who served in the military or naval forces of the United States since April 6, 1917, who have been, or who may be, honorably discharged therefrom," introduced June 27, 1919, by Congressman Rogers, and referred to the committee on immigration and naturalization, failed to pass. It would seem, therefore, that this clause of the naturalization section of the Act approved July 19, 1919, was simply attached as a rider to an appropriation bill, and went through without scrutiny or debate by either house. It cannot, therefore, in the absence of language clearly expressing that purpose, be held to relax the provisions of the prior Act of May 9, 1918, which have been duly considered.

The court has also received a copy of the report of the Senate committee on immigration upon the Act of May 9, 1918, aforesaid. It contains this significant language:

"It [section 2 of the act] also declares that nothing in the act shall enlarge or repeal in any way section 2169 of the Revised Statutes, except as specified in the seventh subdivision and under the limitation therein defined. This means that Filipinos may be naturalized who are enlisted in the army or navy of the United States and are honorably discharged therefrom."

This confirms the purpose and intent of Congress as deduced and declared in the foregoing memorandum. The words "any person of foreign birth" occurring in the Act of July 19, supra, do not enlarge the word "alien" as contemplated by these acts, in view of their specific reservations. A reason for the later legislation, if one is necessary to be advanced, is found in the further limitation of the application of the provisions of section 7 to a period of one year after all the American troops are returned to the United States, which provision is not found in the earlier act.

For the foregoing reasons, I am constrained to adhere to the conclusion reached in my original opinion.

TRAFIKATIEDOLAGET GRANGESBERG OXELOSAND v. AINESWORTH COAL & IRON CO.

(District Court, D. Maryland. June 9, 1921.)

No. 707.

1. **Shipping ⟸38—Breach of bunkering provision by owner does not entitle charterer to cancel.**
Under the rule that when mutual covenants go only to a part, where the breach may be paid for in damages, they cannot be pleaded as a condition precedent, the breach by an owner of a provision in a charter party for the transportation of a cargo of coal giving the charterer the right to bunker the vessel does not authorize the charterer to cancel the charter party, but merely entitles it to recover damages for the breach of that provision.

2. **Shipping ⟸58(3)—Charterer can recover for breach of bunkering clause loss on coal and expenses of preparing it for ship.**
A charterer can recover from the vessel owner, as damages for breach of the clause in the charter party giving the charterer the right to bunker the vessel, not only the difference between the market price of the coal which the vessel would necessarily have had to put in her bunkers for the voyage and the market price at time of resale of such coal, but also any expenses in preparing the coal for delivery to the ship which would not add to its market value on resale.

3. **Shipping ⟸58(2)—Evidence held not to show breach by owner of bunkering agreement.**
On a libel for cancellation of a charter party, in which the charterer filed a cross-libel for breach of the bunkering clause by the owner, evidence of written communications and telephone conversations between the agents of the parties *held* to show that, after the vessel had been bunkered through a misunderstanding of the charter provisions, the owner offered to purchase the bunker coal from the charterer or to discharge that in the vessel's bunkers, and to take on that of the charterer before the time for cancellation of the charter party, so that there was no breach of the bunkering agreement.

In Admiralty. Libel by the Trafikatiedolaget Grangesberg Oxelosand against the Ainesworth Coal & Iron Company to recover damages for the cancellation of a charter party, to which the respondent filed a cross-libel for breach of the charter party. Decree for libelant on the original libel, and cross-libel dismissed.

Brown, Marshall, Brune & Parker, of Baltimore, Md., for libelant.
George Forbes and John Phelps, both of Baltimore, Md., for respondents.

ROSE, District Judge. Each of the parties is a corporation—the libelant of Sweden; the respondent of this country. The former chartered its steamship Narvik to the latter, to carry 6,500 tons of coal, 10 per cent. more or less, at $15 per ton, from Baltimore, Norfolk, or Philadelphia, to a Scandinavian port. Had the charter been carried out, the freight earned would have been somewhere between $87,750 and $107,250. The parties will be referred to as the owner and the charterer, respectively.

The charter was negotiated on behalf of the owner by New York brokers, in accordance with cable instructions given them, to the effect, among other things, that it was to be upon the clear Washington form, the sixteenth article of which says:

"Bunker coal required, to be supplied by charterers at loading port, at current rates."

It appears, however, that there had been another Washington form, which said nothing about bunkering. It so happened that it was this earlier form the owner had by it, and was the one it intended its brokers to use, and which it supposed had in fact been executed. Accordingly it arranged to have the ship bunkered by a concern which had for some time done its Atlantic Coast bunkering. Apparently, when the instructions to provide the bunkers were given, the owner did not know that the charterer had designated a port at which the Narvik was to load, if in fact it had then done so, and the owner thought it probable that Philadelphia would be the one selected. As the ship was to deliver cargo in Baltimore, and as it was desired that she should be there dry-docked, the owner directed that bunkering was, if possible, to go on simultaneously with discharging, so that immediately after the ship came out of the dry dock, she would be ready to go to Philadelphia. Therefore, so soon as she reached Baltimore, on the 15th of October, bunkering began, and was completed the next day, an aggregate of a trifle over 915 tons being put on board.

No copy of the charter as actually signed reached her master or her agents in Baltimore until some days later. It chanced that, in drawing up the charter as actually executed, some clerical errors had been made. Apparently they were not noticed until October 20th, when the owner's brokers called them to the attention of the charterer, and at the same time suggested that perhaps the charterer was not interested in the bunkering, and, if so, there might be an amendment in that respect also. It is probable that, when this letter was written, the owner's brokers knew that the ship had been bunkered, although there is no direct evidence on the subject. It is certain that, if they did, they did not mention it to the charterer. On the 21st the latter accepted the other suggested corrections, but declined to assent to an elimination of the bunkering provision. On Saturday, October 23d, at 9:45 a. m., the ship reported herself ready for cargo.

On Monday, the 25th, the charterer learned that the ship had been bunkered, and, after taking legal advice, sent telegrams to the ship's agents in Baltimore, and to the owner's brokers in New York, that the ship had "breached the charter under clause 16; consider the steamer canceled by us, holding owners for all damages," and at the same time wired instructions to its own agents in Baltimore to give the same notice to the ship's agents by letter. The ship's agents received the telegram at 3:40 in the afternoon of the 25th. Within 20 minutes, they had the charterer on the telephone. As about the only disputed facts in this case are as to what passed over the telephone between the charterer and the ship's agents, it will be convenient to postpone the discussion of the evidence concerning the telephonic conversations

until the story of what each of the parties put into writing has been first told.

On the 25th, after the telephone conversation of the ship's agents and the charterer, and consequently at a late hour in the afternoon, the ship's agents cabled the owner in Sweden that the charterer had canceled the charter absolutely and irrevocably, claiming breach because owner had supplied bunkers; that the agent, subject to the owner's approval, had offered that the steamer take sufficient from them to reach destination, approximately 400 tons; that the agents refused cancellation; that they were consulting solicitors, and asked that instructions be wired immediately. The owner in reply, by a cable received here on the morning of the 27th, directed that the bunkers in the ship be discharged; that they be stowed for another of the owner's steamers due some weeks later; that the agents should claim fulfillment of charter, and take from charterer 800 to 1,000 tons at current rates. It also called attention to the fact that the charter could not be canceled before November 10th, that being the cancellation date named in it.

Immediately upon receipt of this message, the ship's agents wired the charterer that its action in canceling charter party was without justification, and that the steamer stood ready to perform all terms of the charter party, including section 16, and asked that the charterer telegraph immediately whether it would perform or repudiate. To this the charterer replied, by telegram received about 2:25 on the same day, the 27th, to the effect that the agreement to comply with the charter party was received too late; that it was loading another steamer, and would hold the owner responsible for its loss. The agents answered that neither the owner, nor her agents, nor any other authorized person, had ever refused to recognize charterer's rights under article 16, and again demanded performance.

On the morning of the 26th, the owner's brokers in New York, in answer to the telegram of cancellation on the 25th, wired the charterer:

"Referring your telegram impossible arrange bunkering Narvik. We will agree that you bunker steamer Western King provided you waive whatever rights you may have bunkering Narvik Baltimore."

In a letter to the charterer, written the next day, the senders of the above telegram explained that they understood from charterer's telegram of cancellation that the charterer had found it impossible to arrange for bunkering of Narvik, and, if by chance that was true, the brokers were willing to purchase from the charterer, bunkers for the steamer Western King at Philadelphia. They added, however, that they thought that, upon referring to the ship's agents at Baltimore, the charterer would find there was probably no objection to the Narvik taking bunkers from the charterer.

To complete the tale, there remains only the telephonic conversations. According to the ship's agents, there were but two of these, both on the 25th, the first about 1 p. m., on the call of the charterer, and the second at the instance of the agents, immediately after they had received the telegram announcing the charterer's decision to cancel. The charterer thinks there were more than one on each of the

three days, the 25th, the 26th, and the 27th. The records of the telephone company confirm the accuracy of the testimony of the ship's agents on this point, and apparently demonstrate that the recollection of the charterer's president, then its vice president, cannot be depended upon. It should be said that this gentleman acted for the charterer throughout, and for the purpose of this controversy he was it.

It is impossible from his testimony to get any clear idea as to what took place at each telephonic conversation, and what were the chronological order of the various propositions that were made by the two sides, or indeed as to precisely what those propositions were. He felt himself aggrieved, and apparently he thought that the person who spoke from the agents' office at times used a high-handed tone.

Accepting, as I must, the story of the telephonic conversations told by the witness who conducted them for the ship's agents, what happened was this:

About 1 o'clock in the afternoon of the 25th, the charterer called up the ship's agents, and said that it understood that the Narvik had been bunkered, and that it intended to cancel the charter, to which the witness replied that he did not know the facts, but that, if the ship had been improperly bunkered, any loss the charterer had suffered thereby would be made good. The charterer answered that that would not be satisfactory. About 3:40 the telegram of cancellation came in. The agents then called to their office their admiralty counsel, now one of the proctors in this case, and under his advice called up the charterer. The agents said that the owner would stand by the charter. This statement is denied by the charterer, but is confirmed by the proctor, who is not only absolutely reliable, but who paid special attention as to what his client was saying, and appreciated accurately the legal situation in which the parties were. I am satisfied that then and there an unequivocal offer to perform was made.

The charterer's version is that all the agents were willing to do was to let it supply 100 tons of bunker coal. It is true that there was some conversation as to the amount of coal which the charterer thought it was entitled to furnish, and upon this point there was room for difference of opinion. The ship was bound to take from the charterer only so much as it needed, and that might have varied from a matter of 100 tons or so to her full capacity of some 1,200, depending upon whether her bunkers had been filled on the other side, just before she sailed for this country; whether her owner wanted her to take on board coal enough for the round trip, and so on. As she had on board upwards of 200 tons when she reached Baltimore, a matter of 400 tons would have carried her to the other side.

From the cablegram which the ship's agents sent to the owners immediately after the conversation in question, it is probable that they offered to receive from the charterer that amount. That was, perhaps, all the charterer could have demanded, although, when the owner answered, it went further and offered to take on board a quantity which, when added to that in the ship's bunkers when she reached Baltimore, was all they could hold.

I am satisfied that the purpose of the ship's agents in their telephonic conversation with the charterer on the afternoon of the 25th was to make sure that nothing that the charterer had a right to ask should be withheld from it. The gentleman acting for the charterer was quite incensed at what he had come to believe was an unfair attempt to put something over on his company, and he heard then, and remembers now, everything from the standpoint of a man who thought and believed somebody was trying to cheat him. He says, however, that he did not want the bunkers which had been put into the ship taken out, in order that he might put the same kind of coal back. He entirely agreed with the court that such a proceeding would have been in the last degree absurd, and he says that all he wanted was to have the coal the charterer had provided for the ship's bunkers taken off its hands at the current rates. I do not think that he ever made this proposition to the ship's agents in such a clear way that they understood it, or, if he did, he coupled it with a demand that they should take from it 1,200 tons, which was nearly 300 more than he had a right to ask. He testified that he did not feel free to sell his bunker coal until the morning of the 28th, for until that time the other charter was not off. The charterer remained firm in its refusal to accept the ship, and after some days' delay a new charter was procured for a voyage to Dunkirk at $10 a ton. The owner has instituted these proceedings to recover the resulting damages, and the charterer has made a counterclaim for the loss which it alleges the failure of the ship to permit it to supply the bunkers, caused it.

Upon this state of facts, two questions are presented: (1) Would a breach by the owner of the bunkering provision of the charter party have justified a cancellation by the charterer? (2) Was there any breach in fact?

[1, 2] For a century and a half, Lord Mansfield's statement of the governing principle has remained unchallenged:

"Where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but when they go only to a part where a breach may be paid for in damages, there the defendant has a remedy on his covenant and shall not plead it as a condition precedent." Boone v. Eyre, 1 H. Bl. 273; Kauffman v. Raeder, 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247.

In one sense, at least, there can be no question that article 16 is a separable and independent undertaking. The charterer was to furnish the bunker coals, and was to be paid for them at the current rate. Such a bargain is complete in itself, and might be made by the ship with any one other than the charterer, or by any dealer in bunker coals with any ship, whether he had, or proposed to have, any other relations with her or not. Apparently this breach can be adequately compensated for in damages. If the owner fails to perform in this respect, the charterer is entitled to recover what he lost by not being allowed to furnish the coals, and that is all the charterer says it at the time wanted. If the charterer acts as promptly as in this case it claimed the right to do, the loss on the resale of the coals would not ordinarily be a serious matter, for as it was to furnish them to the ship at the current rate—that is

to say, at the market—presumably it could usually get the same price, or nearly the same price, from some one else.

There might, however, under some circumstances be other elements for which the charterer would be entitled to compensation, as for any outlay to which it had reasonably gone in getting the coals ready for delivery to the ship, and which would not add to their value to others. In such expense might perhaps be included any decline in their price between the time in which the ship should have accepted them and the time in which with reasonable diligence they could have been resold. If it was the charterer who failed to perform his bunkering obligations, the loss might easily be greater and the consequences more serious. If the sailing of the ship was thereby delayed, the charterer would have to pay what her use for the time was worth, whether as determined by the charter party or proved in other ways. It is, of course, true that there may be cases in which the obligation of the charterer to furnish coal, provisions, wage money, and generally to finance a ship goes to the very root of the agreement between the parties, or to change the figure is the foundation upon which they build their bargain. When that is so, the failure of the charterer to supply the funds, if the owner is not able to furnish them himself, may well entitle the latter to treat the charter as at an end. The Alida (C. C.) 12 Fed. 343.

But the relation between the parties now at the bar is not of such a character, nor is there anything in the evidence to show that there was anything peculiar about the bunkering provision in this case. The charterer was in the coal business and wanted to sell the bunker coal and make a profit from doing so, which he estimates would have been about $2.80 a ton or between $2,500 and $2,600 in all. Its president frankly testified on the stand that he did not care who supplied the coal which went into the ship's bunkers, provided he was able to sell to the owner the quantity which was needed for them. It must be borne in mind that there was no obligation on the ship to take any particular quantity of coal, and that which the charterer could have demanded put on board might have been very small. Upon the facts here shown, it would be scarcely possible to treat the refusal of the ship to permit the charterer to furnish the bunkers as a justification for the rescission of the contract, even had such refusal been definite and binding.

[3] 2. But, from what has been already stated, it is obvious that there was no such clear-cut refusal. There was apparently a misunderstanding, as the result of which, the ship was bunkered by the owner. There was at the most 48 hours' delay on the part of the agents in finding out whether or not the owner was willing to have these coals removed. Just so soon as it could be communicated with, and had the chance to reply, it unqualifiedly assented to the charterer's contention. It was not too late for it to do so. There was still two weeks before the expiration of the steamer's canceling date.

It follows that the owner is entitled to recover what loss it suffered by the unjustifiable cancellation, and that the cross-libel of the charterer must be dismissed.

HILLSBORO COAL CO. et al. v. KNOTTS, U. S. Dist. Atty., et al.

(District Court, S. D. Illinois, S. D. November 8, 1920.)

No. 105.

1. **Constitutional law ⊜258—Criminal law ⊜13—Lever Act, § 9, not unconstitutional, as depriving persons of liberty without due process of law.**
In section 9 of the Lever Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½i), making it an offense for any person to conspire or combine with another "(a) to limit the facilities for transporting, producing, * * * or dealing in any necessaries; (b) to restrict the supply of any necessaries; (c) to restrict the distribution of any necessaries; (d) to prevent, limit, or lessen the manufacture or production of any necessaries in order to enhance the price thereof"—the qualifying phrase, "in order to enhance the price thereof," applies to all the preceding subdivisions, and as so construed is not unconstitutional, as being so indefinite as to deprive those charged thereunder of their liberty without due process, or as not informing them of the nature and cause of the accusation.
2. **Conspiracy ⊜23—Section 9 of Lever Act not superseded as applied to production of coal.**
Section 9 of the Lever Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½i), making unlawful conspiracies to enhance the price of necessaries, *held* not superseded as respects coal by section 25, providing for federal administration of coal production and sale.
3. **Injunction ⊜105(1)—Equity without jurisdiction to enjoin criminal prosecution.**
A court of equity is without jurisdiction to enjoin a criminal prosecution under a sufficient indictment based on a valid statute.

In Equity. Suit by the Hillsboro Coal Company and Rice Miller against Edward C. Knotts, United States District Attorney for the Southern District of Illinois, and others. On motion by complainants for preliminary injunction, and by defendants to dismiss bill. Motion for injunction denied, and motion to dismiss granted.

Graham & Graham, of Springfield, Ill., and Butler, Lamb, Foster & Pope, of Chicago, Ill., for plaintiffs.

Dan W. Simms, Sp. Asst. U. S. Atty., of La Fayette, Ind., and L. Ert Slack, Sp. Asst. Atty. Gen., of Indianapolis, Ind., for defendants.

FITZHENRY, District Judge. This cause is submitted upon plaintiffs' motion for a preliminary injunction and defendants' motion to dismiss the bill of complaint for want of jurisdiction and want of equity. The individual plaintiff is one of a large number of defendants indicted by a grand jury of the United States District Court for the District of Indiana in the case of United States v. Armstrong et al., 265 Fed. 683, charging that the defendants violated various sections of "An act to provide for the national security and defense by encouraging the production, conserving the supply and controlling the distribution of food products and fuel," approved August 10, 1917, known as the Lever Law, and section 2 of the amendatory Act of October 22, 1919 (41 Stat. 297).

[1] At the time of the hearing a supplemental bill was filed, reciting that certain defendants named in the indictment had demurred to the indictment and moved to quash it; that Judge Anderson, the presiding judge of that court, had allowed the motion to quash as to all of the counts in the indictment, except counts 1, 2, 3, 4, and 17. All of these remaining counts attempt to charge the defendants, of which the individual plaintiff herein is one, with violations of section 9 of the Act of August 10, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛i). We are here concerned only with section 9 of that act. It is charged that the section is unconstitutional, and that the defendants are or are threatening to commit acts beyond the scope of their authority.

Is section 9 of the Act of August 10, 1917, unconstitutional? In very able and interesting briefs counsel for plaintiffs argue that it is, on the ground that it is violative of the Fifth and Sixth Amendments to the Constitution. The Lever Act is a measure passed by Congress in the exercise of its extraordinary war powers, and plaintiffs complain more of an abuse than a lack of power in its enactment.

It is charged that section 9 is void, because it is so vague and indefinite that it does not constitute "due process" under the requirements of the Fifth Amendment to the Constitution. Section 9 is as follows:

"That any person who conspires, combines, agrees, or arranges with any other person (a) to limit the facilities for transporting, producing, manufacturing, supplying, storing, or dealing in any necessaries; (b) to restrict the supply of any necessaries; (c) to restrict the distribution of any necessaries; (d) to prevent, limit, or lessen the manufacture or production of any necessaries in order to enhance the price thereof shall, upon conviction thereof, be fined not exceeding $10,000 or be imprisoned for not more than two years, or both."

In the conduct of any potential enterprise, numerous operations which are not unlawful, but wholesome, require the limiting of facilities or means of transporting, producing, manufacturing, supplying, storing, or dealing in necessaries, involving restrictions of the supply and the distribution of commodities.

Plaintiffs contend to attempt to live within the apparent provisions of this act would amount to a destruction of their business; that there would be no way of anticipating just when they would be operating within their rights and not in violation of the statute; that, in fact, they never would know until a jury would determine those matters by saying by their verdict when a defendant was guilty or not guilty of the crime charged. There is some merit in these contentions. The reasonableness of the criticism of the statute appears to be sustained when one interprets it to state:

"That any person who conspires * * * or arranges with any other person to limit the facilities for transporting, * * * storing, or dealing in any necessaries" shall be fined, etc.

If that were the correct interpretation of the law, the manager and superintendent of a coal mine, who deemed it advisable to shut down the mine for necessary repairs and agreed upon such action, would

transgress the law and be punishable for violating its provisions. Manifestly, Congress never intended to make the limiting of the facilities for the production of coal as suggested in this illustration a crime. Nor would it add much to the strength of the law to interpret a limitation of its operation by an application of the "rule of reason."

What Congress undoubtedly intended to do, in section 9, was to make it unlawful for any person to conspire or agree with any other person to do the things prohibited with reference to necessaries "in order to enhance the price thereof." It was, of course, known to Congress, when this section was written, that when a coal mine is shut down temporarily for the purpose of making necessary repairs, that ordinarily the general production of the mine is stimulated and increased, and the same illustration would apply as well to the operation of almost any enterprise engaged in the production or distribution of necessaries. The purpose of the act was to prevent the people from being imposed upon during a time when the country was in the throes of war, battling for its own existence. It knew that the law of supply and demand, in a period of great national emergency, would naturally enhance the price of necessaries to the limit of the capacity of the public to pay, without those who were engaged in the industries of transporting, producing, manufacturing, etc., necessaries conspiring to further enhance the public burden. It was sought by Congress to make it a crime to conspire with intent to raise the price of necessaries.

If there be uncertainty or vagueness about the congressional act, it is obviated by merely inserting a comma after the word "necessaries" in item (d) of section 9, so that the item will read "to prevent, limit, or lessen the manufacture or production of any necessaries, in order to enhance the price thereof shall, upon conviction, * * *" etc. The qualifying phrase, "in order to enhance the price thereof," then literally applies to and is a part of items (or paragraphs) (a), (b), and (c), as well as (d), which it follows. Punctuation is a minor, and not a controlling, element in interpretation, and courts will disregard the punctuation of a statute, or repunctuate it, if need be, to give effect to what otherwise appears to be its purpose and true meaning. Hammock v. Loan & Trust Co., 105 U. S. 77, 84, 26 L. Ed. 1111; United States v. Lacher, 134 U. S. 624, 628, 10 Sup. Ct. 625, 33 L. Ed. 1080; United States v. Oregon, etc., Railroad, 164 U. S. 526, 541, 17 Sup. Ct. 165, 41 L. Ed. 541; Ford v. Delta, etc., Co., 164 U. S. 662, 674, 17 Sup. Ct. 230, 41 L. Ed. 590; Stephens v. Cherokee Nation, 174 U. S. 445, 480, 19 Sup. Ct. 722, 43 L. Ed. 1041; Sutherland, Statutory Construction, § 232.

By reading the limitation, "in order to enhance the price thereof," into each of the provisions of the preceding subsections (a), (b), and (c), as well as (d), of section 9, it becomes fully as clear, specific, and precise as the general Conspiracy Act. Criminal Code, § 37, Rev. Stat. § 5440; section 10201, U. S. Comp. Stat. 1916. By the Conspiracy Act it is made a crime for two or more persons to conspire "to commit any offense against the United States," or "to defraud the United States in any manner or for any purpose." These quoted

phrases are all-inclusive, but no more specific than section 9 of the Lever Law.

An examination of the counts 1, 2, 3, and 17 in the indictment in the Armstrong Case suggests that the pleader did not consider that the clause, "in order to enhance the price thereof," applied to the things enumerated in items (a), (b), and (c), as well as (d). Section 9 is susceptible of the broad construction placed upon it by the plaintiffs in this case, and to read it as it was undoubtedly interpreted by the pleader in counts 1, 2, 3, and 17 would raise grave questions as to the constitutionality of the act. However, to read it as above suggested removes the vagueness and much of the uncertainty of the provisions complained of. The Supreme Court had a similar question before it in the case of United States ex rel., etc., v. Delaware & H. Co., 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836. Chief Justice White said:

"It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. Knights Templars' & M. Life Indemnity Co. v. Jarman, 187 U. S. 197, 205. And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional, and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning which causes it not to be repugnant to the Constitution, the rule plainly must mean that, where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided, our duty is to adopt the latter. Harriman v. Interstate Commerce Commission, 211 U. S. 407."

It is the judgment of the court that the constitutionality of section 9 must be sustained. It is apparent from the record in this case that the learned judge of the United States court for the district of Indiana has overruled demurrers to all of the counts brought before the court by plaintiffs' bill, and we are disposed to adopt his construction of the legal sufficiency of the several counts. However, there can be no question as to the legal sufficiency of count 4, which charges that the individual plaintiff and the other persons named as defendants in the indictment, at the times in question, within the district of Indiana, did "feloniously conspire * * * and agree together and with divers other persons whose names are unknown * * * to prevent, limit, and lessen the production of a certain necessary, to wit, bituminous coal, in order to enhance the price thereof," by doing certain prohibited acts.

A conspiracy to enhance the price of necessaries is the gist of the crime created by section 9, and is clearly within the Fifth and Sixth Amendments to the Constitution. The gist of the crime as charged in the indictment is a conspiracy to enhance the price of necessaries within the district of Indiana between the 10th day of August, 1917, and the 21st day of October, 1919. It is well settled that the accused is informed of the nature and cause of the accusation, within the requirements of the Sixth Amendment, if the indictment contains such a description of the offense charged as will enable him to make his defense and plead the judgment in bar. Shepard v. United States, 160 Fed. 584, 87 C. C. A. 486; same case, 212 U. S. 571, 29 Sup. Ct. 682, 53

L. Ed. 655. This indictment, it seems, would cover any conspiracy to enhance the price of coal in which the individual plaintiff may have participated, directly or indirectly, in the state of Indiana, from the date of the passage of the law until its amendment on the 22d day of October, 1919, and a conviction under it certainly could be pleaded in bar to any subsequent indictment for the same offense.

[2] It is contended that, if section 9 is constitutional, it does not apply to the conduct of the individual plaintiff and the other defendants in the Armstrong Case, for the reason that they are coal operators and miners, and during all of the times in question were operating their businesses under the complete control and direction of the United States Fuel Administration, which was created, given authority, and was acting under and by virtue of the same statute of which section 9 is a part. Section 25 of the Act of August 10, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛q), provides for the complete regulation and control of the coal-mining industry, the fixing of the price of coal, regulating production, management, and the transportation and distribution of coal, and, in fact, doing everything necessary and proper in the judgment of the President or the Fuel Administration, even to the extent of actually taking over the operation of a coal mine. Section 25 is the only section of the Lever Law dealing exclusively with coal, and therefore section 9, applying to necessaries and being general in its scope, the former being specific, supersedes section 9 in so far as those who are engaged in the industry are concerned.

While section 25 is very complete in its provisions with reference to the regulation and control of the coal industry, and carries its own special penalties for violations of the provisions of the act, or a violation of the orders of the Fuel Administration, yet there is nothing in the latter section with reference to the subject of conspiracy. Section 9 applies exclusively to conspiracies to enhance the price of necessaries, whether the crime is committed either within or without the coal industry. Within the provisions of section 9, as the court reads it, there is a measure of protection for any conspiracies or agreements made in obedience to, or to secure a compliance with, the orders and regulations of the Fuel Administration and acts done within the control of section 25.

It is undoubtedly the rule that, where there is in the same statute a particular enactment and also a general one, which in its most comprehensive sense would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within the general language as are not within the provisions of the particular statute. United States v. Chase, 135 U. S. 255, 10 Sup. Ct. 756, 34 L. Ed. 117; Rodgers v. United States, 185 U. S. 83, 22 Sup. Ct. 582, 46 L. Ed. 816. The contention that section 25 supersedes section 9, however, cannot be sustained, for the latter is fully as specific and exclusive on the subject of conspiracies to enhance prices as the former is specific upon the regulation and control of the coal industry.

[3] The statute which the individual plaintiff is charged with hav-

ing violated being valid, and the indictment making the charge being legally sufficient, it becomes apparent that this case comes squarely within the rule that a court of equity, although having jurisdiction over persons and property in a case pending before it, is not thereby vested with jurisdiction over crimes committed in dealing with such property by a person before the civil suit was brought, and cannot restrain by injunction proceedings regularly brought in a criminal court having jurisdiction of the crime and of the accused. Harkrader v. Wadley, 172 U. S. 148, 19 Sup. Ct. 119, 43 L. Ed. 399. In proceedings by indictment to enforce a criminal statute, the government can only act by its officers, and to enjoin the latter is to enjoin the government. In re Ayers, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216.

The bill in this case is voluminous, and endeavors to show that the indictment in the case of United States v. Armstrong et al. (D. C.) 265 Fed. 683, was returned by the grand jury of the Indiana court upon evidence of certain acts of the individual plaintiff and others engaged in the coal industry in obedience to the orders of the President and the Fuel Administrator, acts which the defendants in the criminal case were required to perform. It is contended that, unless the agreements entered into in compliance with the order, direction, and approval of the President or Fuel Administrator, set forth in the bill, were so interpreted and construed as to constitute the alleged conspiracies mentioned in the indictment, neither of the plaintiffs has at any time conspired, confederated, arranged, or agreed with the other individuals named in the indictment, or with any other persons whatsoever, as alleged in said indictment, or any count thereof, and the plaintiffs deny that either of them has committed any of the offenses which are attempted to be charged in said indictments.

Of course, neither this court, nor the plaintiffs know what evidence was brought to the attention of the grand jurors in Indiana, nor can this court presume to conjecture as to what proof the government may be able to offer in support of its claim that the defendants in the Armstrong Case are guilty of the crime with which they are charged. It is well settled that a court of equity has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors. In re Sawyer, 124 U. S. 200, 210, 8 Sup. Ct. 482, 31 L. Ed. 402.

The court being of the opinion that section 9 is constitutional, that it is not superseded in its operation upon the individual plaintiff herein by section 25, and that the indictment is legally sufficient, it becomes unnecessary to pass upon the numerous other questions raised upon the hearing by counsel and so ably presented. In the light of these views as to the substantial questions involved, it is clear that this court has no jurisdiction to enjoin the defendants in the performance of their official duties.

The motion for a preliminary injunction will be denied, and the motion to dismiss will be allowed.

CROWELL et al. v. UNITED STATES.

(District Court of Massachusetts. April 4, 1921.)

No. 1860.

1. **Collision ⊜79—Evidence held to show lights of libelant's schooner were properly set and burning.**
   The evidence in libel for collision of steamer with libelant's schooner *held* to show schooner's lights were properly set and burning at time of collision.
2. **Collision ⊜75—Steamer held solely in fault for collision with sailing vessel.**
   Steamer *held* solely in fault for collision with schooner, the steamer approaching at full speed, while the color and significance of the schooner's lights were yet uncertain, and giving an order to port when the light was first seen, instead of starboard, or hard astarboard, which would at that time have cleared the schooner.
3. **Collision ⊜49—Steamer's failure to clear schooner raises presumption of fault.**
   It being a schooner's duty to hold her course, and a steamer's duty to keep out of her way, the fact that the steamer failed to do so raised a presumption of fault on her part.

In Admiralty. Libel in personam by Peter H. Crowell against the United States for collision with libelant's vessel by the steamer Laramie, owned by the United States Shipping Board. Decree finding the Laramie solely in fault, and referring the case to an assessor to state damages.

E. E. Blodgett and Blodgett, Jones, Burnham & Bingham, all of Boston, Mass., for libelants.

The United States Attorney.

MORTON, District Judge. This is a case of collision between the schooner Florence Thurlow and the steam tanker Laramie, owned by the United States Shipping Board. At the time in question the Laramie was proceeding, under ballast, from New York to Tampico, Mexico, where she was to load oil under a charter party with the Barber Asphalt Paving Company. The United States filed a suggestion of want of jurisdiction, and exceptions to the libel on the ground that the Laramie was not a merchant vessel, within the purview of the Act of March 9, 1920, c. 95 (41 Stat. 525), which are overruled. The United States thereafter answered, and the cause proceeded as a libel in personam against the United States.

The collision occurred on May 12, 1920, about 9 miles southeast of Sea Girt light on the New Jersey coast, at about 9:20 p. m. The Laramie was running almost due south; the Florence Thurlow about north. The schooner was a four-masted vessel. She had all lower sails set; her booms being well off on the starboard side. She had come from Jamaica, and carried a cargo of logwood, part of which was on deck. The night was clear and dark; the wind, south-southwest and light. There was a shower just after the collision, while the schooner's crew

were in the boats; but it does not seem to have been raining immediately before the accident. The starboard bow of the steamer struck the starboard quarter of the schooner, inflicting such severe injuries that the schooner sank within a few minutes. All her company were safely transferred to the steamer.

[1] According to the schooner's witnesses, her lookout first sighted and reported the steamer when the latter was 4 or 5 miles distant. Both range lights of the steamer were then in line, and it was evident that she was headed at or close to the schooner. From that time, according to the men on the schooner's deck, they kept the steamer under continuous observation. The lookout testified that he inspected the schooner's starboard light and saw that it was burning brightly. The mate also says that he looked at it and that it was burning brightly. According to them, as the steamer approached she swung to her starboard, showing only her red light, but very soon swung back and showed both lights. At that time she was so close to them and so headed that the likelihood of a collision was apparent. As she came still nearer she shut out her red light, went by the fore part of the schooner, and struck on the quarter. Just before the contact the schooner's helm was put to starboard, the effect of which was to turn her bow away from the steamer and to throw her stern slightly towards the steamer. It was a movement so obviously made in extremis and in a great emergency that there is no need to speculate as to whether it was wise or unwise. Probably it did not affect the result, because it is not likely that the schooner's stern was thrown by the movement of her helm into the path of the steamer, when otherwise the vessels would have gone clear. Just before the contact, the schooner's lookout called her crew. Her engineer testifies that he promptly turned out, saw that the steamer was on top of them and was not going to hit the fore part of the schooner, and that he jumped on the starboard rail, looked at the schooner's side light, and saw that it was burning brightly. She was equipped with Davis lights, which are, upon the testimony before me, the best thing that is known in oil side lights. One in good condition, properly trimmed, should have been visible on the night in question for a distance of 3½ or 4 miles.

Taking the evidence of the schooner alone, it shows that she was free from fault, and that the accident was due to improper navigation of the steamer.

The description of the accident as given by the steamer's witnesses does not differ greatly from that given by the schooner's, except as to the starboard light of the schooner. The steamer was in charge of her third mate, but apparently her captain felt some responsibility for the watch; she had a lookout on her foredeck and a man at the wheel. Her log shows that Sea Girt light was abeam at 9 p. m. As she approached it a four-point bearing was taken, to determine the distance of the steamer from the shore. The captain and the third mate were both engaged in that work.

The first that was seen of the schooner from the steamer was when the lookout discovered what appeared to him to be a dim white light

slightly on her port bow. He says that it appeared close at hand, and he ran back a few steps and reported it as dead ahead to the mate, who was on the bridge. The captain was at that time below. The mate testifies that he himself observed the light at the same time as it was reported. The lookout says that he immediately went back to his station, and that by the time he had reached it he was able to make out the sails of the schooner, and also noticed that the light had a greenish hue. It was then so near that a collision appeared inevitable. The captain of the steamer came hurriedly to the bridge, and he and the helmsman testify that they observed the light, and that it was dim and greenish, having the appearance of a smoky white light. When the steamer went by it, however, all the men on her deck who testified to the point said that it was in her forerigging and was her starboard side light. There is no definite testimony that any other light from the schooner except her side light was seen on the steamer. The steamer's witnesses testify that the light was very dim and smoky.

When the light was first observed and reported on the steamer, the mate ordered her helm to port—i. e., he swung her to the right across the schooner's bow; but the steamer never seems to have been so far to port of the schooner as to open the latter's red light. When the color of the light and the sails had become apparent, he directed the steamer's helm to be put hard astarboard, swinging her away from the schooner. He says that the two orders followed each other very closely, only a few seconds between. Her helmsman, however, testifies that there was perhaps a minute between the order to port and the counter orders to starboard and hard astarboard, which came practically together. As the steamer was making nearly 1,000 feet a minute, the difference in time becomes material. The testimony of the helmsman agrees with the testimony given by the schooner's witnesses, viz. that they saw the steamer swing to her starboard, and later, when she was close at hand, swing back. On the steamer's testimony, she did not turn to starboard until after she had discovered the schooner's light; and, of course, being a large vessel, she did not begin to swing the very instant that her helm was ordered to port. An appreciable time must have elapsed after the order before the effect could be noticed from another vessel. Even on the steamer's testimony, it appears probable that the schooner's light was first seen when far enough distant for the steamer to have avoided accident, if she had promptly recognized the color of it, or had stopped her engines and proceeded cautiously until its character could be made out.

The only excuse advanced by the steamer for her failure to keep out of the way of the schooner is that the latter was not showing a proper light; and there is no doubt a good deal of evidence on the part of the steamer that the light was dim and smoky. But I am inclined to give more credence to the schooner's crew than to the steamer's in regard to that matter. They had the steamer under observation longer than the steamer seems to have had them, and would naturally in the meantime pay particular attention to their own lights. The Alice v. Phillips, 81 Fed. 415, 26 C. C. A. 467; The Richmond (D. C.) 114 Fed. 208,

211. They insist that their starboard light was burning brightly. The fact that the men on the schooner described correctly the changes of course made by the steamer shows that they were watching her, as they testified. The lookout on the steamer was a boy of 19, who, according to his deposition, had had a very limited experience at sea and as a lookout; the officers of the steamer, in addition to their duties, had been engaged in taking the bearing of the lighthouse; her mate, who testified that he was on the bridge, well may have had his attention more immediately devoted to other matters than to the sea ahead. Observations of the schooner's light made from the steamer as she slid past it just before the crash by witnesses not disinterested, whose attention must have been distracted by the impending collision seems to me insufficient to outweigh the direct and positive testimony of the schooner's crew. On all the evidence I find that the schooner's lights were properly set and burning.

[2, 3] The immediate cause of the collision appears to have been an error in the navigation of the steamer. If, instead of the order to port, given by the steamer's mate when the light was first seen, the order had been starboard or hard astarboard, as it was later, or if her engines had been slowed or stopped until the character of the light ahead was made out, she would have cleared the schooner without difficulty. I am disposed to hold with some strictness that it is a fault for a vessel to approach closely at full speed a light the color and significance of which is not clear (The Richmond, supra [D. C.] 114 Fed. at page 213; The Alaska [D. C.] 22 Fed. 548, 553); and I find that the steamer was at fault for doing so in this instance. It is possible that the mate of the steamer at first intended to cross the bow of the other vessel, and, when they got near together, found he had misjudged the schooner's distance or speed and would be unable to do so, and that he thereupon made an unsuccessful effort to pass under her stern. It was the schooner's duty to hold her course, and the steamer's to keep out of her way. The fact that the steamer failed to do so raises a presumption of fault on her part which the evidence fails to overcome. The Colorado, 91 U. S. 692, 693, 23 L. Ed. 379; The Richmond (D. C.) 114 Fed. 208.

On all the evidence, I find and rule that the collision was caused solely by the fault of the Laramie. See Brigham v. Luckenbach (D. C.) 140 Fed. 322; The Noreuga (D. C.) 211 Fed. 355.

Decree that the Laramie was solely at fault, and refer the case to an assessor to state the damages.

McCALMONT v. PENNSYLVANIA CO.

(District Court, N. D. Ohio, E. D. April 18, 1921.)

No. 10502.

1. **Master and servant ⊂=129(6)—Causal connection between injury and violation of Safety Appliance Act essential.**
While the Safety Appliance Acts (Comp. St. § 8606 et seq.) are intended for the protection of all employés, and not solely to prevent the necessity for men to go between the ends of cars to make uncouplings, to render a railroad company liable for injury to an employé thereunder, there must be a causal connection in a legal sense between the violation of the act and the injury.

2. **Master and servant ⊂=111(1½), 247(5)—Injury by cars without coupler required by federal act held not actionable.**
A car made defective by loss of a coupler was second of a number of cars standing on a storage track used solely for crippled cars, collected thereon for removal to the repair shop. It was necessary to improvise couplings before the cars could be moved, and plaintiff's intestate was an inspector in charge of such work. With an assistant he went between the first and second cars to shorten a chain coupling made by others, without first putting out a blue flag, as expressly required by the rules of the company, and while there the cars were driven together by another car kicked on the track, and by reason of the absence of the coupler he was killed. *Held*, that the railroad company was not liable under Safety Appliance Act, § 4 (Comp. St. § 8621), because (1) it was not "using, hauling, or permitting to be used or hauled on its line" the defective car at the time of the injury; and (2) the defective condition of the car was not the proximate cause of the injury, which was the negligence of deceased in failing to put out the warning flag.

At Law. Action by Dolly McCalmont, administratrix, against the Pennsylvania Company. Judgment for defendant.

D. F. Anderson (of Anderson, Lamb & Osborne), of Youngstown, Ohio, for plaintiff.

Thos. M. Kirby (of Squire, Sanders & Dempsey), of Cleveland, Ohio, for defendant.

WESTENHAVER, District Judge. [1] At the conclusion of all the testimony, defendant moves the court to direct a verdict in its favor. This motion is based on the ground that defendant's car, alleged to be defective within the prohibition of the Safety Appliance Act, was not at the time in use within the meaning of that act, and also that the defective condition of the car was not in a legal sense the proximate cause of the death of plaintiff's decedent. The questions of law raised by this motion are much disputed by lawyers and cannot be said to be fully settled by decision. I have been called upon to deal with these questions in a number of cases, have read and reread the United States Supreme Court cases cited by counsel as pertinent or controlling, and it may therefore be helpful to counsel, not only in this but in other cases, if I review fully the law as I understand it.

The federal Safety Appliance Act of 1893, in section 2 (Comp. St. § 8606), provides:

"On and after the 1st day of January, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

It will be observed that the prohibition of this section is against hauling or permitting to be hauled, or used, on its line, any car not thus equipped.

The amendment of 1910, in section 4 (Comp. St. § 8621), provides:

"Any common carrier subject to this act, using, hauling, or permitting to be used or hauled on its line, any car subject to the requirements of this act, not equipped as provided in this act, shall be liable to a penalty of $100 for each and every such violation."

The criminal offense thus created is "using, hauling, or permitting to be used or hauled on its line." The word "permitting" was evidently inserted to meet the case of one interstate carrier receiving cars from another line, not thus equipped, and hauling them on its own line. Then follows a proviso in this section which says:

"Where any car shall have been properly equipped as provided in this act and the other acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by [this] section, * * * if such movement is necessary to make repairs and such repairs cannot be made except at such repair point."

The penalties referred to therein are obviously the criminal penalties imposed by that section. It may be removed, without liability for such penalties, to the nearest available repair point, but only in the event such repairs cannot be made where the car becomes defective or insecure. Then follows the provision relied on by plaintiff, with reference to the civil liability. It is in these words:

"And such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employé caused to such employé by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this act and the other acts herein referred to."

There is also a further proviso, in these words:

"And nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain live stock or 'perishable' freight."

These prohibitions of the Safety Appliance Act, as I understand them, are against the hauling, using, or permitting to be used or hauled, any car not thus equipped. The permission to haul from the place where the want of repair is discovered is a permission to haul it only to the nearest available repair place, and only in case it is necessary to do such hauling in order to make repairs, and when they cannot be made except at that repair place. Even this permission to haul to the near-

est available repair place does not permit the hauling of defective cars by chains instead of drawbars in association with other cars commercially used, unless such defective car contains live stock or perishable freight. Obviously this means that crippled cars must be hauled in trains made up exclusively of crippled cars. The association of the word "used" with the words "hauled or permitted to be hauled on its line" clearly indicates that the use must be associated with or related to the transportation or hauling of a crippled car, either in transportation from place to place, or of the car from the place where found to be defective or insecure to the place of repair. It does not mean such use of the car elsewhere or in other relations than such hauling or movement.

Obviously cars have to be equipped somewhere with safety appliances. Obviously, if they are once equipped and get out of repair, they must be repaired somewhere. It could not be contemplated that cars could be either constructed or equipped in such a manner as never to become defective or insecure or out of repair. The act of repairing or putting the crippled car in condition for transportation to a repair point is a different matter, as I understand it, from the using, hauling, or permitting to be used or hauled, upon its line, by the carrier, of a car not properly equipped as is required by the Safety Appliance Act, or becoming out of repair after being once equipped. It is only when the use is in connection with the movement or hauling of the car in the forbidden manner that the Safety Appliance Act can be said to apply. Injuries sustained under other conditions and in other situations are controlled by the negligence rules provided in the federal Employers' Liability Act of April 22, 1908 (U. S. Compiled Statutes, §§ 8657–8665).

Undoubtedly border line cases will arise. It will be difficult at times to say whether the car was thus in use or out of use. The work being done by an employé on that crippled car may be so intimately connected with the intended or contemplated movement or hauling of the car as to be a part of such movement; and other cases will arise in which the same will be so remote as not to be a part thereof. In that situation, the rules established by the decisions for determining when an employé was engaged in interstate transportation, or in work so closely related thereto as to be practically a part thereof, may by analogy furnish a standard whereby this question may be solved. See Pedersen v. Delaware, etc., R. R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153; Roush v. B. & O. R. R. Co. (D. C.) 243 Fed. 712.

But, assuming the Safety Appliance Act applies to the situation, the question arising is whether the defect complained of is a proximate cause of the employé's injuries. This question is very perplexing. In determining it we have the assistance of several decisions of the United States Supreme Court, and I believe it will aid to an understanding of the law if I should review each of those cases. I have read them many times in the past, and during the noon recess have again reread them all.

The first in time, if not in importance, is St. Louis & San Francisco Railroad Co. v. Conarty, 238 U. S. 243, 35 Sup. Ct. 785, 59 L. Ed. 1290. In that case the injured employé sustained his injuries as the result of a collision between a switch engine and a loaded freight car having no coupler or drawbar at one end, which drawbar had been pulled out by the cars in transit. This crippled car was about to be placed on an isolated track for repair, and during the movement was left near a switch leading to that track, while other cars were being moved out of its way. This task would have taken about five minutes. While the crippled car was standing there, a switch engine, having nothing to do with the movement of the crippled car, or with the movement of the other cars which had to be taken out of its way, came along and collided with it; in other words, there was a collision between the switch engine, independently operated, and the crippled car standing upon the track. Conarty and two other fellow employés were riding on the forward end of the switch engine that bumped into the crippled car. His fellow employés, one on one side and one on the other, both stepped from the engine and escaped injury; but he was caught between the switch engine and the crippled car and thus sustained his injuries. The holding was that the violation of the Safety Appliance Act and the movement of the car in this manner was not a proximate cause of the injury to the employé. In the opinion, delivered by Mr. Justice Van Devanter, it is said:

"Had these appliances [the coupler and drawbar of the defective car] been in place, they, in one view of the evidence, would have kept the engine and the body of the car sufficiently apart to have prevented the injury; but in their absence the engine came in immediate contact with the sill of the car with the result stated."

And further:

"It is not claimed, nor could it be under the evidence, that the collision was proximately attributable to a violation of those provisions, but only that, had they been complied with, it would not have resulted in injury to the deceased."

As I understand that statement of the law, it is that the deceased would not have been injured, had the drawbar or coupler been in place on the crippled car, but that their absence was not what in law is called a proximate cause of the injury. Mr. Justice Van Devanter, after reviewing the provisions of the Safety Appliance Act and its objects and purposes, further says:

"Nothing in either provision gives any warrant for saying that they are intended to provide a place of safety between colliding cars. On the contrary, they affirmatively show that a principal purpose in their enactment was to obviate 'the necessity for men going between the ends of the cars.' We are of opinion that the deceased, who was not endeavoring to couple or uncouple the car, or to handle it in any way, but was riding on the colliding engine, was not in a situation where the absence of the prescribed coupler and drawbar operated as a breach of a duty imposed for his benefit."

It obviously follows that the proximate cause in that case must be found in the negligence of the persons operating the switch engine which ran into the crippled car, or in the negligence of the other employés,

who left the crippled car in that situation without giving proper notice or warning to the crew operating the switch engine. In that view of the law, the crippled car was a condition, but not a cause, of the accident.

In Great Northern Railway Co. v. Wiles, 240 U. S. 444, 36 Sup. Ct. 406, 60 L. Ed. 732, the employé who was killed was the flagman or rear brakeman, whose duty it was, under the rules, whenever his train came to a stop upon the tracks, to go back with a flag and protect the rear of the train. The train on which he was employed had come to a halt upon the track as a result of the train separating or pulling apart because of a defective coupler or drawbar. Wiles, instead of going back to protect the rear of the train, remained with the conductor in the caboose, for some reason unknown and unexplained, and a train following close behind ran into the caboose and killed both Wiles and the conductor. No negligence was attributable to the engineer or employés of the following train. A recovery was denied on the ground that the flagman's negligence was the sole proximate cause of his death, from which the corollary follows that the violation of the Safety Appliance Act, which permitted the train to become uncoupled while in use, was a remote cause of the injury.

The first headnote sums up the reasoning of the opinion correctly in these words:

"Where there is nothing to extenuate the negligence of the employé, or to confuse his judgment, and his duty is as clear as its performance is easy. and he knows not only the imminent danger of the situation, but also how it can be averted by complying with the rules of the employer, there is no justification for a comparison of negligences on the part of the employer and employé, or the apportioning of their effect under the provision of the Employers' Liability Act. To excuse such neglect on the part of an employé of an interstate carrier would not only cast immeasurable liability on the carriers, but remove security from those carried."

As counsel well know, it was in part upon the authority of the Wiles Case that I held no liability existed in the Copeland Case, and my judgment in the Copeland Case has since been sustained by the Circuit Court of Appeals. See 269 Fed. 361.

In Minneapolis & St. Louis R. R. Co. v. Gotschall, 244 U. S. 66, 37 Sup. Ct. 598, 61 L. Ed. 995, the question, mooted, but left undecided, in the Wiles Case, again arose and was decided, namely, whether or not an inference is to be drawn of a violation of the Safety Appliance Act from the mere fact that the automatic coupler on the train pulls apart while the train is being hauled. There was no proof offered of a failure to observe the act, except that one of the couplers had pulled open, permitting the train to separate. The doctrine of res ipsa loquitur was applied. That case was followed by me and applied in what is known as the Caldwell Case, and my judgment was again affirmed by the Circuit Court of Appeals. See 264 Fed. 947.

The next case of importance is Louisville & Nashville R. R. Co. v. Layton, 243 U. S. 617, 37 Sup. Ct. 456, 61 L. Ed. 931. It is this case which has been making for confusion in the minds of the legal profession and has been taken as modifying, if not overruling, the doctrine of the Conarty Case. Upon the facts, the case is comparatively simple,

and scarcely requires to be distinguished from the Gotschall or Caldwell Cases. The facts were these:

A number of cars were standing upon a track about two car lengths from five other cars on the same track. An engine, pushing one stock car ahead of it, came through the switch and attempted to couple by impact to these five cars. It struck with such force that the five loaded cars were driven over the intervening two car lengths of space, and collided so violently with the other cars standing on the track that the plaintiff, who was on one of the five cars for the purpose of releasing the brakes, was thrown to the ground and injured. The engine, with the stock car attached, stopped within a half a car length after the impact. The stock car failed to couple automatically with the five cars, as was contemplated by the switching movement, owing to the fact that the stock car was not equipped with automatic couplers which would couple by impact, as is required by the law.

The question discussed in the opinion is as to whether the failure to comply with the Safety Appliance Act was a proximate cause of the injury. Upon the facts as I have stated them, it is, as I have said, difficult to see any difference between them and the facts of the Gotschall Case or of the Caldwell Case. In the Gotschall Case the train broke in two, owing to a defective coupler, and Gotschall, being on that train in the performance of his duty, was thrown to the ground and injured. In the Caldwell Case the train likewise broke in two for the same reason, and Caldwell either was on or had ascended the runaway cars, and was trying to stop them when they collided with other cars, throwing him to the ground. In the Layton Case the injured employé was on one of the five cars for the purpose of releasing the brakes as a part of the hauling movement in contemplation at the time the effort to couple automatically was attempted.

Thus we see that the facts are quite narrow, and it also seems to me that the broad inference, drawn from the language used in the opinion, that an interstate carrier is liable under any and all circumstances to an injured employé working in and about a crippled car, cannot be sustained. Mr. Justice Clarke was distinguishing the narrow language which had been used in the Conarty Case. As a result of that language some members of the legal profession were asserting that the automatic coupling requirement was designed for the benefit and protection only of persons required to go between the cars to make couplings, and was not for the benefit and protection of employés in other situations, injured as a result of the failure to comply with such provisions. In view of the absolute duty thus to equip cars, and the absolute liability imposed for hauling cars not thus equipped, obviously all employés are and were intended to be within its beneficent provisions. It was this view that Mr. Justice Clarke was emphasizing, and his language is not to be taken as modifying the fundamental rule that a causal relation between the violation of the Safety Appliance Act and the employé's injuries must always exist.

That this was the Supreme Court's understanding of the decision in the Layton Case is made clear by its recent decision in Lang v.

New York Central R. Co., 255 U. S. ——, 41 Sup. Ct. 381, 65 L. Ed. ——, decided March 28, 1921. In this case the court's understanding of the Layton Case and of the rules of law under consideration is made much clearer by the dissenting opinion of Mr. Justice Clarke, concurred in by Mr. Justice Day. Plaintiff here, in effect, bases his right to recover upon the law stated in this dissenting opinion, and not upon the law, as I understand it, pronounced in the court's opinion. The Lang Case must be taken as controlling, not only because it is the latest expression of that court, the decisions of which we are bound to follow, but also because of the careful review of the earlier cases.

Upon the facts, the court say it is not in conflict with the Layton Case. Briefly stated, the facts were that at a place called Silver Creek there were some 11 cars in the yard upon a side track. The train crew, of which Lang was a member, had orders to pick up at Silver Creek one of these cars destined for Farnham, and, in the opinion, called the Farnham car. When Silver Creek was reached, the conductor of the train and Lang, one of the brakemen, on looking for the Farnham car, found it was practically in the middle of a string of 11 cars, one of which, next to it, was a car from which the drawbar was missing. In order to get out the Farnham car, it was necessary to pull out the six cars, of which the Farnham car was farthest from the end and next to the crippled car. This was done, and after the Farnham car had been set out upon the track, where it might later be picked up, the engine switched two of the remaining cars on the one side track, and kicked the three remaining cars back again onto the track from which they had been taken, and where the crippled car was standing. Lang, the brakeman, was on the rear end of that one of these three cars next to the crippled car, and had gotten there in the line of his duties for the purpose of setting the brakes and stopping it before it came into contact with the crippled car. Owing to some miscalculation, whether of a defective brake, or whether he failed to apply the brake soon enough, or some other cause not made apparent, the car upon which he was riding was not stopped as had been contemplated by him, but ran into and collided with the crippled car. He was standing with one foot down on the brake step, and, owing to the absence of the drawbar, the two cars came so close together that his leg was caught between the two, and he was so crushed that death resulted.

The question disputed was whether or not the case came within the Conarty or the Layton Case. On this point the Appellate Division of the Supreme Court of New York (187 App. Div. 967, 175 N. Y. Supp. 908) held that it came within the Layton Case. Upon appeal, the Court of Appeals (227 N. Y. 507, 125 N. E. 681) reversed the judgment of the trial court and of the Appellate Division, and directed the complaint be dismissed, because that court was of the opinion that it fell within the Conarty Case. The opinion of the United States Supreme Court, delivered by Mr. Justice McKenna, says:

"Two questions are hence presented for solution: (1) Was the Court of Appeals estimate of the Conarty Case correct? (2) Was it properly applied to Lang's situation?

"(1) The court's conclusion that the requirement of the Safety Appliance Act 'was intended to provide against the risk of coupling cars' is the explicit declaration of the Conarty Case. There, after considering the act and the cases in exposition of it, we said: 'Nothing in its provisions "gives any warrant for saying that they are intended to provide a place of safety between colliding cars. On the contrary, they affirmatively show that a principal purpose in their enactment was to obviate the necessity for men going between the ends of the cars."' * * * The case was concerned with a collision between a switch engine and a defective freight car, resulting in injuries from which death ensued. The freight car was about to be placed on (we quote from the opinion) 'an isolated track for repairs, and was left near the switch leading to that track while other cars were being moved out of the way—a task taking about five minutes. At that time a switch engine with which the deceased was working came along the track on which the car was standing and the collision ensued.' The deceased was on the switch engine, and it was on its way 'to do some switching at a point some distance beyond the car and was not intended and did not attempt to couple it to the engine or to handle it in any way. Its movement was in the hands of others.'

"(2) That case. therefore, declares the same principle of decision as the Court of Appeals declared in this. and, while there is some difference in the facts, the difference does not exclude the principle. In neither case was the movement of the colliding car directed to a movement of the defective car. In that case the movement of the colliding car was at night, and it may be inferred that there was no knowledge of the situation of the defective car. In this case the movement of the colliding car was in the daytime, and the situation of the defective car was not only known and visible, but its defect was known by Lang. He therefore knew that his attention and efforts were to be directed to prevent contact with it. He had no other concern with it than to avoid it. 'It was not,' the trial court said, 'the intention of any of the crew [of the colliding car] to disturb, couple onto, or move the crippled car.' It was the duty of the crew. we repeat. and immediately the duty of Lang, to stop the colliding car and to set the brakes upon it. 'so as not to come into contact with the crippled car,' to quote again from the trial court. That duty he failed to perform, and, if it may be said that notwithstanding he would not have been injured, if the car collided with had been equipped with draw bar and coupler, we answer, as the Court of Appeals answered, 'Still the collision was not the proximate result of the defect'; or, in other words, and as expressed in effect in the Conarty Case, that the collision under the evidence cannot be attributable to a violation of the provisions of the law, 'but only that, had they been complied with, it [the collision] would not have resulted in the injury to the deceased.'"

Little or nothing can be profitably added by me. However, it may be said that the defective car might be regarded as in use, so as to bring it within the Safety Appliance Act. It was not standing on a dead track, or repair track, for the purpose of being hauled to a place of repair, or of being put into shape that it might thus be hauled. It was and had been mixed with sound cars and shifted about the yard from day to day preparatory to being unloaded. In this respect, the tacit assumption is that the defective car was hauled, or permitted to be hauled, or used, on the line of an interstate carrier. The decision is rested on the ground that there was no causal connection, in a legal sense, between the violation of the Safety Appliance Act and the injury. In this view the defect, as well as the presence of the defective car, was a condition of the injury, and not a proximate cause of the injury.

[2] Let us apply the rules of law and these authorities to the facts of this case. The defective car was standing with some six other cars

on track 444. This was a storage track for crippled cars, upon which were placed cars found to be defective and in need of repair, and was used for no other purpose. They were removed from that track once or twice every 24 hours by a separate engine in a separate train to a repair shop some 2,000 or 3,000 feet distant. After crippled cars were thus placed on this dead track, it became and was necessary to make improvised couplings, by chains or otherwise, in order that they might thus be moved. The car in question was the second from the east end of a string of six, and had been placed there some time between 12 o'clock midnight and 6:30 in the morning of the accident, and some one, during the same period, had made a chain coupling of the car in question to the end car. Plaintiff's decedent, Newell J. McCalmont, was a car inspector, boss, or foreman. At some time during the forenoon of the day, some witnesses say about 8 o'clock and others about 10, he was making an inspection of these cars, accompanied by an assistant by the name of Joseph Robassi. It was a part of his duties to inspect these six cars, and it may be assumed that it was also a part of his duties either to make improvised couplings or to cure any defects or insufficiencies which might appear in such as were already made as a result of his inspection. Coming to the car in question, he observed to his assistant that there was too much slack in the chain coupling, and announced that they would go between the cars and correct it. At this juncture his assistant, Robassi, called his attention to the fact that there were no blue flags out to protect the string of cars standing on this dead track; but, in disregard of this warning, the deceased proceeded with the work, giving instructions to his assistant to follow him. They went between the cars and were engaged in remaking the chain coupling, when another car, kicked onto this track from the yard, collided with the end of the string and crushed McCalmont between the two cars, causing his death.

The evidence is clear that this string of cars was not protected by a blue flag and that the colliding car was merely being set in upon this same track as the other cars had already been set there, and for the same purpose. The crew of the engine thus setting it in are not shown to be the crew or engine which would at some later period move these cars to the repair shop, and were not contemplating at the time moving the string of six cars, or, indeed, driving the car into contact with them. In other words, there is no evidence tending to show negligence under the federal Employers' Liability Act, but the plaintiff can recover, if at all, only because of the violation of the federal Safety Appliance Act. The rules of the company, introduced in evidence, bearing on the situation, are 26 and 723. Rule 26 provides:

"A blue flag by day and a blue light by night, placed at one or both ends of an engine, car, or train, indicate that workmen are under or about it; when thus protected, it must not be coupled to or moved. Workmen will display the blue signal, and the same workmen are alone authorized to remove them. Other cars must not be placed on the same track, so as to intercept the view of the blue signals without first notifying the workmen."

Rule 723 provides:

"The car inspector, in the absence of a foreman, will perform the same duties as the foreman in the district assigned to him. When inspecting or repairing cars, he must protect himself by displaying the blue signals as prescribed by rule 26."

It was these rules which the assistant, Robassi, had in mind when he called the attention of the decedent to the absence of a blue signal immediately before the decedent went between the cars.

Upon these facts, is it not true that the Wiles Case is controlling? It seems so to me. The duty of McCalmont is clear; its performance was easy. There was nothing to extenuate his negligence or to confuse his judgment. He knew, not only the imminent danger of the situation, but also how to avert it by complying with the rules of the employer. It was his negligence which was the moving cause of the accident. The condition of the defective car must, in the light of the Conarty and the Lang Cases, be regarded, at most, only as a condition and not as a proximate cause, of the accident. For a discussion of proximate as distinguished from remote cause, see Railroad Co. v. Keeves, 10 Wall. 176, 19 L. Ed. 909; Scheffer v. R. R. Co., 105 U. S. 249, 26 L. Ed. 1070.

In addition thereto, it does not seem to me that the car which caused the injury was in use within the meaning properly to be given to that word under the Safety Appliance Act. The defendant was not hauling it, or permitting it to be hauled or used, on its line. It had taken it out of use and placed it on a dead track, and the hauling or the movement of it from that dead track to the repair place, which is permitted to be done only at the risk of the defendant, had not yet begun and was not then in immediate contemplation. What McCalmont was doing was not so intimately associated with, or related to, that hauling or movement as to be practically a part of it. He was merely making a temporary repair to the car upon the dead track, so that at some future time it might thus be moved or hauled. The law does not forbid or prohibit work in or about a car upon a dead track, so as to put it into condition thus to be moved or hauled; nor does the law impose an absolute liability upon the interstate carrier for injuries sustained by one engaged in doing that kind of work. In that situation, and while doing that kind of work, the applicable law, it seems to me, would be the negligence rules provided by the federal Employers' Liability Act, and not the absolute liability of the Safety Appliance Act.

For the foregoing reasons, I am of opinion that defendant's motion should be granted. An exception is allowed plaintiff.

ASLAKSEN v. UNITED STATES.

(District Court, N. D. Ohio, E. D. April 23, 1921.)

No. 2707.

Salvage ⊂=34—Award to master for salvage service at sea.

Libelant, master of the steamship Lake Ellenorah, in ballast and worth $900,000, in answer to a wireless call went to the assistance of the Avondale, a vessel of the same owner, 100 miles distant in the North Atlantic, and found her wholly disabled, including her steering gear. The Avondale, with cargo, was worth nearly $2,000,000, and was then some 500 miles from St. Johns, Newfoundland, which was the nearest port. The time was November and the weather was foggy, with high winds and heavy seas, and the Avondale was in great danger of total loss. Libelant, with some dissent on the part of his officers, because the Lake Ellenorah was not equipped for such work, undertook to tow her to St. Johns, and succeeded in doing so in safety after six days, during which both vessels and crews were in considerable danger. Libelant had sole responsibility for the operation, and remained on duty almost continuously. *Held* that, but for the common ownership of the vessels, a salvage allowance to the Lake Ellenorah and crew of $100,000 would have been no more than reasonable, and that an award of $3,000 to libelant for his services was a just, though moderate, allowance.

In Admiralty. Suit by Olav Aslaksen against the United States. Decree for libelant.

Goulder, White & Garry, of Cleveland, Ohio, for libelant.

E. S. Wertz, U. S. Atty., and D. J. Needham, Asst. U. S. Atty., both of Cleveland, Ohio.

WESTENHAVER, District Judge. Libelant, master of the Lake Ellenorah, a steamship owned by the United States Shipping Board Emergency Fleet Corporation, has filed this libel to recover for salvage services rendered November 5 to 11, 1919, inclusive, to the Avondale, another steamship owned by the same corporation. The facts have been agreed in writing. That agreement is adopted by me as my findings of fact. In this memorandum, such part of the facts only will be stated as are necessary to an understanding of the questions of law to be decided.

The Lake Ellenorah was on November 5, 1919, without cargo and in ballast only, en route from Plymouth, England, to Norfolk, Va., and while in the North Atlantic Ocean, 500 miles more or less southeasterly from St. Johns, Newfoundland, picked up a wireless call for assistance from the steamship Avondale. She altered her course and steered for the location indicated in the wireless call, which proved to be about 100 miles distant. Between 7 and 8 o'clock the same evening, she came up to the Avondale, which was displaying a bright light as a guide. The Avondale was then entirely disabled, floundering and laboring in the seaway, unmanageable, without ability to navigate, and drifting at the mercy of the elements. She had been thus lying and drifting for a number of days and sending out wireless calls for help. Her machinery was so disabled that her main engine could not be used; her

engine room is described as a wreck, and the conditions were such that it was impossible to make necessary repairs or to recondition her at sea, and, as afterwards developed, was incapable of steering well when taken in tow. Her crew were also worn out. These facts and conditions were reported by the master of the Avondale to the libelant and a request made that the Lake Ellenorah tow the Avondale to some place of safety as quickly as was possible. The wind had been blowing very hard from the southeast for several days, with violent seas, and, although the wind had by now fallen, there was still running a very heavy swell, which continued for several days and until the change of weather presently to be stated. The weather also was very foggy, and this condition likewise continued off and on during the ensuing six days consumed in performing the salvage service for which compensation is now asked.

The value of the Avondale was about $1,800,000, and the value of her cargo $132,000. She was a large oil tank steamer, some 400 feet in length, 54 feet beam, 9,000 tons' carrying capacity, and drawing 28 feet of water. She was bound from the United States to Greenock, Scotland, with a cargo of oil. The Lake Ellenorah was valued at about $900,000. She was 253 feet in length, 43 feet beam, 3,000 tons' carrying capacity, and was drawing about 12 feet of water forward and 16 feet aft. She was not constructed as a towing ship, nor adapted to that service, having no appliances or towing bitts, and no place for making fast a line aft, except the regular quarter bitts on either side. The nearest safe port, from the position in the open Atlantic where the Avondale was found, is St. Johns, Newfoundland. At this season of the year and in that latitude a low barometer might be expected at any time, with heavy gales and bad weather. It is agreed that the Avondale's position was an extremely dangerous one for an unmanageable ship, and that there was continuous danger after she had been taken in tow that the tow line might part, and substantial danger of accident to either or both ships, which might set her adrift, with the possibility of meeting with even the gravest disaster.

In this situation, the libelant, after consulting his officers and not without some opposition from them to attempting the operation, determined to attempt the salvage undertaking, and so notified the master of the Avondale. The latter had no available line, but the Lake Ellenorah had a wire cable of 120 fathoms, carried for use in emergency, and this was used. After two efforts and with no little difficulty, this cable was passed to the Avondale and made fast to her, and was attached to the Lake Ellenorah by bridles made fast to the quarter bitts. This operation consumed several hours. The Lake Ellenorah then started slowly and was able to make only 4 miles an hour. The Avondale was unable to steer after her, but sheered broadly, and the strain from the plunging of the two ships was so great as to first part one of the bridles and a little later the towing cable. Thereupon it was agreed between the masters of the two ships that the Lake Ellenorah would stand by until morning and make another attempt; the master of the Avondale reporting that he had found below and would try to get up a ten-inch hawser and wire cable, each of 120 fathoms. This he suc-

ceeded in doing during the night. The Avondale ran out, by direction of the libelant, 15 fathoms of her anchor chain and attached the towing cable to it, in order to avoid chafing at that end. Two members of the crew of the Lake Ellenorah, one the first officer and the other the son of the libelant, volunteered to go, and did, in a small boat called a "dinghy," suitable for use in the seaway by two men, to pick up the cable and bring it aboard the Lake Ellenorah. This eventually was done, not without difficulty and substantial danger, and the cable was finally made fast.

The Lake Ellenorah again proceeded towards St. Johns with her tow. The Avondale in her disabled condition steered badly in the seaway, from which much difficulty was encountered during the towing. Difficulty was also experienced from the racing of the propeller wheel of the Lake Ellenorah as her stern would be lifted by the swells out of the water. Thus proceeding on an approximate northwest course for St. Johns, two days later, on the evening of November 8, the wind suddenly veered around to the northwest, blowing hard and increasing. This wind, opposed to the heavy southwest swells, caused a nasty, irregular sea, adding much to the difficulties of the undertaking and causing much anxiety aboard both ships, which were at that time in the vicinity of the dangerous Virgin Rocks, which were to be passed to the northward. The wind, sea, and currents caused the vessels to drift so seriously that on the afternoon of the 9th it was found that no headway could be made, but that the vessels were drifting and in danger of going on the Virgin Rocks in spite of every effort. A seaman on the Avondale later reported that breakers could be heard. The weather was foggy, observations had not been dependable, and exact positions could not be fixed; but the libelant determined to hold fast to the Avondale and change his course and run off more southerly with the wind abaft the beam, and thus try to get enough headway to clear the Virgin Rocks. He was also by this time able to communicate by wireless with Cape Race for confirmation concerning his position. This changed course was pursued with the wind abaft the beam until libelant could calculate that they had successfully cleared the Virgin Rocks, and he then adopted a course for Cape Race, and about 10 hours later sighted that light. The vessels arrived at St. Johns about 3:00 p. m. November 11.

During the whole period from November 5 until the afternoon of November 11, libelant had the sole responsibility for conducting the operation, with all the accompanying anxiety. The heavy sea and winds, the foggy character of the weather, and the consequently unsatisfactory observations as to his position, added to the difficulties and uncertainties of the operation. He was on deck, in active charge, almost continuously, not retiring from his post during the entire length of time, and securing only short intermittent naps in the rest room. It is agreed that the conditions prevailing, as herein noted, made the situation and services throughout the entire period hazardous, and called for judgment, courage, and skill. The salvage operation was successfully conducted, and completed without material damage in the operation to either ship.

The United States Shipping Board Emergency Fleet Corporation awarded to the master and crew of the Lake Ellenorah as full compensation for these salvage services the sum of $7,000. In apportioning this amount, the Board allowed the master the sum only of $1,008.78, a trifle more than the sum apportioned to the chief engineer, and only three times the amount apportioned, respectively, to the first assistant engineer and to the first officer. All of the officers and crew accepted the award in their favor except the master, who, deeming the award to him insufficient, has brought this libel.

The jurisdiction of this court to entertain this libel and determine the issue is not questioned by defendant. It is specially conferred by Act of Congress approved March 9, 1920 (41 Stat. 525). See sections 2 and 10. Nor is it disputed that the libelant is entitled to recover for salvage services, notwithstanding both ships involved in the operation are owned by a common owner. 35 Cyc. 740; Jacobson v. Panama R. R. Co. (2 C. C. A.) 266 Fed. 344. The principles upon which compensation is allowed for salvage services are well settled. See 35 Cyc. 750, 752. An authoritative and sufficient statement of these principles is made in The Blackwall, 10 Wall. 1, 19 L. Ed. 870, which, with slight changes of phraseology, are excerpted as embodying the principles controlling in this case. Salvage services are viewed by the admiralty courts, not merely as pay on the principle of quantum meruit, or as remuneration for work and labor, but as a reward given for perilous services voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property. Public policy encourages the hardy and adventurous mariner to engage in these laborious and sometimes dangerous enterprises, and, with a view to withdraw from him every temptation to embezzlement and dishonesty, the law allows him, in case he is successful, a liberal compensation. That compensation, while liberal, should not be so extravagant as to encourage the presentation of unreasonable demands.

The circumstances considered by courts of admiralty as the main ingredients in determining the amount of an award are the following: (1) The labor expended by the salvors in rendering the salvage service. (2) The promptitude, skill, and energy displayed in rendering the service and saving the property. (3) The value of the property employed by the salvors in rendering the service and the danger to which such property was exposed. (4) The risk incurred by the salvors in saving the property from the impending peril. (5) The value of the property saved. (6) The degree of danger from which the property was rescued.

In the present case, all the foregoing ingredients are present, some of them in a high degree. Every ingredient justifying a liberal award is present, with the single exception that the Avondale was not a derelict. Her situation and condition were such, however, that she would have been wholly lost to her owner, if some ship had not performed promptly and successfully the services performed by the Lake Ellenorah. An extended examination has been made of other cases most nearly parallel upon the facts to the instant case, in an effort to determine by comparison what would be first, a fair allowance for the en-

tire service; second, what would be a proper apportionment thereof between the owners of the ship thus employed and the master and crew; and, third, what would be a fair apportionment of the part allotted to the master and crew between the master and the remaining members of the crew.

Among the cases thus examined, the following may be noted as most nearly parallel on some one or another of the aspects of the instant case: The Charles Wetmore (D. C.) 51 Fed. 449; The Wellington (D. C.) 52 Fed. 605; The Lamington (2 C. C. A.) 86 Fed. 675, 30 C. C. A. 271; The St. Paul (2 C. C. A.) 86 Fed. 340, 30 C. C. A. 70; The Johnson Lighterage Co. No. 24 (D. C.) 240 Fed. 435, 444, affirmed on all pertinent points (3 C. C. A.) 248 Fed. 74, 160 C. C. A. 214; The Fordenskjold (D. C.) 253 Fed. 273; The F. Q. Barstow (D. C.) 257 Fed. 793; The Tijuca (D. C.) 247 Fed. 358; The Melderskin (D. C.) 249 Fed. 776; The Portugal (D. C.) 253 Fed. 264; The George Hawley (5 C. C. A.) 242 Fed. 473, 155 C. C. A. 249; The Avalon (9 C. C. A.) 255 Fed. 854, 167 C. C. A. 182. In addition thereto, my attention has been called to The British Peer, decided February 28, 1921, by the Admiralty Division of the British Admiralty Courts, which, in most respects, is an exact counterpart of the present case, except that the enterprise seems to have been less hazardous, but to have required a towage of 1,560 miles. Upon the question of the apportionment between the master and members of the crew, attention is also called to Kennedy's Law of Civil Salvage (2d Ed.) 174, 175.

Upon the basis outlined and illustrated by the numerous cases, a salvage award of $100,000 for the entire service performed by the Lake Ellenorah, including her master and crew, could not be regarded as excessive. In The Blackwall, an allowance of 10 per cent. of the value of the property salved was not regarded as excessive, even though the operation took but a few hours and involved relatively small hazard. In The St. Paul (2 C. C. A.) 86 Fed. 340, 30 C. C. A. 70, a salvage allowance of 6½ per cent. on the valuation of $2,000,000 of the property rescued was sustained. In The British Peer, above referred to, the salvage allowance was 5 per cent. An apportionment of this allowance as between the owners, on the one hand, and the master and crew, on the other, of two-thirds to the owner and one-third to the crew, would not be unreasonable. An allowance, therefore, to the master and crew of $33,333 would undoubtedly be sustained.

Our problem is to make an apportionment between the master and crew of their share of the salvage compensation. Kennedy's Law of Civil Salvage, 174, 175, says:

"The master of the salving ship not only takes his share in the actual work, but also has a peculiar burden of responsibility in undertaking and in conducting the salvage enterprise, and therefore, under ordinary circumstances, he is held to be entitled to receive out of the salvage reward a special recompense. The share allotted to him has often been from one-half to one-fourth of that allotted to the master and crew. In recent cases of salvage by steamers, his share has usually been one-third."

In The British Peer, one-fourth of the total was apportioned to the master and crew, and, of that fourth, one-fourth was apportioned to

the master. An examination of the American cases sustains the view thus expressed.

In the present case, the responsibility and service of the master, as compared with that of the crew, is relatively high and entitled proportionately to the most liberal allowance. In my opinion, an award to him now of $3,000 would be modest, not liberal, compensation. If a fair salvage award for the entire service had been made, and one-fourth or one-third thereof only were apportioned to the master and crew, and that portion then divided between the master and crew on a pro rata basis of wages paid, his share would exceed this sum. Any less allowance would be niggardly, and tend to thwart the public policy upon which salvage services are allowed.

A decree will be entered, finding the issues in the libelant's favor and allowing the sum of $3,000.

MORGAN v. CLEAR LAKE IRRIGATION & LUMBER CO. et al.

(District Court, D. Oregon. April 25, 1921.)

No. 8515.

Corporations ⇐480½—Agreement held to effect equitable satisfaction of corporate trust deed.

A trust deed executed by a corporation to secure its bonds *held* to have become invalid by reason of transactions through which the present claimant of the bonds received the bonds of another corporation, which had succeeded to the property under an agreement that they were to be used in taking up the bonds of the first company for cancellation to relieve the property from their prior lien.

In Equity. Suit by David Morgan, trustee, against the Clear Lake Irrigation & Lumber Company and others. Decree for defendants, with order granting an injunction on the counterclaim of defendant Wapinitia Irrigation Company against defendant Joseph R. Keep.

Chester A. Sheppard and Fred Gronnert, both of Portland, Or., for complainant.

Harry G. Hoy, of Portland, Or., for defendant Wapinitia Irrigation Co.

Wood, Montague & Matthiessen, of Portland, Or., for defendant water users.

Ralph A. Coan, of Portland, Or., for defendant Keep.

WOLVERTON, District Judge. For some years prior to 1907 Joseph R. Keep had been engaged in acquiring water rights and privileges from the general government; also certain timber rights and licenses to cut the timber from public lands. In acquiring these rights and privileges, and in improving them with a view to their utilization, he expended considerable money, and beyond that became largely involved financially. For the purpose of more fully utilizing these properties and of organizing an irrigation project, Keep promoted the in-

corporation of what is known as the Clear Lake Irrigation & Lumber Company, hereinafter for convenience to be designated the Clear Lake Company. The capital stock was fixed at $500,000, divided into 5,000 shares, of $100 each. The articles of incorporation bear date October 24, 1907. Of this stock Keep subscribed 4,998 shares, and J. H. Kelly and J. M. Hanslmair each 1 share.

At a stockholders' meeting held November 9, 1907, Keep, having subscribed for all the stock except 2 shares, proposed in writing to pay for his stock by sale, conveyance, and transfer to the corporation of certain property more particularly described, as he asserts, "in a form of bill of sale and of deed inclosed herewith; said property being subject to an indebtedness for moneys actually advanced by me and by other parties for my account in the sum of about $146,000." It was further proposed that the company issue its first mortgage bonds in the sum of $300,000, in denominations of $500 each, and that it secure to Keep the payment of this indebtedness, first, by delivering to him $21,000 of these first mortgage bonds; and, second, $125,000 in preferred stock. The stockholders accepted his proposal. The bill of sale was made and delivered, comprising some sawmill properties, rights, machinery, tools, and equipments; but it is questionable whether the deed was ever executed or delivered—no record ever having been made of it in the proper recorder's office. Keep thinks it was, but the fact that he subsequently deeded the same properties to the corporation successor of the Clear Lake Company would seem to indicate that he is in error.

A trust deed to secure the issue and payment of $300,000 of the company bonds was in due time executed and delivered to the Portland Trust Company as trustee, and duly recorded. The affairs ran along until on March 7, 1911, a meeting of the stockholders was held, at which it was resolved to dissolve the corporation, dispose of its property, and wind up its business. In the meantime Keep claims that he expended $50,000 on account of the company.

At a meeting of the directors held March 17, 1911, on report of the president (Keep) that he was unable to dispose of the property and at his solicitation, the board entered a resolution whereby Keep was required to enter into a written agreement that he would pay all lawful debts of the company, aside from the bonds, not to exceed $94,000, on or before two years from date—a list of the creditors to be agreed upon between himself and J. L. Hartman: Provided, further, that Keep should cause the Eastern Irrigation, Power & Lumber Company to issue a series of $200,000 first mortgage bonds, of which series bonds to the amount of $94,000 should be placed in the hands of Hartman as trustee, to be held as additional security that Keep would pay such debts; in consideration whereof, the resolution further recites:

"This company hereby sells, assigns, and transfers to said Joseph R. Keep all bonds belonging to this company, and any and all such bonds which have been pledged as security for the payment of any debt which is to be paid by said Joseph R. Keep, shall, upon the payment of such debt, be delivered to and become the property of the said Joseph R. Keep."

It is claimed in behalf of plaintiff that by this resolution the Clear Lake Company sold to Keep all its outstanding bonds, being $150,000 in amount, and being all the bonds of the company that were ever issued and disposed of. On December 12, 1916, Keep assigned whatever interest he had in these bonds to Joseph C. Bayer. On December 21, 1918, the Portland Trust Company resigned its trust under the trust deed. February 12, 1920, Bayer and Keep, as purported owners of a large majority of the bonds, appointed David Morgan, of Seattle, Wash., trustee in the place and stead of the Portland Trust Company, and later, on March 16, 1920, Bayer assigned all his right, title, and interest in the bond issue to David Morgan.

Morgan, as such trustee, has instituted this suit to foreclose the trust deed, and to subject the property therein described to sale and application of the proceeds in payment of these bonds. It is conceded by counsel at the outset that Morgan does not occupy any more favorable position than Keep would, if he were suing. The initial controversy depends upon whether Keep has or can claim any such interest in these bonds as will entitle him to recover thereon, and to subject the property covered by the mortgage to their payment.

In the meantime, about February, 1911, the Eastern Irrigation, Power & Lumber Company was organized, with a capital stock of $50,000, divided into shares of $1 each. The stock was subscribed as follows: Joseph R. Keep, 49,950 shares; and N. W. Chapman, H. J. Keep, W. T. Houser, J. G. Garrow, and W. S. Chapman, each 10 shares. An assessment of 100 per cent. was made upon this stock. That being done, Keep proposed to sell and convey to the company all his land, land contracts, water, water power, water rights, timber, and timber rights, and all other rights, privileges, and permits owned or controlled by him in Wasco county, Or., more fully set forth in a deed then tendered, on condition that the company credit him with the payment of $49,950 and issue and deliver to him certificates of fully paid-up stock to the amount of 49,950 shares, and also issue and deliver to him promissory notes in the amount of $187,750, payable in two years, with 6 per cent. interest. The proposition was accepted by the Eastern Company, and its terms were complied with. It should be said in this connection that some of the other stockholders, with Keep's assistance, made rather a careful survey of the property involved, and placed a valuation upon it of $237,750, which equals the par value of the capital stock added to the amount of the notes given him.

The deed from Keep and wife, which was delivered to and accepted by the Eastern Company, covered all the property comprised by the Clear Lake Company's deed of trust to the Portland Trust Company, and in addition certain timber rights, and possibly other property rights and privileges. The Clear Lake Company also executed its deed to the Eastern Company, covering seven water rights which it had located subsequent to its organization, with a covering clause comprising "any other water rights, ditches, flumes situated in Wasco county, Oregon, not herein enumerated," and gave to it a bill of sale of the said mills, buildings, machinery, etc. These deeds and the bill of sale were executed on the 16th, 17th, and 20th of March, 1911.

On March 20, 1911, in pursuance of a proposition from Keep, the board of directors of the Eastern Company by resolution agreed to issue company bonds in the sum of $200,000 and deliver them to Keep, in consideration whereof Keep surrendered to the company the note issue of $187,750 and transferred to it 9,450 shares of its fully paid-up stock. The bonds were accordingly delivered to Keep. Subsequently a trust deed was given to J. C. Bayer as trustee, covering the property of the Eastern Company, to secure the payment of these bonds.

Prior to the time of Keep's coming into the possession of the Eastern Company bonds, he had hypothecated a large number of the Clear Lake Company bonds to secure indebtedness of his own and of the Clear Lake Company. None other than he seems to have used the Clear Lake Company bonds. There is no evidence that the company itself used them for sale on the market or otherwise, or for securing its own debts or obligations.

Mr. W. S. Chapman, who became a stockholder in the Eastern Company and had much to do in assisting Keep to promote its organization, had a firm understanding with Keep that he (Keep) should, on acquiring the Eastern Company's bonds, use them to take up and cancel and retire the Clear Lake bonds, which were then held by him or out as collateral to secure his creditors and those of the Clear Lake Company. Keep denies this, and the crucial issue arises whether it was the understanding on his part that the Clear Lake bonds should eventually be taken up and canceled, to relieve the holdings of the Eastern from any prior lien or incumbrance on account of the trust deed given by the Clear Lake Company to the Portland Trust Company.

By a resolution adopted by the board of directors, of date March 30, 1911, Keep was required to file with the secretary of the Eastern Company a written statement that he would protect all its property claims from the claims and creditors of the Clear Lake Company. In pursuance of this resolution, Keep made and subscribed his assurance as follows:

"This indenture witnesseth: That for one dollar, and other considerations, I, Joseph R. Keep, have agreed and do hereby agree to protect the Eastern Irrigation, Power & Lumber Company against all further claims of every one against the properties conveyed by me and by the Clear Lake Irrigation & Lumber Company to the said Eastern Irrigation, Power & Lumber Company in deeds filed for record in Wasco county, Oregon, as follows."

The deeds and bill of sale referred to are those executed on the 16th, 17th, and 20th of March, 1911.

The business continued until in the early spring of 1913, when Keep was arrested on a charge or charges preferred against him by the state, at which time the creditors of the Eastern Company became greatly exercised, and it was deemed essential for their protection that Keep should retire from the board of directors, and that a new board should be selected by the stockholders to take charge of the management of the company's affairs. It seemed also important that Keep should turn over his Eastern stock to some one, so that it would not be dissipated by him and the credit of the company imperiled on

account of the outstanding bonds of the Clear Lake Company. To this end Keep was entreated by the directors while in jail to make some arrangement whereby the company would be protected, to which he readily and freely assented. This resulted in his entering into a trust arrangement, with power to vote his stock or a large portion thereof, with E. E. Miller, of date March 26, 1913. Under this agreement the board of directors was realigned and Keep's name was omitted.

Under the agreement and by its terms $53,000 of the Eastern bonds were turned over to Miller to be delivered to J. L. Hartman as security for the payment of debts of the Clear Lake Company, in accordance with an understanding had between Keep and Hartman. $89,500 of the Eastern bonds which were then held by different parties as collateral for Keep's debts were, as soon as the debts were paid, to be turned over to Miller, and the remaining $57,500 of such bonds were to be delivered by Keep to Miller within 60 days. The trust agreement was to remain in force for the period of 2 years. In the meantime Miller was given power and authority to conduct and manage the affairs of Keep in such manner as should seem best for his interest.

We are enabled to trace specifically and certainly 80 of these bonds, by a receipt given to Miller by J. L. Hartman, trustee for them, showing that they were delivered to him in exchange for $75,000 of the bonds of the Clear Lake Company held by R. S. Howard, receiver of the Title Guarantee & Trust Company, which Clear Lake bonds it is certified Hartman was to deliver to Miller, to be held by him until all of said bonds had been surrendered and canceled, whereupon the trust deed or mortgage should be satisfied of record.

Miller testifies that it was agreed between Keep and himself that he was to take up all of these Clear Lake bonds as soon as he could get them, and that when they were all assembled they should be canceled, and that he bent his energies towards the accomplishment of that end. Howard talked with Keep many, many times, he says, and Keep gave him to understand all the time that the Clear Lake bonds were to be disposed of. Howard was personally cognizant of the transaction certified by the receipt of Hartman, and he testifies that it was specifically understood with Keep at the time that the exchange of bonds was made that the Clear Lake bonds were to be surrendered for cancellation. The Howard and Hartman transaction marks not the only incident where the exchange of bonds was made. A number of exchanges were consummated, and practically all with the like understanding with Keep that the Clear Lake bonds were to be surrendered for cancellation. The witness Russell E. Sewall is particularly clear on the subject, and gives a memorandum of the names of a number of creditors concerned. Practically all the Clear Lake bonds have been thus turned over through different channels either to Miller or to Hartman, and all with the same understanding respecting their cancellation. Hartman declares that in all cases the Clear Lake bonds were to be cancelled and the mortgage released.

In view of the testimony, there can scarcely be a question that the Clear Lake bonds were to be surrendered for cancellation, and that Keep so understood it and agreed that it should be done; and not

only that, but he actually participated in so assembling the bonds, with representation to the parties consenting to the exchange that they should be retired and canceled. The Clear Lake bonds have been practically all accounted for. Miller secured of them 247; Hartman 34; Morgan has 3, which Hartman gave to Keep to be delivered to Miller, under the understanding with Miller that, when all the bonds were gathered in, they should be canceled; and 12 others are out, supposedly in the hands of one Mills, who is making no claim here for them. This leaves 4 unaccounted for. At any rate, all should be canceled in pursuance of the continued understanding with Keep to that effect. Beyond this, Keep should be estopped to claim otherwise by his express act in undertaking to secure, as he did, the issuance by the Eastern Company of a series of $200,000 first mortgage bonds. These bonds were issued, as he agreed they should be, and he ought not now to be heard or permitted to say or do anything that would subordinate them to any prior incumbrance.

Another question has been brought into the case by reason of the Wapinitia Irrigation Company's having been made a party defendant, with a view to subordinating its property and rights, whatever they are, to the lien of plaintiff's trust deed. The Wapinitia Company has interposed a counterclaim against Keep, charging him with being the instigator and real party in interest in instituting and maintaining the principal suit to foreclose, and with annoying the water users claiming rights and privileges from the Wapinitia Company, and threatening to disturb them in their enjoyment of such rights and privileges. This entails an inquiry touching the organization of the Wapinitia Company, and, incidentally, whether Keep ought to be heard to claim any interest therein.

The Eastern Company acquired, not only the holdings of the Clear Lake Company, but additional holdings from Keep, and all these have been embraced in the trust deed to Bayer to secure the payment of the $200,000 bond issue, which bonds, as we have seen, became the property of Keep. The Wapinitia Company acquired its property and holdings from the Eastern Company. Keep claims that they were so acquired through a fraud upon him committed by Miller by maladministration of his office as trustee for Keep under the trust arrangement of March 26, 1913.

The Eastern Company, in pursuance of a proposition made by W. B. Keen and others to purchase a portion of its properties, rights, and privileges for promoting a separate irrigation project, sold and conveyed to the Wapinitia Company such of its property as was desired. In arranging and perfecting the sale, Miller testifies, in effect, that with an open mind he disclosed to Keep everything that was going on, and consulted and collaborated with him freely at all times touching the Wapinitia project, and that whatever was done looking to the consummation thereof was done with his explicit and unrestrained consent and approval. Keep flatly controverts Miller's statements in almost every material particular, and disclaims any knowledge of the Eastern Company's negotiations with Keen for the sale of the property to the

Wapinitia Company, or of the sale being made, until some time after it had been consummated.

Happily, the documentary evidence contained in the record renders a satisfactory solution of this dispute, without an attempt to reconcile their conflicting statements. On July 20, 1914, Keep wrote the Secretary of the Interior a letter whereby he specifically recognized that certain rights and privileges therein noted were to be transferred to W. B. Keen, or his order. He further released to the government all such rights, and directed and authorized it to make the necessary transfer to Keen. Keep seems to dispute his signature to the letter, but I am persuaded that it is genuine.

On September 30, 1914, J. C. Bayer, trustee, gave a partial release of the Eastern Company's $200,000 mortgage, releasing the lands, rights, and privileges conveyed to the Wapinitia Company from the lien of the trust deed. Before he would consent to execute the release, he exacted of the bondholders of the Eastern Company's issue a request or direction on their part that he do so. In compliance therewith, Keep and the other holders made such request and direction in writing. The one made by Keep bears date September 1, 1914, whereby he represents that he is the owner of 40 of such bonds, and further represents that he understands that a sale has been made to W. B. Keen of a portion of the water rights and privileges theretofore secured from the government and from the state of Oregon, and that in order to make a conveyance to Keen it is necessary to release the property purchased by him from the lien of the trust deed or mortgage held by Bayer. The property to be released is specifically described. The request proceeds:

"Now, therefore, in consideration of one dollar and other good and valuable consideration to me in hand paid, the receipt of which is hereby acknowledged, I hereby consent, authorize, and direct you to release said property conveyed, or to be conveyed, to the said W. B. Keen by the said company from the lien of the trust deed or mortgage, so far as the bonds owned by me are concerned. [Signed] Joseph R. Keep."

Other like requests were made by members of his family, of which he was apprised. These documents show beyond question that Keep, not only gave his free assent to the sale being made to Keen, and likewise to the Wapinitia Company, but actually and actively participated in it; and it is now too late, after the Wapinitia Company has become possessed of its rights and privileges, and expended large sums of money to that end, in reliance upon his acts, for Keep to attempt to oust it, or to disturb it or the water users in the enjoyment of their possession.

A decree will be entered dismissing the plaintiff's complaint, and enjoining Keep from disturbing the Wapinitia Company and the water users in the full enjoyment of their property, rights, and privileges.

UNITED STATES v. SYLVESTER.

(District Court, D. Connecticut. March 8, 1921.)

No. 1321.

1. **Intoxicating liquors ⇐244—Congress intended to confiscate interest of wrongdoer in transporting vehicle and to protect all innocent persons.**
The intent of Congress in enacting National Prohibition Act, tit. 2, § 26, providing for the forfeiture of an automobile in which liquor is illegally transported, unless good cause to the contrary is shown by the owner, and for the sale of such automobile and the payment of bona fide liens thereon, was to penalize only the wrongdoer, and to protect the interests of innocent persons in the vehicle unlawfully used.

2. **Intoxicating liquors ⇐255—Conditional seller, proving bona fide lien on transporting vehicle and ignorance of unlawful use, receives payment of lien.**
A conditional seller of an automobile truck used by the buyer for the unlawful transportation of liquor, who proves that he has a bona fide lien for a balance due on the purchase price and that he had no knowledge of the unlawful use of the automobile, is entitled to the payment of his lien out of the proceeds of the sale of the automobile.

3. **Intoxicating liquors ⇐252—Forfeiture of transporting vehicle not absolute, as under revenue laws.**
The forfeiture of a vehicle used for the unlawful transportation of intoxicating liquor under National Prohibition Act, tit. 2, § 26, is not absolute, as was the forfeiture of conveyances used in the removal of liquor on which the revenue tax was not paid, under Rev. St. § 3450 (Comp. St. § 6352).

4. **Intoxicating liquors ⇐255—Innocent owner of vehicle, who loaned it to unlawful user, can secure return.**
An owner of an automobile, who loaned it to another without knowledge that it was to be used for the unlawful transportation of liquor, and without information which should have aroused his suspicions, is entitled to a return of the vehicle to him after its seizure while being used in such unlawful transportation.

5. **Intoxicating liquors ⇐255—Lienor of transporting vehicle cannot secure its return.**
Under National Prohibition Act. tit. 2, § 26, one who has a lien on an automobile seized while being used for the transportation of intoxicating liquor is not entitled to have the vehicle returned to him, and thereby be enabled to profit by the transaction, but is limited to a repayment of the amount of his lien from the proceeds of the sale of the vehicle.

6. **Intoxicating liquors ⇐255—Sale of forfeited vehicle should be abandoned, when highest bid does not equal bona fide liens.**
Where only a small amount of the purchase price of a vehicle had been paid, so that the lien of the seller, who was ignorant of the unlawful use of the automobile, is substantially equal to the value of the vehicle, and the highest bid at the marshal's sale does not equal the amount of the lien, the marshal should abandon the sale and report the facts to the court.

Proceeding by the United States against Anthony Sylvester for the forfeiture of a truck used in the illegal transportation of liquor. The Commercial Investment Trust filed a petition, reclaiming the truck as an assignee of the conditional seller thereof. Order entered for sale of the truck.

George H. Cohen, Sp. Asst. U. S. Atty., of Hartford, Conn.
William A. Wright, of New Haven, Conn., for reclaiming petitioner.

THOMAS, District Judge. On July 26, 1920, the defendant and his brother bought a motor truck from the Diamond T Motor Truck Company, of New York City, on a conditional bill of sale for an agreed price of $3,300, and paid $1,100 the day the truck was delivered. On July 27, 1920, the Commercial Investment Trust, the petitioner in these proceedings, purchased for value, without notice, and before maturity, from the conditional vendor, the note and the conditional sale contract to secure the note. Subsequently two installment notes, of $183.33 each, were paid, so that there is now due on said contract the sum of $1,833.34. Both the conditional sale contract and the assignment of it were properly executed, acknowledged, and recorded.

The defendant was subsequently arrested and duly convicted of transporting intoxicating liquor in violation of the National Prohibition Act (41 Stat. 305), and paid his fine. Thereupon the government filed a petition asking that the motor truck used for the transportation of the intoxicating liquors, which is the same truck mentioned in the conditional bill of sale, and which was seized and is now in the possession of the enforcement officers, be ordered sold at public auction in accordance with the provisions of section 26 of title 2 of the National Prohibition Act. In due season, and in accordance with the provisions of the act, the Commercial Investment Trust intervened, by filing a reclaimer petition, asking for an order directing the delivery of the truck to the petitioner, on the ground that the title to the truck remained and was at all times vested in the petitioner under the terms of the conditional bill of sale by which the truck was sold, and that the illegal transportation of the intoxicating liquor by the defendant was without the knowledge or consent of the conditional vendor or his assignee.

The answer of the government admits (1) the proper execution of the conditional bill of sale and its proper assignment to the petitioner; (2) that the illegal transportation of liquor by the defendant was without the knowledge or permission of either the original vendor or the petitioner. But, even in view of the conceded facts, the government contends that the petition must be denied, and the truck sold in accordance with the provisions of section 26 of the act. So that the question here presented is this: Is a motor vehicle, bought on a conditional bill of sale and seized in the illegal transportation of intoxicating liquor in violation of the National Prohibition Act, subject to forfeiture and sale, where the same has been used for such illegal transportation by the vendee without the knowledge or permission of the vendor or his assignee?

[1] The answer to the question lies in the interpretation and construction to be given section 26, title 2, of the act, which, so far as it is here pertinent, provides:

"Whenever intoxicating liquors transported * * * illegally shall be seized by an officer he shall take possession of the * * * automobile, * * * and shall arrest any person in charge thereof. * * * The court

upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, *shall pay all liens, according to their priorities, which are established, by intervention or otherwise, at said hearing or in other proceedings brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor,"*

—and shall pay the balance of the proceeds into the treasury of the United States as miscellaneous receipts.

Thus it is apparent that this section makes it unlawful for any one to transport intoxicating liquor in and by means of any vehicle, and in addition declares that the vehicle thus used shall be forfeited. But it is apparent that the Congress intended to penalize only the wrongdoer. This is accomplished in two ways—first, by imposing a penalty for the offense of transporting intoxicating liquor; and, second, by confiscating *his interest* in the vehicle. The question, therefore, is to determine how to bring into practical operation the provisions of section 26, to the end that the wrongdoer may be properly punished, while the innocent parties may be protected against loss, as far as possible.

When a defendant is arrested for transporting intoxicating liquor, and the vehicle is seized, what is to be done with it depends upon what interest the defendant has in it. If he had no interest—that is, if he had stolen it, or had borrowed it from its real owner, who neither knew nor could be presumed to have knowledge of the illegal purpose for which it was to be used—manifestly the wrongdoer had no interest to forfeit, and it logically follows, under the provisions of the act, that the vehicle should be returned to its rightful owner, by order of court. If, on the other hand, the wrongdoer had an interest in the vehicle, his interest should be confiscated and the vehicle ordered sold. What, then, is to become of the interest of the conditional vendor or the interest of the mortgagee? Are such persons to lose their interest in the vehicle or the value of their property right? The answer is a negative one, and is found in the provisions of section 26, which guard against such loss, as far as possible.

[2] From its phraseology it is apparent that just such cases were in mind when the law was framed, and that the Congress realized that vehicles would be used for the illegal transportation of intoxicating liquor by persons who would purchase the same on conditional bills of sale, and that such vehicles would be used for such unlawful purpose without the knowledge or consent of the conditional vendor or his assignee. In order, therefore, to protect a person retaining title under a valid conditional bill of sale, or one who holds a valid chattel mortgage, such person must satisfy the court that he holds a bona fide lien and lacked the knowledge or information of the illegal purpose for which the vehicle was used or was to be used. Having done this, he is entitled to receive from the proceeds of the sale the amount of the lien, established by intervention or otherwise, after the costs as provided by law, are paid. Section 26 of the act seems so clear that there can

be no possible doubt but that it was the intention of the Congress to protect innocent vendors or mortgagees, as far as possible.

[3] Discussion of the principles of law found in U. S. v. Stowell, 133 U. S. 1, 10 Sup. Ct. 244, 33 L. Ed. 555, U. S. v. Mincey, 254 Fed. 287, 165 C. C. A. 575, 5 A. L. R. 211, Logan v. U. S., 260 Fed. 746, 171 C. C. A. 484; U. S. v. One Saxon Automobile, 257 Fed. 251, 168 C. C. A. 335, and similar cases, are not germane, as prosecutions in those cases arose under section 3450 of the Revised Statutes (Comp. St. § 6352) which is a statute to protect the revenue of the government, and provides that the "conveyance * * * used * * * in the removal * * * shall be forfeited." No provision whatever is made to protect bona fide innocent vendors, or even owners. The conveyance is confiscated, and the confiscation is absolute, whether or not good cause is shown to the contrary; nor does it offend against the Fifth Amendment to the Constitution, which prohibits the taking of life, liberty, or property without due process of law. Grant Co. v. United States of America, 254 U. S. 505, 41 Sup. Ct. 189, 65 L. Ed. —, decided by the Supreme Court on January 17, 1921.

[4] To justify an order for the return of the truck to the petitioner, reliance is placed by the petitioner on U. S. v. Brockley, 266 Fed. 1001; but the facts there are not the facts here. In that case Brockley borrowed the automobile, and on page 1002 the court said:

"The admitted facts in the present case show ownership and want of knowledge on the part of the vehicle's owners as to the purpose for which the vehicle was to be employed."

And continuing Judge Witmer said:

"Without any other attending circumstances, this is sufficient to warrant the court to order its return."

In that case the wrongdoer had no interest whatever in the automobile, and therefore there existed no interest which could be confiscated, while here we are asked to return the truck to the assignee of the conditional vendor, because it was sold on a conditional bill of sale, where it appears that about 45 per cent. of the purchase price has been paid by the vendees, thereby showing an interest that the wrongdoer had in the vehicle to that extent. It is thus apparent that the ruling in the Brockley Case cannot control here.

The intent of the Congress, as disclosed in section 26, here under discussion, is clearly expressed. The conclusions respecting its interpretation are:

First—The seizure, forfeiture, and sale of vehicles is not absolute, as under section 3450 of the Revised Statutes, but is subject to the order of court after it has heard all the facts of each case.

Second—An owner who transports intoxicating liquor illegally forfeits the intoxicating liquor and the vehicle and suffers a penalty.

Third—A conditional vendor or a mortgagee, who allows the vehicle to be used for such unlawful purpose with his knowledge, or who gives his consent to the illicit transportation, shall also forfeit all interest in or his lien upon the vehicle.

Fourth—A bona fide vendor or mortgagee, without having any notice that the vehicle was being used or was to be used for the illegal transportation of intoxicating liquor, shall be protected to the amount of his bona fide lien, as far as possible.

Fifth—The owner of a vehicle, who loaned it to another, who, in turn, transported intoxicating liquor therein, is entitled to a return of the vehicle, where he had no knowledge of the purpose of the borrower, and no facts are shown which should have aroused his suspicion.

Sixth—In the second and third instances, the vehicle shall be sold by the United States marshal at public auction, and after the costs are paid, as provided by law, then the balance of the proceeds of the sale shall be turned into the treasury of the United States.

Seventh—In the fourth instance, after the bona fide lien and lack of notice or knowledge have been established, the vehicle shall be sold at public auction, and after the costs, as provided by law, have been paid, the United States marshal shall then pay, if possible, the amount of the bona fide lien in full to the proper person, and the balance, if any, shall be turned into the treasury of the United States.

[5] To grant this petition would permit a lienor or mortgagor to profit by the transaction, and that result was never intended by the framers of the law. Cases may arise where the application of this rule would result in realizing an insufficient amount at the sale to pay the full amount of the bona fide lien; but where a substantial amount has already been paid, as here, on a new truck, undoubtedly the full amount of the balance due, plus the costs, will be realized, so that the lienor will be fully protected.

[6] Where, however, the amount paid by the purchaser is small in proportion to the purchase price, so that a large amount will have to be realized by the United States marshal at the sale, and where the highest bid is insufficient to meet the costs and the amount of the bona fide lien, the United States marshal shall then abandon the sale and report the facts to the court for further instructions. In such event further hearing will be had before the court to determine then whether the lienor has shown "good cause" why the vehicle should not be sold.

As the instant case clearly falls under the fourth and seventh conclusions, stated supra, the prayer of the petitioner, in so far as it requests the return of the truck, is denied. Therefore let an order be prepared forthwith, providing for the sale by the United States marshal, at public auction, of one Diamond T motor truck, No. 12347, described in the petition, in accordance with the provisions of section 26, title 2, of the National Prohibition Act, and let the proceeds of the sale, after costs as provided by law are paid, be turned over to the petitioner to the amount of its lien of $1,833.34, plus interest at 6 per cent. from October 26, 1920, the date when the first defaulted payment became due in accordance with the terms of the conditional bill of sale, and let the balance, if any, be turned into the treasury of the United States.

Ordered accordingly.

ALEXANDER et al. v. SECURITY BANK & TRUST CO. et al.

(District Court, S. D. Texas, at Houston. May 17, 1921.)

No. 136.

1. **Trusts ⊜358(1)—Sufficient to trace trust funds into deposit of agent, appropriated by bank to his personal debt.**
   In tracing trust money, misappropriated by a bank, with the connivance of a depositor, in payment of his private debt to the bank, it is sufficient if the trust funds can be sufficiently traced to be reflected in the deposit, and it is not essential that the identical money be located.
2. **Trusts ⊜356(2)—Bank held liable for trust funds applied to depositor's indebtedness.**
   A depositor of defendant bank was a shipper of produce, in part of that bought by him, and in part as agent for others, and in making shipments he deposited drafts on consignees, which were accepted by defendant as cash and credited to his account. He had small capital, and in the course of an unfavorable season became indebted to defendant in the sum of $15,000. During the next season, when he was making large shipments, known by defendant to be in large part on commission for plaintiffs and others, but depositing the drafts in the usual way to his own credit, defendant obtained from him a number of checks, and from time to time, as his account warranted, applied such checks in payment of his indebtedness. *Held* that, so far as drafts for shipments owned by plaintiffs could be traced into the deposit so withdrawn, defendant was liable therefor.
3. **Estoppel ⊜88(1)—Attempted settlement with agent for funds misappropriated held not an estoppel to follow the funds.**
   Where a bank in which an agent had deposited funds of his principals to his own credit, with knowledge of their trust character, had procured their application in payment of a debt of the agent, the owners of the funds *held* not estopped to maintain a suit against the bank by taking notes of the agent, with personal security, for part of the amount, pursuant to an agreement for settlement made without knowledge by them that the bank had received the money, and which was not carried through, so as to constitute an accord and satisfaction.
4. **Subrogation ⊜10(1)—Trustee ex maleficio is not entitled to subrogation.**
   A trustee ex maleficio *held* not entitled in equity to be subrogated to securities held by complainants for their own protection.

In Equity. Suit by Joseph Alexander and others against the Security Bank & Trust Company and another. Decree for complainants.

This is a suit in equity by the complainants, seeking to follow certain moneys of theirs which came into the hands of Martin, as their agent, and which were by him deposited in the Security Bank & Trust Company, and thereafter checked out to persons other than plaintiffs. The admitted facts are these:

That Jesse Martin, doing business in Wharton county, Tex., under the firm name of Jesse Martin & Co., conducted on his own account and as broker for others the business of buying and selling potatoes, grain, hay, and other kinds of produce. That he had been conducting this kind of business for some time prior to 1918, when the facts out of which this controversy arose transpired; that it was, and had been, his custom for some time to do his banking business through the Security Bank & Trust Company in his own name. That in the year 1917 he had handled for plaintiffs in this case their potato crop, which was planted, grown, and marketed at and from Wharton, Tex., in 1917

and 1918, and that during both these years he also handled a large amount of business, some on his own account and some as agent for others, and that practically all of his business was, and had been for a long time, transacted through the defendant bank.

That the course of handling the business of plaintiffs was in 1917, when the potatoes were loaded on the cars, that he would handle the shipping and sale of same, make all proper deductions which arose in closing up the account sales for the respective cars, and after deducting his commission of $15 per car would remit to complainants the net amount due them. The same arrangement existed in 1918, with the exception that he had an understanding with complainants that, instead of paying them by checks, he would deposit their net funds to their account in the Wharton Bank & Trust Company, and pursuant to that agreement he did deposit the sum of $8,000 in that bank; the balance of their funds, $16,000 in round numbers, he deposited in the Security Bank & Trust Company, and checked them out to persons other than complainants; and complainants, with the exception of some small amounts later paid them by Martin after the misappropriation of their funds was discovered, have received none of said $16.000.

The evidence shows that Martin was a man of small capital, or, as one of the directors of the Security Bank & Trust Co. stated, "His stock in trade was a lead pencil and a piece of paper;" but the evidence also shows that he was a very active, energetic trader, and handled quite a large volume of business during the crop year. Due to weather conditions, which affected corn which Martin was handling in the year 1917, and due to delays and congestion in railroad traffic and other causes beyond Martin's control, during the year 1917 and the first part of 1918, there was accumulated a considerable debt to the bank, reaching in April, 1918, about $15,000.

This debt was represented by drafts which, in accordance with their regular custom, the bank had taken as cash items, payment on which had been delayed or refused, so that, instead of the case being, as it had formerly been, that with few exceptions the drafts which Martin put through the bank sufficed, upon their acceptance and payment by the drawee, to keep his account with the Security Bank in proper condition, such an unsatisfactory condition from a banking standpoint had arisen that Martin had a conference with the president of the bank and Wright, the cashier and active manager, in April, in which this condition was called to his attention, he was advised that the bank could not, without great embarrassment, continue to carry these long overdue drafts, and was induced to promise that as soon as possible he would take up these drafts, giving the bank cash therefor.

That subsequently the potato season came on, and Martin handled a large amount of potatoes, some of which he bought outright, but at least 90 per cent. of which was handled by him on commission. As the result of moving these cars of potatoes there went through Martin's account, after the 1st of May, something over $40,000, and while these funds were going through the bank Mr. Wright, the cashier, went to Martin and called his attention to the fact that he had promised to take up the $15,000 or so of long overdue drafts which they held of Martin's, and wrote out and caused Martin to sign checks on his account with them, aggregating the amount of the overdue drafts. This transaction took the form, according to the testimony of the cashier, of several checks, so that they could be passed through the bank as Martin's account would warrant, and covered a period of five or six days.

As before stated, the funds which went to Martin's credit during this active period were realized in large part by the delivery by Martin to the bank of drafts with bills of lading on moving cars attached, which drafts were taken by the bank as cash items, and for the amount of the drafts Martin was given immediate credit. Some few of these drafts were later returned unpaid, but that fact is immaterial, since the receipt of the drafts as cash items and the deposit of their value in cash stands, as to complainants, exactly the same as though Martin had gotten the money from the consignees and placed it to their credit, and any claim which might accrue to the bank because of the nonpayment of drafts would be a different cause of action, resting upon a different consideration.

The above are the undisputed facts. The only matters upon which there was any dispute on this branch of the case were: (1) Whether the bank knew, when they got Martin to sign checks on his account to pay up a past-due indebtedness to them, that these checks were being satisfied with moneys actually belonging to complainants; in other words, whether they knew that Martin was using his clients' moneys to pay his own debts; and (2) if they did know it, what amount of complainants' moneys the evidence sufficiently shows were appropriated by the bank to pay Martin's debt to it.

On the first of these matters the case presents no difficulty, for, notwithstanding the fact that the officers of the bank, particularly Wright, testified that they did not know that Martin was doing business as a broker, and did not know that any of the funds deposited by him were moneys of his principals, the testimony of Martin is equally positive that they did know these facts, and every fact and circumstance in the case in an overwhelming way points to the same conclusion. It is simply inconceivable that a banker, in the position which Wright occupied toward a customer such as Martin, who was heavily indebted to the bank, could have been as ignorant of Martin's business and condition as Wright claims to have been; nor is his claim to credence strengthened by the testimony of his conversations with Ingram, which, to put the most favorable light on them, were distinctly uncandid. I have therefore no difficulty in holding that the bank knew that Martin was operating on a shoestring, and handling his customers' money, and particularly the money of complainants in this case.

The second point in dispute, as to the amount of complainants' money which the bank actually misappropriated, is more difficult. The evidence establishes without contradiction that the major part of Martin's potato business in May and June was commission business, or, as he himself testified, about 10 per cent. of the business was his own, the balance commission, and with the exception of about $8,000, which he depoited in the Wharton Bank & Trust Company to the credit of complainants in this suit, all moneys received by him on account of all his clients were deposited by him in his own name in the Security Bank & Trust Company; the books of the bank showing that during the months of May and June there was over $40,000 deposited by Martin in the bank, of which approximately $16,000 was the money of complainants in this case, the balance belonging in part to Martin, but the larger part to clients of his.

Martin testified that the drafts for the potato crop were put in in May and June; that the crop started rolling in May, but most of it rolled in June. He also testified that about half of the drafts covering complainants' potatoes were deposited prior to the 1st of June, and about half between that day and the 10th, but that this was just a matter of opinion. That he did not think it would be possible to check over the papers and determine which drafts belonged to complainants and which belonged to others. The drafts and other records of the bank covering Martin's account were offered in evidence, and from them the respective counsel have made up a statement undertaking to trace the complainants' drafts into the bank, and by comparing these receipts with the checks upon which the bank satisfied Martin's debt to it to determine just how much of complainants' money the bank actually got.

The results obtained by respective counsel have not been alike, nor is the court entirely satisfied, after checking the matters himself in the light of counsel's efforts, that the evidence is in the shape it ought to be in to permit of an entirely satisfactory tracing. I am of the opinion, however, and will so find, that the evidence is sufficient to show that of the funds of complainants which were deposited in the bank the bank obtained on the checks of Martin $7,800. In view, however, of the unsatisfactory character of the evidence, either party may make application, should it so desire, to reopen the case on this point.

In addition to the issues set out in the foregoing statement of facts the case presents an issue of estoppel, based upon the following facts, most of which are undisputed:

That after the plaintiffs had discovered the fact that their moneys had been misappropriated by Martin, and before they had obtained the precise information as to who had gotten their money, an attempt was made to make a set-

tlement with Martin, which attempt resulted in Martin paying a small amount of cash and produce, giving notes with personal indorsement for a part of the balance, and making an agreement, which was not fulfilled, to close the adjustment by the securing of an additional loan of $1,000 indorsed by personal security. The last-named note not having been obtained, the settlement fell through; but the issue is made by defendants Security Bank & Trust Company that the acceptance of payment on account from Martin and the taking of his notes constituted either a novation, accord and satisfaction, or in some way established a situation which released the bank, because, as they claim, after Martin had had these dealings in an attempt to effect a settlement, he advised the bank of them and stated to them that he had thereby saved them from a lawsuit; that the bank, upon receipt of that information, surrendered to Martin some collateral which they held to secure his debt to them, and had thereby had their position made worse; whereas, had complainants not made the settlement, or had they advised the bank that they intended to hold it responsible, such delivery to Martin of their securities in hand would not have occurred.

The testimony of complainants on this score is that they did not know, and could not get information from the bank from which they could ascertain, the facts as to the bank's liability, and the evidence bears out their contention that they were wholly unable to get any information whatever from the bank. There is no evidence that any of the complainants ever stated to the bank that they were not looking to it, or in any way advised the bank, or induced the bank, unless their failure to sue the bank earlier could have that effect, to take any action in the matter.

Upon these facts the bank contends that complainants should be estopped to proceed against them in this suit, and further that, if they are not so estopped, they shall surrender to the bank what securities, if any, the defendants obtained in their negotiations with Martin. These securities are not declared on by complainants, or referred to in the pleadings by either complainants or defendants; but they were presented ore tenus in court for such action as the court might think proper to take upon the same.

Williams & Neethe, of Galveston, Tex., for plaintiffs.

Kelley & Hawes, of Wharton, Tex., and Terry, Cavin & Mills, of Galveston, Tex., for defendants.

HUTCHESON, District Judge. [1] No character of case better illustrates the principle of the equitable maxim, "Ubi jus ibi remedium," than that of tracing trust moneys misappropriated by banks with the connivance, or through the active agency, of a depositor who has used his principal's money to pay his private debts, for though in years past the courts found difficulty in stating the law of the case growing out of the fact that money has no earmarks, the principle is now almost universally recognized that it is sufficient if the trust funds can be sufficiently traced so as to be reflected in the amount of the deposit, and it is not essential that the identical money be located. Many cases have stated the matter, but none better than the case of Santa Marina Co. v. Canadian Bank of Commerce (D. C.) 242 Fed. 143, where the authorities are collated; nor have I found a better discussion of the general principle or better collection of authorities than is contained in the very interesting note in L. R. A. 1916C, 21.

These authorities and others like them make it plain that there is no real legal difficulty at all in the application of the trust doctrine to moneys deposited and misapplied, but that the real trouble arises in the application of the principle to the facts of a particular case, for it is

of course fundamental that funds must be traced before the trust can be asserted in them. This is clearly settled by numerous authorities, and perhaps nowhere better stated than in Board of Commissioners v. Strawn, 157 Fed. 49, 84 C. C. A. 553, 15 L. R. A. (N. S.) 1100. The same case establishes a doctrine, which has been reaffirmed and specifically applied in Schuyler v. Littlefield, 232 U. S. 707, 34 Sup. Ct. 466, 58 L. Ed. 806, that if the mingled fund is reduced below the amount of the trust fund the latter must be regarded as dissipated, except as to such balance, and sums subsequently added cannot be treated as part of the trust fund.

It is hardly necessary to state that the courts recognize that in the interest of commercial security a bank may safely deal with a depositor without undertaking to scrutinize the source of his deposits, or, even if the trust character is known, seeing to the proper application of the funds. It is well settled that a bank has the right to assume that the depositor is acting within his authority, and will deal justly by his principal; but this rule breaks down, or rather, has no application, where a bank, with knowledge of the trust character of a deposit, assists the depositor to misapply it by appropriating it, either by a charge ticket, or through the check of the depositor, to the private obligation owed by the depositor to the bank.

[2] It is conceded in this case that the funds of the complainant in dispute were deposited by Martin in the defendant bank in his own name, and that these funds were all checked out by Martin to others than complainants; nor is there any dispute that the bank, during the period when the funds, or some of them, were being deposited by Martin in the bank, caused Martin to sign checks for and received payment of $14,862.75 of debts in the form of unpaid drafts long overdue from Martin to the bank. Nor, since I accept and approve the proposition of defendant's brief that, in giving Martin a deposit receipt for the drafts, the legal effect was the same as if the consignee had paid Martin the same amount of money in the bank, is there any doubt that the money realized from the drafts drawn against plaintiffs' potatoes by their acceptance as cash items by the bank was the money of complainants. Commercial Bank v. Armstrong, 148 U. S. 50, 13 Sup. Ct. 533, 37 L. Ed. 363. The money stood in exactly the same case as if Martin had gotten it from the drawees of the drafts and deposited it.

The question, therefore, of bona fide purchase of the drafts by the bank, or whether the matter should be treated as a purchase by the bank of the plaintiffs' potatoes, in which event, of course, the bank could get no higher title than Martin had, and would be liable for the value of the personal property, is not in the case. The case upon the law and the evidence is one where the moneys of complainants was with the knowledge of the bank to the extent of $7,800 appropriated by the bank, with the consent of the defendant Martin, to pay Martin's debt, and upon the plain principles of law above set out the complainants are entitled to recover from the bank that sum, unless the proposition of estoppel of the defendant bank avails to defeat recovery.

[3] A very interesting discussion of a similar situation is found in the case of Bank v. Jones, 18 Tex. 811, to which I deem it unnecessary to add that, this being a suit in equity, and the defendant having been found in default ex maleficio, through a deliberate and knowing misappropriation of complainants' funds, this court will be slow to erect out of a transaction which admittedly failed to result in an accord and satisfaction an estoppel by which the bank could keep the fruits of its wrong. While the case of Parkerson v. Borst (C. C. A.) 264 Fed. 766, is not exactly in point on the facts, it at least illustrates the disinclination of a court to lend too ready an ear to the wrongdoer's plea of election or estoppel.

The facts here which present an absolute failure to reach an accord and satisfaction present the strongest kind of case for the application of the doctrines of that case and of Bank v. Jones, 18 Tex. 811, supra. In what is here said it is not meant to declare that, had a complete accord and satisfaction between plaintiffs and Martin been reached, the effect would not have been a ratification of the acts of the agent, and an agreement on the part of the principal to treat the funds deposited by the agent in the Security Bank, and by him applied to his debts as a loan. No facts, however, warranting such a conclusion appear in this case. Neither the pleadings of the plaintiffs nor the defendant Martin declare upon these papers, nor in my opinion do they present any defense to this suit, or have any proper place in it.

[4] As to the remaining contention that these securities should be delivered to the defendant bank, it is sufficient to say that I can conceive of no theory upon which a trustee ex maleficio can in a court of equity require that a complainant deliver to him securities or documents which he holds for his own protection, even if the documents be treated as evidencing existing obligations of the codefendant, which I do not now mean to hold.

The result of these views will be that complainants should have judgment against Martin for the full amount of the balance due by him, the debt having arisen through misappropriation of trust funds, and being therefore unaffected by the bankruptcy, with interest on same from the time of its misappropriation, and that complainants should also have judgment against the defendant bank for $7,800, with interest from June 1, 1918, and against both defendants for costs.

THE NORTH AMERICA. THE W. S. TAYLOR. SCULLY v. ATLANTIC COAST TRANSP. CO.

(District Court, E. D. New York. April 27, 1921.)

Collision ⊜95(1)—Tugs in fault for collision between meeting tows.

A collision between tows meeting at a bend in a narrow ice channel in Buzzard's Bay, each in charge of two tugs, *held* due to the faults of both the leading tugs, which were in control of the movements of their respective tows; one for not giving warning when she stopped the barge in tow at the point of the bend, being unable to get past in time, and the other,

which had the right of way, for not stopping when she reached the bend and saw the danger of passing, until the barge could be moved out of the way.

In Admiralty. Suit for collision by Thomas J. Scully against the steam tugs North America and W. S. Taylor, claimed by the Atlantic Coast Transportation Company, with the tugs Scully and Mercury impleaded. Decree against the North America and the Scully, each for half damages.

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

Harrington, Bigham & Englar, of New York City, for owner of steam tugs North America and W. S. Taylor.

Burlingham, Veeder, Masten & Fearey, of New York City, for owner of steam tugs Thomas J. Scully and Mercury.

CHATFIELD, District Judge. On the 30th day of January, 1920, the steam tug North America and the steam tug W. S. Taylor were bringing down through the channel from Hog Island to Wing's Neck the Ampere, a large steel coal barge, bound for New York. The North America and the Taylor had, during the day immediately preceding, come from New Bedford, with the Ampere in tow of the North America and other barges in tow of the Taylor. At the Cape Cod Canal, and in the channel in Buzzard's Bay up to the entrance to the canal, so much ice had been encountered that it was necessary to bring the barges through one at a time and for both tugs to assist in the operation. A stop had been made at the mooring dolphins near Hog Island on the forenoon of the 30th, and the North America, when the trip was resumed, went ahead, breaking the ice where necessary, particularly as they approached the bend in the channel at Buoy No. 15. When the North America was not engaged in breaking the ice, she went back and assisted the Taylor in towing the Ampere, by extending a hawser to the Taylor, which in turn had the Ampere on a short hawser to a bitt directly over the stem of the Ampere.

From Hog Island to a point a short distance below, the view of the channel down to Wing's Neck is obstructed by Mashnee Island. As the North America came out from behind this island, shortly after going back and giving the hawser to the Taylor, she observed the tug Scully coming up the channel toward the Cape Code Canal, with two barges, the Congressman Scully and the Francis Scully, in tow, and with the tug Mercury close up behind the second barge to assist in holding the tow straight, or to push the vessels through the ice where that aid was necessary. The tug Scully had the first barge upon a single hawser, extending over the bow to the center bitt. A canal pilot was also on the Scully; but, owing to some discussion as to the advisability of towing with a single hawser, this pilot seems to have taken but a fitful or intermittent part in the actual handling of the boat.

The channel from Hog Island to Buoy No. 15 was broken out to a sufficient width so that the tows could pass with safety. Below Buoy No. 15, the lane through the ice was also broken to a sufficient width so that the boats could easily pass, but immediately around Buoy No.

15, and particularly at the turn opposite that buoy, which is on the west side of the channel, the ice was packed so solidly and the lane through the water was so narrow that the captain of the North America realized that the tows would have difficulty in passing each other, and as the event proved there was not room just at the turn for the boats to squeeze by without breaking further ice on one side or the other.

The captain of the North America and the captain of the Taylor both testify that their tow, including the Ampere, had completely passed around the turn, and were proceeding to starboard close to the unbroken edge of ice in a straight course, with the Ampere then in line behind the Taylor. One of the witnesses from the tug Scully testifies that the Ampere had made the bend at the corner. The captain of the Scully and the captain of the Mercury, on the other hand, testify that the Ampere was either just making the turn at Buoy No. 15, or had not sufficiently rounded the turn so as to be following in a straight course behind the Taylor. In this they are corroborated by the mate of the North America, and from the whole testimony it appears that, when the North America and the Taylor found they could not warp the Ampere around the corner against the heavy packed ice, the Ampere had not proceeded far enough to reach a point where she could pass, in the lane below the bend, the Scully tow, without being in physical contact with the side of the Scully barges.

When the North America stopped, the Taylor immediately stopped her engines, and the Ampere remained fixed in the ice, protruding across the channel in such a position that the tug Scully was barely able to pass between her bow and the solid ice upon the opposite side. The Scully and the Mercury had already made two trips through the channel with the barges of the Scully's tow, and were now bringing up the Mercury's barges from a position in the ice where they had spent the preceding night, near Wing's Neck. After the Scully passed the North America and saw the position of the Ampere, she blew three whistles to the Mercury, to hold back the tow. Prior to this no navigation signal had been given by either boat, as they were each in plain sight, and each on her own side of the channel.

According to the testimony the tide was flood at this point—that is, running toward the Cape Cod Canal—although it was nearing the turn. The captain of the North America had been counting upon having the benefit of the flood tide, which would pull the ice out of the jam at Buoy No. 15, until the turn was reached, and after making the turn he expected to have an ebb tide, which would carry the ice away from Buoy No. 15 into the wider waters of Buzzard's Bay. But at the time of collision the flood tide was still running with the Scully and against the North America.

The Scully, with her single tow line and her square bow, yawed when in contact with the ice, unless held back by the Mercury at the tail of the tow. Until the Mercury reversed, the barge Scully was moving from side to side to some extent; but at the three-whistle signal from the tug Scully, not only did the Mercury stop the headway of the tow, but the tug Scully shifted her towing line from the center bitt to the

port forward bitt of the barge Scully, and pulled the barge close over against the ice on the starboard side of the channel. Then the tug Scully went ahead, passing the Taylor at a distance of less than 25 feet, evidently going much closer to the bow of the Ampere, and, with the tide, proceeding at a fairly rapid rate in spite of the holding back of the Mercury.

Examination of the chart, together with the testimony that the Scully tow was following closely the starboard side of the channel, makes it apparent that as the tug Scully moved around the turn, directly opposite the Ampere, she must have drawn her tow to port, even though the barges were following directly behind the Scully. The ice was packed so tightly that observation of the edge of the lane must have been difficult until the turn was made, and the bow of the Congressman Scully brought up against the stem of the Ampere just as the tug Scully came opposite the stern of the Ampere, while the tug Mercury was then nearly alongside the tug Taylor.

The witnesses are not in agreement as to the exact point where the Ampere and the Scully touched. One of the witnesses testifies definitely that the anchor on the port side of the Ampere caught the port bow of the barge Scully. Another of the witnesses testifies that the corner of the Scully bumped into the bluff of the bow of the Ampere, while several of the witnesses testify that the stem of the Ampere brought up against the bow of the barge Scully a little inside of the port corner. Whether this blow was delivered by the stem of the Ampere or by the fluke of the anchor is comparatively unimportant. The testimony shows that two of the bow planks were broken some 3 or 4 feet from the port corner of the Scully. Several of the witnesses at the trial placed models to illustrate the way in which the boats came in contact, and unless the Ampere was at an angle across the channel it would seem to be difficult to explain how the barge Scully, which is over 100 feet long, could have been so far over to port as to cover one-half the width of the Ampere and the 3 or 4 feet which the injuries on the Scully measured in from the corner (making a total of 31 or 32 feet), as the side of the Scully must at that time have lapped back along the side of the Taylor.

The rule of the Canal Commission, which apparently is respected down through the dredged channel to Wing's Neck, provides that the tow traveling with the tide shall have the right of way, and in fact one of the witnesses testifies that tows are not allowed to pass through the canal proper, except in the direction in which the tide is moving. As this accident happened below the canal, the North America cannot be held responsible for being under way; but evidently the Scully tow, moving with the tide, had the right of way, and this apparently was recognized by the North America, which endeavored, after sighting the Scully tow, to reach the bend at Buoy No. 15 in time to round the bend and get out of the Scully's way. In this they were not successful. The North America, after the collision, dropped the hawser to the Taylor, went back, and began to break out more ice upon the starboard side of the Ampere, in which she was joined by the tug Scully, who came around from the stern of the Ampere, and in this way sufficient room

was given so that the Ampere could be forced over by the Scully barges, which squeezed through by her side and proceeded when the tug Scully resumed the trip.

The Taylor had lost some of the blades of her propeller, and evidently did not get the Ampere in motion before the Scully got its tow started again, nor until the North America was back in a position to tow. No fault whatever has been shown on the part of the barge Congressman Scully for the injuries for which this action has been brought. The libel was filed against the Ampere and the Taylor, which in turn have brought in the tug Scully and the tug Mercury. The libelant is entitled to recover against the tug or tugs which may be held liable for the collision.

So far as the tug Taylor is concerned, everything was done, apparently, which could have been done, both in handling the Ampere and in endeavoring to bring her to a point where the tows could pass in safety. Responsibility for whatever was done by the Ampere rests upon the North America, even though the Ampere was at the time in tow of the Taylor, for the North America had assumed contractual relations in managing the tow, in return for assistance by the Taylor. In a similar way no fault has been shown on the part of the Mercury, which evidently obeyed the signals from the tug Scully, and did nothing contributing to the collision for which it should be held at fault.

The libel and petition, therefore, should be dismissed, in so far as the Taylor and the Mercury are concerned, but without costs. The tug Scully, having the right of way, was not at fault for proceeding with her tow, unless some warning was given from the North America, or unless some situation was indicated of such a nature that it became incumbent upon the Scully to do what she could to avoid collision. The leading tugs were almost on top of each other, when it became apparent that the North America and her tow had stopped, and that the Ampere was obstructing the channel. The tug Scully knew that the barge Scully upon the single hawser was not towing steadily through the ice, and sought to remedy this, and also hold back her tow, by directing the Mercury to reverse. One of the Mercury's lines broke, but was quickly replaced, and the other line held. Apparently the ice was packed so thickly that the exact position of the Ampere was difficult of observation by the Scully until the Ampere stopped; yet the North America blew no alarm signal, and, it would seem, gave up the attempt to pull the Ampere around the bend, leaving her fast in the ice across the channel, upon the assumption that the Scully would also stop, even though the North America should have known that the Scully had the right of way.

Under these circumstances the North America was clearly at fault, and made a mistake in estimating the time which the Ampere would have in rounding the corner, in failing to warn the Scully as danger became probable, and also in desisting from trying to move the Ampere out of danger before collision was inevitable, if according to the captain of the North America the Scully was still some 1,000 feet away when the Ampere stopped, either exactly at or very close to the bend, and where she was obstructing the lane through the ice. This distance

seems altogether impossible, as other witnesses estimate the distance at 25 feet; but the greater the distance, the greater the mistake of the North America.

In open water there would be no question that with the right of way, the Scully should not be held responsible for proceeding. But as she passed the bow of the Ampere, the entire situation must have become apparent; she found it necessary to adopt the desperate move of shifting her hawser, so as to attempt to pull the bow of the Congressman Scully over to starboard. She must have been aware that her own course around the turn and the curved ice boundary of the channel would force her barges much closer to the Ampere than she herself would pass, and there could have been barely room for her to go through. Although proceeding with the tide, it is evident that the ice was packed sufficiently, so that the boats could have been stopped and the Mercury could have held back the Francis Scully from piling up on the Congressman Scully. In the face of all this the Scully started up her engines, and with the tide went ahead into collision. It seems to the court that in this the Scully was at fault, and should bear an equal part with the North America for the damages resulting.

The libelant may have a decree, one-half against the North America and one-half against the tug Scully, while the libel against the Taylor and the petition against the Mercury will be dismissed, without costs.

THE BLUEFIELDS.

(District Court, S. D. Alabama. May 27, 1921.)

1. **Costs ⇐42(2)—Courts ⇐85(3)—Court rule governing offer of decree to avoid cost must be construed with federal statute authorizing docket fee.**
   The rule of the District Court authorizing an offer to permit entry of decree, and providing that after such offer is made no costs shall be taxed against respondent, unless a decree for a larger amount than was included in the offer is rendered, must be construed in the light of the federal statute fixing the costs, and requires the payment, not only of costs then accrued, but also the necessary costs for filing the tender and entering the final decree thereon.

2. **Admiralty ⇐124—Decision of controversy not necessary to taxing proctor's fees.**
   Under Rev. St. § 824 (Comp. St. § 1378), authorizing a docket fee for attorney, solicitor, or proctor on a trial before a jury, before referees, or on a final hearing in equity or admiralty, it is not essential to the allowance of such docket fee that a controversy has been submitted or decided; but it is sufficient if some question of law or fact involved in or leading to the final disposition actually made of the case has been submitted or presented to the consideration of the court, whether it is a disputed state of facts or an agreed statement of facts.

3. **Admiralty ⇐88—Libelant can take final decree after claim is paid into court.**
   When the respondent pays into court the amount claimed by libelant in an admiralty suit, with costs accrued to date, the libelant is not required to dismiss his libel, but may ask for the entry of final decree on the admission of liability contained in the payment into court.

4. Admiralty ⇐125—Proctor's fee can be taxed on decree after payment into court.

Since the proctor's docket fee can be taxed when the decree for libelant is rendered pro confesso and the final decree entered thereon, it can also be taxed against a respondent who admitted liability only by paying the amount of the claim into court, with the costs then accrued.

5. Admiralty ⇐124—Libel for wages held properly filed under honest belief master would make an erroneous deduction.

A libel to recover the wages of a sailor, who had been sent to a hospital for treatment, where the sailor honestly believed, from a misunderstanding of the statement by the owner, that the owner intended to deduct from his wages the hospital bill, was not merely vexatious, and the libelant is entitled to recover his proctor's docket fee.

In Admiralty. Libel against the schooner Bluefields for wages of libelant while he was employed as a sailor on the schooner. On motion of the libelant for final decree. Granted, and entry of decree directed.

A. T. Howard, of Mobile, Ala., for libelant.
E. G. Rickarby, of Mobile, Ala., for claimant.

ERVIN, District Judge. This matter comes on to be heard on a motion of the proctor for libelant for a final decree. The facts in this case are substantially as follows:

Libelant was employed as a sailor on the schooner Bluefields, and had earned $44.90, and when they got to Mobile he was found to be in a condition which necessitated his going to the Marine Hospital, and he was sent there. After being treated, he was discharged by the hospital, and then he made a demand for his wages on Capt. Scott, owner of the vessel, who resides in Mobile. Capt. Scott told him that he could not then go with him to the shipping commissioners to pay him off, but there had been a bill for the services of the hospital presented, and he did not know at that time whether the vessel or the sailor would have to pay the bill, but that he would go with him the following day to the proper authorities, and then he would know whether to deduct the hospital bill or not, according as the authorities said it should or should not be deducted.

The sailor misunderstood in part what Capt. Scott had said, and inferred from the conversation that he would be willing to pay the wages on the following day, but was going to deduct the hospital bill. The sailor then went to the port authorities, who told him the hospital bill could not be deducted from his wages. He then asked them what he should do, and was advised by them to consult his attorney. This he did; he stating to his proctor that Scott proposed to deduct the hospital bill from his wages. The libel was filed, and, as soon as notice of the filing of the libel was given, the vessel came in and paid the amount of the sailor's demand, and paid the costs then accrued into court, and it is now held by the clerk. The only controversy in the case arises over the question of a proctor's fee to the libelant's proc-

tor, and this question depends on the proper construction of section 824 of the Revised Statutes (Comp. St. § 1378).

[1] The rule of this court provides as follows:

"At any time before trial a respondent or claimant may serve and file a written offer to allow a decree to be entered for a sum therein specified, with costs to the date of the offer. Such offer shall have the effect of a tender, and the respondent or claimant shall recover costs from the date of filing the offer, unless the libelant shall recover damages in excess of the amount of the offer."

There having been no final decree entered, it is manifest that the libelant's proctor has not yet become entitled to his fee; but treating the case, for the purpose of deciding the question, as though the motion had been granted and a final decree entered in favor of the libelant, I will proceed to discuss the question of the proctor's fee.

[2] It is manifest in the first place that the rule of this court must be construed in light of the federal statute, and also that in construing the rule it will be necessary for the claimant who makes the tender to pay into court, not only the costs then accrued, but the necessary costs of filing the tender and entering the final decree thereon. The controlling statute is section 824 of the Revised Statutes, which reads as follows:

"On a trial before a jury, in civil or criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of $20."

There is a further provision that, if the claim is for less than $50 the proctor's docket fee shall be only $10. This statute has been before the courts frequently, and has not been construed uniformly at all by the various courts; some of them holding that the docket fee is earned whenever any final order is made disposing of the cause. Goodyear v. Sawyer (C. C.) 17 Fed. 2; The Alert (D. C.) 15 Fed. 620; L. & N. R. Co. v. Mer. Comp. & Storage Co. (C. C.) 50 Fed. 449. Others hold that there must be a passing on the merits of the "controversy" by the court in order to tax the fee. Swan v. Wiley, Harker & Camp Co. (D. C.) 161 Fed. 236. I am inclined to think that these two conflicting views are the extremes, and according to my construction of the statute the right lies between them. In discussing the matter we must remember that section 823, Revised Statutes (Comp. St. § 1375), forbids allowance of any other compensation to the attorney than such as shall be taxed and allowed under the provisions of section 824.

What, then, is necessary under section 824 to entitle a proctor to have his fee taxed. It will be noticed in the first place that—

"The fee is not made by the statute to depend upon a judgment or decree, but is taxable on a trial or final hearing." The Bay City (D. C.) 3 Fed. 47.

This seems to me to be conclusive against the first line of authorities. The question then arises: What is such a "final hearing in equity or admiralty" as entitles a proctor to have his fee taxed?

It has been held, and I think correctly so, that where a decree pro confesso is entered, and thereon the final decree is made, that the tax fee is earned. Andrews v. Cole (C. C.) 20 Fed. 410. In Coy v. Perkins (C. C.) 13 Fed. 111, Justice Gray says:

"We are of the opinion that upon the face of the statute the intention of the legislature is manifest that it is only where some question of law or fact, involved in or leading to the final disposition actually made of the case, has been submitted, or at least presented to the consideration of the court, that there can be said to have been a final hearing which warrants the taxation of a solicitor's or proctor's fee of $20."

This statement meets my views. It will be noticed that nothing is here said about any "controversy" or dispute. We all know that many final hearings are had, both in equity and admiralty, and decrees written thereon, which do finally dispose of a question of law or fact involved in the bill or libel as filed, in which there is no "controversy," but the parties have agreed on the facts or on an adjustment. It seems to me that, where this has been done, the parties are strictly within the terms of the statute, and the fee must be taxed. The H. C. Grady (D. C.) 87 Fed. 483. The language of the statute is not "on the final hearing of the controversy," but merely "on the final hearing," so that the proctor must represent the libelant's claim to a decree on some final hearing whch disposes of the case as made in the libel, whether this decree is made on the law, or whether it is made on a disputed state of facts, or whether it is made on an agreed state of facts. If the cause was dismissed by the libelant, or was disposed of in some such manner, there is never such final hearing as entitles the proctor to have his fee taxed; but, on the other hand, there is nothing in the statute which limits the allowance of the fee to cases in which there is a controversy over the law or facts. We should follow the statute, and not try and distort its meaning, but give its words their fair and ordinary meaning.

[3] It is conceded that at present no fee can be taxed in favor of the libelant's proctor, because no final decree has been rendered. It is contended that, because the money has been paid into the court to cover libelant's claim and the costs now accrued, the libelant cannot now proceed to take a final decree on these facts.

It is conceded in argument that, if no appearance had been made by the vessel or her owner, the libelant could have taken a decree pro confesso, and then on the submission have obtained a final decree, which would have authorized the taxing of his fee. Contention is made, though, that because the money has been paid in court the libelant must dismiss his libel, so that the fee cannot be taxed. I know of no power on the part of the defendant to control the conduct by the libelant of his cause, and it seems to me that, where the money has been paid into the court by the vessel, the libelant has his option either to dismiss the libel and take the money, in which event no fee could be taxed, or to ask, as he here has done, for a final decree because of the confession made by the payment into court of his wages. It seems to me that a decree so rendered would be such a final hearing as was contemplated by section 824, though there is no controversy or dispute over the facts or law as stated in the libel; the only dispute being whether or not the taxed fee shall be allowed.

[4] Again, if the proctor is entitled to his fee on a final decree on a decree pro confesso, or on a plea filed confessing his cause, how can claimant contend that, if he does less than expressly confess the de-

mand by merely paying the money into court, the right to the fee is defeated.

[5] It is further contended that this libel was improperly filed, because the libelant was informed before it was filed, and at the time he made his demand for his money, that his wages would be paid on the following day, and that the litigation was vexatious, and no costs should be allowed. In this case I find that the sailor honestly believed that the owner was going to deduct the hospital bill from his wages before payment, and there was no impropriety in his bringing suit when he did.

The decree will therefore be entered in accordance with this opinion, and the clerk is hereby directed that, when the decree is finally entered, he will tax a fee of $10 for libelant's proctor.

BELT LINE RY. CORPORATION v. NEWTON, Atty. Gen., et al.

(District Court, S. D. New York. January 25, 1921.)

1. **Carriers ⇐12(4)—Interest on bonds can be included in cost of carrying passengers.**

   The interest paid by a street railway company on its bonds can be included in computing the cost of carrying each passenger, though the street railway company, with consent of the state Public Service Commission, had ceased to operate cars over a portion of the lines mortgaged to secure the bonds.

2. **Courts ⇐493(3)—Parties can choose forum for relief against rate order after exercising legislative remedy.**

   A public service corporation, after exercising its legislative remedy against a confiscatory rate by proceedings before the state Public Service Commission, which had taken under advisement an application for rehearing thereof, and had not decided such application within 30 days after submission as required by Public Service Commissions Law, N. Y. § 22, can choose its forum for review of such action and bring suit in United States District Court.

3. **Carriers ⇐12(5)—Share of railroad in fare of transfer passengers held confiscatory.**

   Where the cost of carrying each passenger on a street railway exceeds four cents, and a majority of its passengers either travel on or receive transfers as required by an order of the state Public Service Commission, which allows it only two cents for such passengers and its income is less than the operating expenses and interest on borrowed money, the order requiring the acceptance and issuing of transfers for the prescribed share in the fare is confiscatory, so that its enforcement should be restrained.

In Equity. Suit by the Belt Line Railway Corporation against Charles D. Newton, as Attorney General of the State of New York, and others, to restrain the enforcement of an order of the Public Service Commission of New York. On motion for preliminary injunction enjoining the operation of the Public Service Commission's order, dated October 29, 1912, in so far as it fixes at five cents the maximum joint rate or fare to be exacted for through transportation over the lines of the plaintiff and the lines operated by all other street service railway corporations or any of them named in said order, except Third

Avenue Railway Company and the Forty-Second Street, Manhattanville & St. Nicholas Avenue Railway Company, on the ground that the same has become and now is in contravention of section 10 of article 1 of the Fourteenth Amendment to the Constitution of the United States. Granted.

Alfred T. Davidson, of New York City, for plaintiff.

Winthrop & Stimson, of New York City, amici curiæ.

Wilber W. Chambers, Ely Neumann, M. Maldwin Fertig, and Charles Horowitz, all of New York City, for defendants.

Before HOUGH, Circuit Judge, and LEARNED HAND and MAYER, District Judges, holding the court pursuant to section 256 of the Judicial Code (Comp. St. § 1233).

PER CURIAM. This motion in substance seeks to have abrogated as confiscatory, and therefore unconstitutional, the system by which the Fifty-Ninth Street crosstown surface line is obliged to issue to and receive transfers from passengers desiring to exchange at the intersection of Fifty-Ninth street with Seventh, Sixth, Lexington, Second, and First avenues, in the borough of Manhattan, the result of which system is that for each passenger so exchanging and from a through rate of five cents the plaintiff receives two cents and no more. As the result of this long-standing system, the major portion of the passengers on plaintiff's crosstown line pay a fare of two cents only to plaintiff—the proportion of two-cent passengers to five-cent passengers being (with sufficient accuracy for present purposes) in the proportion of 10 to 7.

The facts presented are simple and not in dispute. The propositions of law are easy to state, and their elaborate discussion unnecessary in a court of first instance. For these reasons we shall content ourselves with briefly stating our findings of fact and legal conclusions therefrom.

1. Plaintiff is a corporation organized in 1911, which by purchase in foreclosure acquired the franchises, property, and rights formerly of the Central Park, North & East River Railroad Company, and by virtue of such acquisition became authorized to operate a surface railway on Fifty-Ninth street, between First and Tenth avenues, on First avenue, between Fifty-Ninth street and Fourteenth street, and on Tenth avenue and West street, between Fifty-Ninth street and the Battery.

2. It is still operating what is known as the Crosstown Line on Fifty-Ninth street, and that on West street and Tenth avenue; but the operation of the line on First avenue south of Fifty-Ninth street has been abandoned with assent of the Public Service Commission.

3. Plaintiff is subject to the operation of the Commission's order of October 29, 1912, under which no greater fare than five cents can be charged for the through transportation of one passenger, and of such fare of five cents the two cents long allotted by treaty or agreement to plaintiff is a fair and equitable provision. For the year ending June 30, 1920, the actual cost to plaintiff of carrying each passenger was 3.46 cents, of which sum .53 cents represents interest on first mortgage bonds and other borrowed money.

4. For the period of four months ending October 31, 1920, said actual cost was 3.96 cents, and the carrying charges for borrowed money amounted to .56 cents.

5. For the year ending June 30, 1920, a comparison between the actual cost of carrying passengers plus interest on borrowed money and the total income of the plaintiff from every source showed a deficit of $20,814.82, and by the same comparison a deficit exists of $28,120.27 for the four months ending October 31, 1920. These calculations allow for payment of taxes, but do not cover any reserve or any sum for replacement or depreciation of physical property. By the same system of computation the accumulated deficit, without depreciation allowances, of this plaintiff since January 1, 1916, amounts to $201,270.13.

6. In May, 1920, plaintiff applied to the Public Service Commission for a modification of the order of October 29, 1912, substantially praying to be relieved from the obligation to carry passengers for two cents—in other words to abolish transfers at the points above mentioned.

7. Hearings were had before the Commission under the above application, and on July 9, 1920, the Commission entered an order holding that the joint rate of five cents fixed by the order of October 29, 1912, had by reason of changed conditions become "unjust, unreasonable, and insufficient to render a fair and reasonable return for the service furnished, wherefore [continued the order] the said maximum joint fare or rate was fixed," commencing September 13, 1920, at the sum of seven cents, instead of five cents.

8. Thereupon plaintiff, on July 23, 1920, applied for a rehearing pursuant to section 22 of the Public Service Commissions Law (Consol. Laws, c. 48), and in respect of the matters determined in and by said order of July 9.

9. On November 4, 1920, the Commission made an order granting said application for rehearing, and on November 5 entered an order by which it "deferred and postponed" the operation of the order of July 9, 1920, "until such date or dates as shall or may be fixed by the Commission at or after the termination of such rehearing."

10. The matter of the rehearing before the Commission was terminated on November 10, 1920, was then finally submitted to said Commission for decision, and has never been decided, although section 22 of the Public Service Commissions Law requires that any rehearing "shall be determined by the Commission within thirty days after the same shall be finally submitted." This bill was filed more than 30 days after such final submission to the Commission.

[1] 11. Plaintiff's method of computing cost per passenger by including as an item of expense interest on borrowings is proper, and the abandonment of the "East Side Belt Line" makes no difference in the indebtedness or the interest thereupon of the plaintiff. The debt attaches to every part of the line, and almost all of said debt is represented by first mortgage bonds approved by the defendant Commission.

12. The action or non-action of the Public Service Commission has in effect continued and is now continuing in force the order of 1912.

13. The deficits produced by plaintiff's carriage of a majority of all passengers for two cents apiece amount to or result in confiscation.

14. In this case the "legislative" act of rate making is complete and is now requiring carriage of passengers at a rate resulting in confiscation.

15. The only remedy for or review of such rate or rate making under the laws of the state of New York is the writ of certiorari, which remedy is wholly judicial.

16. By reason of the neglect or refusal of the defendant Public Service Commission to render any decision in respect of a rehearing of the matters involved in the order of July 9, 1920, no certiorari is now possible; nor will the issuance of such writ ever be possible unless and until by mandamus or proceedings in the nature thereof the Public Service Commission is required to comply with section 22 aforesaid.

[2] 17. When the legislative remedy for the creation or maintenance of a confiscatory rate is exhausted, the parties injured may choose their forum of reviews and assert their rights (as has here been done) in the courts of the United States. Home Telephone Co. v. Los Angeles, 211 U. S. at page 278, 29 Sup. Ct. 50, 53 L. Ed. 176; Prentis v. Atlantic Coast Line, 211 U. S. 210, 228, 29 Sup. Ct. 67, 53 L. Ed. 150; Bacon v. Rutland R. R., 232 U. S. 134, 34 Sup. Ct. 283, 58 L. Ed. 538.

[3] 18. In the case at bar the aggregate transactions of the plaintiff are resulting, and long have resulted, in failure to pay actual operating expenses. This fact renders unnecessary an inquiry of the character considered in Chesapeake, etc., Ry. v. Public Service Commission, 242 U. S. 603, 37 Sup. Ct. 234, 61 L. Ed. 520.

19. This decision is limited to the enjoining of the transfers complained of in combination with or as obtainable from a five-cent fare. The basic fare of five cents is not attacked in this litigation.

The motion is granted and order filed herewith.

UNITED STATES v. KANE (SILVER BOW MOTOR CAR CO., Intervener).

(District Court, D. Montana. May 31, 1921.)

No. 3639.

1. Intoxicating liquors ⇐255—Relieving vehicle, used in illegal transportation, from forfeiture, is discretionary with court; "good cause."

Under National Prohibition Act, tit. 2, § 26, providing that, on conviction of a defendant of illegal transportation of liquor the court shall order the sale of the vehicle used, and seized, "unless good cause to the contrary is shown by the owner," what constitutes "good cause" rests in the discretion of the court, which should be reasonably convinced, from

the facts and circumstances shown, that justice will be better served by a refusal to enforce the forfeiture.

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

2. **Intoxicating liquors ⇐255—Good cause not shown for refusing to forfeit automobile used in illegal transportation.**

Intervener contracted to sell an automobile to defendant and others, to be paid for in monthly installments, retaining title and the right to retake possession on any default. Defendant was arrested for illegal transportation of liquor in the car, which was seized, but returned to him on giving bond. Eight months afterwards he pleaded guilty and was fined, and surrendered the car, which was ordered sold. In the meantime intervener, though it knew the facts, and though payments were in default, took no steps to retake possession of the car, and its president testified that, while he did not know of defendant's intention to use it in violation of law, he probably would have sold it if he had known, relying on the insurance. *Held*, that "good cause" for relieving the car from forfeiture was not shown.

Criminal prosecution by the United States against Jack Kane. On petition of intervention of the Silver Bow Motor Car Company, claimant of automobile. Petition denied.

George F. Shelton, U. S. Dist. Atty., of Butte, Mont.
William N. Waugh, of Butte, Mont., for intervener.

BOURQUIN, District Judge. Intervener seeks to show good cause why an auto used by defendant to transport whisky in violation of National Prohibition Act Oct. 28, 1919, c. 85, 41 Stat. 305, should not be sold. Defendant was arrested and the car seized on August 9, 1920, in Granite county. He pleaded not guilty on August 25, changing to guilty on April 11, 1921.

Upon inquiry by the court, he asserted unincumbered ownership of the car, whereupon he was fined only $25, and the usual order of condemnation, forfeiture, and sale of the car was then made. Intervener applied for leave to show good cause why the order of sale should not be executed, on April 25, alleging it owned the car, having sold it to defendant and two others upon condition subsequently broken by them; that it had no knowledge or notice that the car would be illegally used as aforesaid, though it was so used, as it "is now informed and verily believes." Its counsel was defendant's counsel, though he was absent when defendant pleaded guilty, two days previously having advised the court he would be absent and that defendant would so plead.

Leave granted and hearing had, intervener's president, Goodenberger, testified that intervener sold the car to defendant and two others, on July 17, 1920, for $1,360—payments, $300 cash, $100 August 13, and $100 monthly thereafter, of which only the cash and second payments had been made; that intervener knew of the offense and seizure of the car about the time of occurrence. The bill of sale introduced discloses all parties of Butte, where sale made; that the vendor retained title until all payments made, and option to resume possession

on default, payments made to be forfeited; that the car would not be removed from three named counties, Granite county not one of them, and like option of repossession and forfeiture for any breach; and that vendees would insure the car against fire, loss payable to vendor as its interest appears. Intervener then rested.

Upon cross-examination witness stated he did not know defendant's covendees, and they did not advise him of their contemplated use of the car; that "we do not have to inquire into that," nor "into their financial or other repute"; that vendees secured insurance, and delivered the policy to witness, which he then produced. It is also dated July 17, 1920, and runs to vendees as the insured, describing vendees, naming defendant first, of vocations "soft drinks, miner, and farmer, respectively." Amongst other things, it insures vendor against conversion of the car by the vendees and against confiscation of it for violation of the National Prohibition Act, and it stipulates that intervener will immediately repossess itself of the car, if located after conversion, promptly notify the insurer of any vendees' defaults which might result in confiscation, render certain assistance to insurer, if the car is confiscated, and the like.

Further cross-examined, witness testified that without such insurance "we couldn't do business"; that "we have to be protected" by insurance; that, even if they "had a hunch" vendees were about to take the car out of the state, "we wouldn't worry, as the insurance would protect us." On redirect he stated:

"We wouldn't know the buyers were going to violate the Volstead Law. The chances are that, if we did know it, we would sell them the car anyhow, as we would be protected by the insurance."

And to the last and leading question, viz., "Did you or the company know the vendees were going to violate the law by transporting liquor?" he answered, "No." It appears that, upon seizure, the car was brought to Butte, redelivered to defendant upon his bond as owner, and redelivered to the marshal after order of sale made.

[1] The seizure and order of sale were made pursuant to section 26, tit. 2, of the National Prohibition Act, which provides that, upon conviction of the offender, the court shall order a sale of the car used, "unless good cause to the contrary is shown by the owner," and that, if the car is sold, all liens "which are established * * * as being bona fide and as having been created without the lienor having any notice that the * * * vehicle was being used or was to be used for illegal transportation of liquor" shall be paid so far as net proceeds permit. This section is by no means clear but, although it is penal and not for revenue, it seems to attach guilt to the vehicle by reason of the illegal use, regardless of guilt or innocence of the owner. This is apparent from the provision that, if no claimant to the vehicle is found, it is in effect condemned and forfeited, and is sold by the officer who made the seizure—presumably, the proceeds, as in any sale, the property of the United States.

And it is further indicated by the fact that the owner's mere freedom from complicity in the offense will not relieve the vehicle from

forfeiture. Even a lienor secures no relief merely because not involved in the offense, but only when he had no knowledge, when the lien was created, that the offense was contemplated; and an owner, with more control, can justly be held to greater accountability. For the owner to secure relief requires that he shall show good cause, analogous to procurement of remission by the Secretary of the Treasury of forfeitures in cases of revenue. "Good cause" is a term that cannot be reduced to legal certainty, and vests discretion in the court when it has statutory authority to do a thing on good cause shown. See Kerchner v. Singletary, 15 S. C. 535; Kendall v. Brilly, 86 N. C. 56; People v. Sessions, 62 How. Pr. (N. Y.) 415. What is good cause, to relieve the owner from forfeiture of the vehicle, depends upon the circumstances, including the owner's conduct before, during, and in respect to the case. See Harnett v. Vise, 5 Ex. D. 307.

If the circumstances do not reasonably inspire belief that justice will be better served by refusal to impose or enforce the statutory order of forfeiture and sale, prima facie due or made, good cause has not been shown. See Jones v. Curling, 13 Q. B. D. 272; Huxley v. Company, 14 App. Cas. 26; Whitcher v. Benton, 50 N. H. 25. Each case will depend upon its own facts and circumstances, and no more definite rule can be declared in advance. The burden of proof to relieve from forfeiture is upon those seeking relief. The statute is definite in respect to what shall be proven by a lienor; indefinite in respect to an owner. This difference in statutory phraseology, and the greater accountability of an owner, indicates that the "good cause" that must be proven by an owner is something other and more than the lack of notice at a particular time that must be proven by a lienor.

An owner may assert that he is free from complicity in the illegal use, and had no notice such use was contemplated, and yet, by reason of neglect, indifference, consent, or acquiesence manifested in advance, or condonation or ratification afterward, or other fault or inequitable conduct, he may fail to show good cause against forfeiture and sale.

[2] In the case at bar, intervener sold the car to a stranger association, one of whom was of a vocation notoriously often a cloak for illicit liquor traffic. It made no inquiries into the vendees' purpose or repute, and does not disclose whether they were bad or known to it. Its attitude is it was not interested, nor obliged to inquire. It was indifferent to illegal use of the car and to its conversion or confiscation (which, for all that appears, it may have manifested to vendees), for it was insured against loss. Indeed, it blandly declared that, had it known illegal use was contemplated, the "chances are" it would have made the sale, being insured.

It contemporaneously learns of the conversion and seizure of the car, and no doubt of the car's redelivery to the defendant; but it does not invoke forfeiture and retake possession of the car, as it had engaged to do. It accepts one deferred payment about the time of or subsequent to seizure, invokes no forfeiture for default in all others, and did not seek to collect the latter, so far as appears. It did not make known its ownership to plaintiff until more than eight months after

seizure, and after defendant by misrepresentations of ownership had escaped with a small fine. All these facts and circumstances, however it might be were they not thus in combination, suffice to the conclusion that good cause against sale of the car has not been shown by intervener, the owner.

Its conduct throughout manifests a degree of indifference, if not of consent, that its property be devoted to illegal uses, that is reprehensible, at least. It may have disclosed its attitude to the vendees then, as it has to the public now. Why not? Business would be stimulated, and the car confiscated; deferred payments would be made by a responsible insurer, avoiding hazard of loss by the default of a stranger association of unknown repute and responsibility. Failure to resume possession of the car for defendant's conversion, offense, and defaults, failure to collect deferred payments, failure to disclose its ownership as aforesaid, all unexplained, and the disingenuity of its petition, which implies but recent knowledge of the offense, savor of condonation and ratification of defendant's offense, of collusion and strategy in his interest and to plaintiff's prejudice, and constitute inequitable conduct. To remit forfeiture of the car seems less consistent with justice than does to enforce it.

Judgment accordingly.

UNITED STATES v. VIESS.

(District Court, W. D. Washington, N. D. June 1, 1921.)

No. 5825.

1. **Intoxicating liquors ⇐249—Police judge, as "magistrate," may issue search warrant for liquor unlawfully possessed.**
   Under Rem. & Bal. Code Wash. §§ 744, 7520, 7521, enacted pursuant to the authority given by Const. art. 4, § 12, to create inferior courts and define their jurisdiction, which created municipal courts presided over by a justice of the peace, who was designated as police judge, and prescribed the jurisdiction of such courts, the police judge is a "magistrate" who can issue a search warrant to seize intoxicating liquors, under section 6278, which must be construed with Rem. Code 1915, § 6262—11, authorizing search warrants by the justices of the peace.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Magistrate.]

2. **Intoxicating liquors ⇐249—Sheriff, marshal, and constable are "peace officers."**
   A sheriff or his deputy, a constable, marshal, or policeman of a city, or conservator of the peace, are "peace officers," to whom a search warrant to search premises for intoxicating liquors may be issued, under Rem. Code, Wash. 1915, § 6262—11.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Peace Officer.]

3. **Intoxicating liquors ⇐10(2)—City may regulate possession not inconsistent with national or state laws.**
   A city has power to regulate the possession of intoxicating liquors in a manner not in conflict with the National Prohibition Act or the laws

of the state, and may authorize the search of a private dwelling for liquors unlawfully possessed, where not prohibited by the state laws, though National Prohibition Act, § 25, provides that no search warrant shall issue thereunder to search any private dwelling.

4. **Criminal law ⊜394—Liquors seized under valid police judge warrant may be used as evidence in federal courts.**

Intoxicating liquors legally seized in defendant's dwelling under a search warrant issued by a police judge may be used in evidence in a prosecution in a federal court for violation of the National Prohibition Act, though a search of the dwelling would not have been permitted under section 25 of that act, since the purpose of section 25 was not to establish a special rule of evidence, but to define probable cause for a search.

David Viess was prosecuted for violating the National Prohibition Act. On motion by defendant for a return of whisky seized by search of his premises under a search warrant issued by a police judge. Denied.

Robert C. Saunders, U. S. Atty., and George E. Mathieu, Asst. U. S. Atty., both of Seattle, Wash., for plaintiff.

John F. Dore, of Seattle, Wash., for defendant.

NETERER, District Judge. On January 20, 1921, John B. Gordon, "justice of the peace in and for Seattle precinct, King county, Washington, sitting as police judge of Seattle," issued a search warrant upon sworn complaint of J. J. Haag, police officer, in which warrant it appears that intoxicating liquor is being manufactured, sold, bartered, exchanged, given away, furnished, and otherwise disposed of and kept, in violation of a city ordinance, "about and upon certain premises therein and hereinafter designated and described." The premises searched was the residence of the defendant, and certain whisky was seized. The defendant has moved a return upon the ground that the police magistrate may not issue a search warrant.

[1] The basis of power of the police justice must rest upon constitutional authority, or legislative enactment predicated on such authority. Article 4, § 1, State Constitution, vests judicial power in certain courts, municipal not included, but grants power to the Legislature to provide other courts. Section 12, art. 4, supra:

"The Legislature shall prescribe by law the jurisdiction and power of any inferior courts which may be established in pursuance of this Constitution."

And the power is limited to that granted. State ex rel. Milroy, 71 Wash. 592, 129 Pac. 384; In re Barbee, 19 Wash. 306, 53 Pac. 155. Section 6262—11, Rem. Code of Wash., provides that if:

If "upon the sworn complaint * * * it shall be made to appear to any * * * justice of the peace that there is probable cause to believe that intoxicating liquor is being manufactured * * * or kept in violation of the provisions of this act, such justice of the peace * * * shall * * * issue a warrant directed to any *peace officer* in the county, commanding him to search the premises designated. * * *" (Italics mine.)

Section 6278, Rem. & Bal. Code of Wash., supra:

"Upon complaint being made of the violation of this section ['liquors are kept'] a *magistrate* shall issue a search warrant * * * commanding the

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

sheriff or constable to * * * search the premises and seize and hold all intoxicating liquors. * * *" (Italics mine.)

The Legislature, pursuant to section 12, art. 4, supra, created municipal courts in cities of the first class, granting jurisdiction:

"(1) Of any and all criminal offenses under any ordinances of their respective cities.

"(2) Of all criminal offenses under the laws of the state of Washington, charged to have been committed within their respective cities, less than a felony.

"(3) The judges of said courts shall have all the *powers of a committing magistrate* as to all offenses committed within their respective cities. Wherever the jurisdiction hereby conferred may be exercised by other courts, under the Constitution and laws of this state, the jurisdiction hereby conferred shall be deemed to be concurrent with such other courts." (Italics mine.)

A magistrate is defined by Bouvier as:

"A public civil officer, invested with some part of the * * * judicial power given by the Constitution. In a narrow sense this term includes only inferior judicial officers, as justices of the peace."

Section 7520, Rem. Code, supra:

"The mayor * * * shall appoint one of the justices of the peace * * * police judge of such city."

Section 7521, R. & B.:

"The police judge so appointed, in addition to his powers as justice of the peace, shall have exclusive jurisdiction over all offenses defined by any ordinance. * * *"

[2] A sheriff or his deputy, a constable, marshal, or policeman of a city are peace officers. 30 Cyc. 1327; Messer v. State, 37 Tex. Cr. R. 635, 40 S. W. 488; Hopewell v. State, 22 Ind. App. 489, 54 N. E. 127. A conservator of the peace is a peace officer. Jones v. State (Tex. Cr. App.) 65 S. W. 92. A municipal judge is authorized, not only to enforce municipal ordinances, but is given concurrent power of all offenses less than a felony committed within their respective cities. Section 744, R. & B. Code, supra. Sections 6262—11 and 6278, supra, must be construed together, and as so construed a "justice of the peace" and a "magistrate" have power to issue search warrants, and warrants so issued may command the "sheriff" or "constable" or "any peace officer" in the county to search the premises designated.

[3] The city has power to regulate possession of intoxicating liquors not in conflict with the National Prohibition Act (41 Stat. 305) or laws of the state. The state prohibits traffic in all alcoholic liquors, as does the city ordinance; the provision of the state law being incorporated in the city ordinance. The acts recited in the search warrant are a violation of both state law and city ordinance, and may support a search and seizure, while under the National Prohibition Act (section 25) no search warrant shall issue to search any private dwelling occupied as such unless used for unlawful sale, etc. No such inhibition rests in the state law or city ordinance, and the laws of the state where not inconsistent with the National Prohibition Act are in force. U. S. v. Peterson et al. (D. C. Wash.) 268 Fed. 865.

[4] A police judge, having the power of a magistrate or a justice of the peace, has power to issue a search warrant based upon a sufficient state of facts. A reason being shown, and a search and seizure being made by a peace officer, to whom the warrant was issued, the search was legal and the seizure lawful.

The purpose of section 25, supra, was not to establish a special rule of evidence for prosecutions under the National Prohibition Act, but rather to define probable cause under the act for search. A search having been made under a local statute which was legal and the seizure therefore lawful, section 25, supra, does not change the lawful possession to unlawful when offered as evidence by the United States in a prosecution for a violation of the National Prohibition Act.[1]

The motion is denied.

PUBLIC SERVICE CORPORATION OF NEW JERSEY et al. v. HEROLD (ten cases).

SAME v. MOFFETT (three cases).

(District Court, D. New Jersey. June 14, 1921.)

Internal revenue ⇐2, 38—1916 act held to extend time for claim for refund, but not for suit for refund against the collector.

As respects the right to recover taxes illegally collected, for the years 1909 and 1910, under the Corporation Excise Tax Law, *held*, that Act Sept. 8, 1916, § 14a (Comp. St. § 6336n), allowing claims for refund of taxes illegally collected under the 1909 act to be presented, notwithstanding the provisions of Rev. St. § 3228 (Comp. St. § 5951), which sets a two-year limitation for such presentation, does not repeal Rev. St. § 3227 (section 5950), barring suits for the recovery of any internal revenue tax illegally collected, unless brought within two years after the cause of action accrued, and therefore does not revive the right, otherwise barred by Rev. St. §§ 3226, 3227 (sections 5949, 5950), to sue the collector, but only revives the right, if barred by Rev. St. § 3228 (section 5951), to file a claim with the Commissioner.

At Law. Ten cases by the Public Service Corporation of New Jersey and others against Herman C. H. Herold and three cases by the same plaintiffs against Isaac Moffett. On motions for judgment on the pleadings. Judgment for defendants.

E. A. Armstrong and Frank Bergen, both of Newark, N. J., for plaintiffs.

Wayne Johnson, of Washington, D. C., John M. Sternhagen, of New York City, and A. L. Boulware, of Washington, D. C., for defendants.

[1] NOTE.—On the day this decision was filed, the Supreme Court filed a decision in Burdeau v. McDowell, 255 U. S. ——, 41 Sup. Ct. 574, 65 L. Ed. ——, in which it held that papers stolen from another, and thereafter sent to agents of the Department of Justice, they having no part in wrongfully obtaining them, might be produced in evidence against the person from whom stolen, and not be violative of any constitutional provision, and a petition to direct a return was denied.

RELLSTAB, District Judge. These cases come before the court on the pleadings and certain facts agreed upon at the hearing. Both parties move for judgment.

The plaintiffs seek to recover taxes, paid by them under protest, with interest thereon from the time of their payment. These taxes were assessed against them for the years 1909 and 1910, under the Act of August 5, 1909, commonly called the Corporation Excise Tax Law (36 Stat. 112). In previous litigations between the parties, involving these taxes and others assessed under the same act for later years, the taxes were declared illegal, but the plaintiffs were held to be barred from recovering those assessed for the years 1909 and 1910, for failure to claim a refund within the time specified by R. S. § 3228 (Comp. Stat. § 5951). See Public Service Ry. Co. Cases (D. C.) 227 Fed. 491, 494, 496, 500, affirmed as to 1909 and 1910 taxes (C. C. A. 3) 229 Fed. 902, 144 C. C. A. 184.

Subsequently to the rendition of the last of these decisions and the passage of the act of September 8, 1916 (39 Stat. 756 et seq., Comp. Stat. § 6336a et seq.), plaintiffs, in accordance with section 14a (Comp. Stat. § 6336n) of that act, presented to the Commissioner of Internal Revenue their claims for a refund of such taxes. The Commissioner rejected the claims, whereupon these suits were instituted. Thereafter the Commissioner, without knowledge of the suits, reconsidered his rejection and allowed the claims. Upon learning of the suits, he, following the practice of the department, canceled their allowance.

The defendants challenge the plaintiffs' right to sue, claiming that the judgments entered in the previous actions are a bar; that they failed to comply with R. S. §§ 3226, 3227, and 3228 (Comp. Stat. §§ 5949–5951), and that section 14a of the act of September 8, 1916, gives them no right of action. The issues—solely questions of law—call for the interpretation of the following statutory provisions:

"Sec. 3220. The Commissioner of Internal Revenue * * * is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, * * * also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty." 6 U. S. Comp. Stat. § 5944, p. 6969.

"Sec. 3226. No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected * * * until appeal shall have been duly made to the Commissioner of Internal Revenue * * * and a decision of the Commissioner has been had therein: Provided, that if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the Commissioner at any time within the period limited in the next section." Id. p. 6985.

"Sec. 3227. No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected * * * shall be maintained in any court, unless the same is brought within two years next after the cause of action accrued." Id. p. 6989.

"Sec. 3228. All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected * * * must be presented

to the Commissioner of Internal Revenue within two years next after the cause of action accrued." Id. p. 6991.

Act Sept. 8, 1916, § 14a:

"That upon the examination of any return of income made pursuant to * * * the act of August fifth, 1909, * * * if it shall appear that amounts of tax have been paid in excess of those properly due, the taxpayer shall be permitted to present a claim for refund thereof notwithstanding the provisions of section 3228 of the Revised Statutes." Id. p. 7356.

The act of 1916 contains no repealer of any of these sections of the Revised Statutes, but it does make the time limit in R. S. § 3228, within which the claim must be presented to the Commissioner of Internal Revenue, inapplicable to claims for a refund of taxes illegally collected under the 1909 act. The 1916 act is in recognition of the government's moral obligation to refund taxes illegally collected, and upon the presenting of a claim therefor to the Commissioner, he was authorized by R. S. § 3220, to make payment. But what if he rejected it, or failed to act upon it, within the six months specified in R. S. § 3226? Could a suit thereupon be instituted against the collector for the recovery of such taxes? R. S. § 3227, as noted, in terms bars the suit, "unless the same is brought within two years next after the cause of action accrued." Ordinarily such cause would accrue upon the payment of the tax. Savings Institution v. Blair, 116 U. S. 200, 204, 6 Sup. Ct. 353, 29 L. Ed. 657. If this limitation with respect to the bringing of suit is controlling, no action for a recovery of such taxes can be brought, either against the United States or its collectors. Did the 1916 act revive the right to bring suit against the collector, as well as the right to file a claim with the Commissioner?

The defendants contend that the legislative purpose of the 1916 act was merely to remove the barrier found in R. S. § 3228, and had no effect whatever upon the limitations found in R. S. §§ 3226 and 3227.

In the present suits it is not necessary to decide whether the 1916 act must be given such limited effect. Much may be said in support of a proposition that a new right or cause of action was given to the taxpayer by that act, but in these suits the only question is whether a new right or cause of action was given against the collectors. The liability of the collectors for a return of these taxes was denied in the previous suits. What is there in this act that even points to a revival of their liability? The taxes illegally collected having been paid into the United States Treasury, as required by the statute (R. S. § 3210 [Comp. Stat. § 5932]), the moral obligation to return it rested on the government and not the collectors. The 1916 act removed the legal disability (the bar of R. S. § 3228), which prevented the government from discharging its moral obligations. This is all that this act expressly did. If it may be said that by so doing there arose an implied promise to pay, it was that of the government, and not that of the collectors, through whom the taxes reached its treasury.

So far as they are concerned, the former adjudications are their sufficient defense. The defendants are entitled to judgments of no cause of action.

THE ALBATROSS.

THE ALDEN A. MILLS.

(District Court, D. Massachusetts. June 2, 1921.)

Nos. 1768, 1923.

1. **Collision ⇐82(2)—Speed in fog in frequented waters too great to stop within seeing distance is immoderate.**
   A vessel proceeding during a fog in frequented waters at such speed that she cannot stop within seeing distance of another vessel is going at an immoderate speed, and is at fault for a collision resulting therefrom.
2. **Collision ⇐82(2)—Vessel held at fault for reversing engines.**
   A vessel which had just backed out from her pier in a fog and had started her engines forward, when another vessel was seen heading directly toward her amidships on her port side, was at fault for reversing her engines, since it was her duty to maintain her course, and the duty of the other vessel to pass under her stern, and is liable for a collision when she was struck so near the stern that it was evident the other vessel would have cleared her, if she had not reversed, notwithstanding her master's claim that the collision was inevitable, and he reversed merely to receive the blow in a less vulnerable spot.
3. **Collision ⇐81—Vessel held at fault for requiring other duties of lookout in a fog.**
   A vessel just backing from her pier in a fog was at fault for requiring the lookout in her bow to take in the bow line, since a lookout should be given no other work which interferes with that duty, especially on congested waters in a fog.

In Admiralty. Separate libels by the Commonwealth Fisheries Company against the steamer Albatross, and by the Albatross Company against the steam trawler Alden A. Mills, to recover damages for injuries resulting from a collision between the two vessels. Decree rendered, finding each vessel at fault and dividing the damages.

In No. 1768:

Currier & Young, of Boston, Mass., for libelant.

Richard H. Wiswall, Hill, Barlow & Homans, and Blodgett, Jones, Burnham & Bingham, all of Boston, Mass., for claimant.

In No. 1923:

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for libelant.

MORTON, District Judge. This is a case of collision in a fog in Boston Harbor between the steam trawlers Alden A. Mills and Albatross. It took place at about 9:15 on December 23, 1919, abreast the wharf of the Boston Marine Company in East Boston. There was no wind or sea; the fog was dense.

The Albatross was proceeding down the harbor, heading diagonally across it on a long slant toward the west shore. She had at least two men on lookout on her forward deck, her master on the bridge, a man at the wheel, and the mate in the pilot house, blowing fog signals. The bow lookout reported a vessel ahead. The master was unable at that time to see the vessel; but by his orders the engines were immediately

reversed and the helm put hard aport. The effect of these maneuvers was to throw the bow of the Albatross to starboard as fast as possible.

The vessel which the lookout of the Albatross saw proved to be the Alden A. Mills, which had just backed out from the wharf of the Boston Marine Company, across the path of the Albatross, and was about to turn to port and go up the harbor. When first sighted the Mills was almost squarely across the path of the Albatross, which was headed about amidships of the Mills. They were about 200 feet apart. At this time the Mills had just started her engine ahead; but it is doubtful if it had yet overcome her sternway from backing out. That she was under way, proceeding up the harbor, as her master testifies, is certainly not the fact.

The Albatross was swinging to starboard—i. e., towards the stern of the Mills—under her reversed engine and hard aport helm. In this situation the master of the Mills ordered her engine full speed astern. This moved the Mills backward and kept her in the path of the Albatross as the latter swung. Inasmuch as the Albatross struck the Mills only about 30 feet from the stern, and the Mills in all probability moved astern more than that distance after sighting the Albatross, it seems fairly clear that if the Mills had kept her engines going ahead, or even had simply stopped them, the accident would not have happened.

When leaving the wharf the Mills blew a long blast. In the interval of several minutes between that and the collision, she had, on her own testimony, given only two short blasts, neither of which was heard on the Albatross. They were not proper signals for a vessel backing, nor for one lying motionless. They were not given, according to witnesses on the Mills, until just as she started her engines ahead. For several minutes after ceasing her coming out signal, she gave no signal at all.

[1] In this circuit, at least, it must be regarded as settled that a vessel proceeding in a fog in frequented waters, at such speed that she cannot stop within seeing distance of another vessel, is going at an immoderate speed and is at fault. The Sagamore, 247 Fed. 743, 159 C. C. A. 601. The Mills was not moving either toward or away from the Albatross as the latter approached her. So that the facts fall squarely within the principle of law just stated, and the Albatross must be held at fault for immoderate speed.

[2] Making every allowance for the latitude of action permitted in an emergency, it seems to me that the conduct of the master of the Mills in backing his vessel after the Albatross was sighted was so stupid and inexcusable as to be negligence; and I so find. The Albatross had suddenly appeared broad off on his port side, headed directly at it. He knew that it was the duty of his vessel to keep her course and of the other vessel to pass under his stern; that the other vessel would naturally assume that she had come upon a vessel crossing her bow from starboard to port, and that she would be practically certain to do exactly what the Albatross did in this case. The reason given by him for his really extraordinary maneuver, viz. that he thought the other steamer sure to hit him and was moving his vessel, so that the

blow would fall in the least vulnerable spot and not injure his boats, seems to me to be an afterthought. It is, to say the least, unsatisfactory and unconvincing.

[3] The Mills was also at fault for not having a proper bow lookout. The man (Peddle) assigned to that duty was directed to take in the bow rope, and was doing so as the Mills backed out. The captain of the Mills testifies that the first report of the Albatross came from Peddle; and Peddle testifies that, "after I pulled a line in, I started to look up the harbor and I saw this boat;" that the Mills "had not gotten out far enough to start ahead" at that time. The stern lookout on the Mills did not see the Albatross "so soon as they did forward." A lookout should be given no other work which interferes with that duty, and this is especially true on congested waters in a fog. If Peddle's attention had not been directed to getting in the bow line in accordance with his orders, it is likely that he would have discovered the Albatross sooner than he did.

It is at least doubtful whether the Mills gave sufficient and proper fog signals; but it is unnecessary to decide this point.

Decree that each vessel was at fault and for divided damages

ROMNEY S. S. CO., Limited, v. ARCHIBALD McNEIL & SONS CO., Inc.

(District Court, D. Maryland. May 4, 1921.)

No. 726.

Shipping ⇐178—Railroad strike, which only partially interrupted transportation, held not to excuse charterer's delay in furnishing cargo.

A charterer of a vessel to carry a cargo of coal, who was excused by the charter party from demurrage for delay occasioned by strikes, is liable for delay in furnishing the cargo for the vessel, notwithstanding a strike on the railroads which were to transport the coal, where that strike was only partial, and did not prevent the railroads from hauling more coal to the port than had ever been done before, so that the delay was caused by the unusual conditions in the coal industry, which were known to both parties at the time the charter party was made.

In Admiralty. Libel by the Romney Steamship Company, Limited, against the Archibald McNeil & Sons Company, Incorporated, to recover demurrage. Decree rendered for libelant.

The charter of the Apsley was on the Washington coal form of July, 1919, containing the provisions:

"3. The act of God, restraint of princes, rulers, and people, fire, and all and every other dangers and accidents of the seas, rivers, and steam navigation, of what nature and kind soever, riots, and strikes always mutually excepted."

"4. * * * Lay days to commence from 48 hours after readiness to load, whether berthed or not berthed, and master has given notice in writing of such readiness. * * * Should the steamer not be ready for cargo at her loading port on or before June 15, 1920, the party of the second part, or his agent, may at his option cancel this contract of affreightment at any time not later than the day of the steamer's readiness to load. Cargo to be loaded into steamer with customary dispatch, in accordance with the rules of the

port of loading, but in no case at less than 1,500 tons per running day, Sundays and legal holidays excepted. Any time lost at docks through riots, strikes, lockouts, or disputes between masters and men, or by reason of floods, frost, fogs, or storms, or by reason of accidents to ship's tackle, winches, equipment, or other disability of the ship which prevents her taking cargo, that occasions a stoppage of delivery of coal to said steamer is not to be computed as part of the loading time, unless any cargo be actually loading during such time. In the event of any stoppage or stoppages arising from any of these causes and continuing for the period of six (6) running days from the time when the steamer is ready to load, the party of the first part (meaning 'owners') may, at its option, terminate this contract, without prejudice, however, to any rights of action which it may have: Provided, however, that such stoppage occurs before any cargo shall have been loaded on board the steamer."

"6. Also that for each and every day said steamer is on demurrage at either loading or discharging port the party of the second part, or agent, shall pay to the party of the first part, day by day, demurrage at the rate of forty-eight cents ($.48) per net registered ton of steamer per running day, or pro rata for part of a day. Dispatch money to be paid by steamer at the rate of sixteen cents ($.16) per net registered ton of steamer per lay day saved or pro rata for part of a lay day saved, nonreversible."

This charter party effective, whether permit for cargo granted or not granted.

Charles R. Hickox (of Kirlin, Woolsey, Campbell, Hickox & Keating), of New York City, and Stuart S. Janney (of Janney, Stuart & Ober), of Baltimore, Md., for libelant.

George A. McLaughlin (of Peale & McLaughlin) and T. Catesby Jones (of Harrington, Bigham & Englar), both of New York City, and George W. Whip (of Lord & Whip), of Baltimore, Md., for respondent.

ROSE, District Judge. This is one of ten cases, in every one of which a steamship owner is suing either for delay in furnishing a cargo of coal, as required by charter, or for failing altogether to supply it. In all there are ten libelants, one in each case. They are all corporations, six of them of Great Britain, two of Spain, one of Greece, and one of Japan. There are but three respondents. One of them figures in five suits, another in three, and the third in two. While the controlling questions are not the same in all, it is necessary for a clear understanding of any of them to have in mind the conditions which prevailed and to an extent controlled the water-borne coal trade of Baltimore during some part or another of the five months between April 1 and August 31, 1920. It was therefore agreed that testimony taken in any one of these cases should, so far as applicable, be considered as having been taken in any or all of them.

In the one now under consideration, the claim is for demurrage. The steamship involved, the Apsley, reported on June 2d, and by the terms of the charter loading should have been completed by June 9th, but it was not in fact finished until June 13th. The charterer says that the cargo would have been loaded in time, had it not been for the so-called outlaw strike of switchmen on the Baltimore & Ohio, the Pennsylvania, and the Pittsburgh & Lake Erie railroads, on which were located the mines from which it procured its coal. The charter provided that—

"Any time lost at docks though riots, strikes, lockouts, disputes between masters and men, * * * that occasion a stoppage of delivery of coal to said steamer, is not to be computed as part of the loading time."

In the spring of 1920 coal was very high in Europe, and, by comparison, much cheaper here. It looked as if a handsome profit could be made by exporting it, and there was a rush to charter ships to carry it. Consequently, far more of them came to Baltimore for coal than at any previous time in the history of the port, with the possible exception of the preceding October. The roads which bring it to Baltimore from the mines were, in common with the rest of the railroad systems in this portion of the country, by no means in the best condition for promptly carrying large volumes of freight. On the 1st of April, 1920, the war had been over less than 18 months. The roads had just been taken back from government operation. Their equipment was far from being as good or as ample as it once had been. An unusually severe winter had added to their difficulties, and to the disorganization and congestion of traffic, by which they were embarrassed, and their facilities were further overstrained by the demands of an unusual activity in business throughout the country. All these conditions were well known to everybody when the charter was made.

Not long after April 1st the strike upon which the charterer seeks to rely broke out first at Chicago and then at other places, and in varying and fluctuating degrees continued to annoy the railroads until July, but there was never any time at which it was general. It never completely tied up traffic anywhere for more than a very few days at a time. In spite of it, and of all the other troubles of the railroads, freight continued to move in large volume. In June, when the Apsley reported herself ready for cargo, more coal was brought into Baltimore and loaded over its piers into ships than in any preceding month in its history; October, 1919, alone excepted.

It is unnecessary in this particular case to consider any doubtful questions of law, for respondent has failed to show that its tardiness in supplying the cargo was the result of a strike in any such direct sense as is necessary under any of the authorities to excuse it from its charter obligation. The truth is that the railroads, in spite of all the handicaps they suffered by strikes and other causes, were, so far as coal was concerned, doing far better than their previous average best. Charterers may not take advantage of their own mistakes in arranging for more shipments than can be promptly loaded. W. K. Niver Coal Co. v. Cheronea S. S. Co., 142 Fed. 403, 73 C. C. A. 502, 5 L. R. A. (N. S.) 126.

The owner is entitled to demurrage at the charter rate.

HELLENIC TRANSPORT S. S. CO. v. ARCHIBALD McNEIL & SONS CO., Inc.

(District Court, D. Maryland. May 4, 1921.)

No. 724.

1. **Shipping ⟸52—Government restrictions on transportation of coal for export held not to excuse charterer's failure to furnish cargo.**
An order of the Interstate Commerce Commission forbidding transportation of coal for export without a special permit, made for the purpose of insuring a sufficient supply for New England, which cut down the quantity of coal for export by only one-eighth and did not prevent substantially the normal number of vessels from being loaded, does not excuse the charterer's failure to furnish the cargo, which was due rather to the unprecedented demand for export coal which caused the Commission's order, and which did not prevent other shippers, who had no permit for transportation, from purchasing coal for their cargoes at the port.

2. **Shipping ⟸52—Government prohibition excuses charterer, though he could not have furnished cargo anyway.**
The prohibition of the export of coal by the government excuses, under the restraint of princes clause, the failure of a charterer to furnish the cargo as required by the charter, even though the charterer would have been unable to furnish the cargo in absence of such prohibition.

3. **Shipping ⟸175—Charter held to impose on charterer risk of delay in getting ship to berth.**
A provision in the charter party that the time for loading was to count from the master's notice of readiness to load, whether the steamer was in berth or not, imposes on the charterer, not on the owner, the risk of delays in getting a berth.

4. **Shipping ⟸39—Interlineation in printed charter party prevails over inconsistent printed provision.**
A typewritten interlineation in the charter party must be given its natural meaning, even though such a construction may limit the terms of some of the printed clauses or be inconsistent with them, since the minds of the parties were specially directed to the matter with which the interlineation dealt.

5. **Shipping ⟸52—Contingency provided against by charter must render performance practically impossible.**
In order that the contingencies specified against in the charter party shall constitute a good defense to a libel for the charterer's failure to furnish the cargo, the charterer's performance must have been thereby rendered in a practical sense impossible, illegal, or dangerous; it being insufficient that the happening of one of them adds materially to the difficulties and embarrassment of the charterer.

6. **Shipping ⟸52—Restraint of princes, excusing charterer, must be proximate cause of failure.**
While the restraint of princes, which will excuse the charterer's failure to furnish a cargo within the terms of the charter party, need not have been directed against the ship or the goods, but may have had other objects, it must have been the proximate cause of the failure, as distinguished from the remote cause, and if by itself it could not have prevented performance it will not excuse nonperformance merely because, in combination with nonexcepted causes, it did so.

7. **Shipping ⟸52—Restraint in getting cargo to ship excuses failure only if it was unobtainable from another source.**
The restraint of princes clause in a charter party will not excuse the charterer's failure to furnish a cargo, where the restraint imposed was

on the transportation of the cargo for the ship from the source at which the charterer had planned to obtain it, unless that source was, by the terms of the charter or in the contemplation of the parties at the time it was made, or by the well-established course of trade, the only source from which the charterer could have been expected to get the cargo.

8. **Shipping ⇐58(2)—Party seeking to weaken binding effect of charter has heavy burden of proof.**

It is no light matter to weaken the binding force of mercantile contracts, and the burden is heavily on him who asks that it be done.

In Admiralty. Libel by the Hellenic Transport Steamship Company against the Archibald McNeil & Sons Company, Incorporated, to recover damages resulting from the charterer's failure to furnish a cargo of coal for the ship. Decree rendered for libelant.

The charter of the Iolcos was on the Americanized Welsh form, 1914, containing these provisions:

"3. Steamer to load as customary and in turn with other steamers, but in no case at less than fifteen hundred (1,500) tons per running day, Sundays and legal holidays excepted. Time for loading to count from seventy-two (72) hours after master has given written notice of steamer's readiness to load to charterers on their agents, whether steamer is in berth or not; such notice to be given between business hours of 9 a. m. and 5 p. m., or 1 p. m. on Saturdays. Any time lost through riots, strikes, lockouts, or any dispute between masters and men, occasioning a stoppage of pitmen, trimmers, or other hands connected with the working or delivery of the coal for which the steamer is stemmed, or by reason of accidents to mines or machinery, obstructions on the railway or in the docks, or by reason of floods, frosts, fogs, storms, or any cause beyond the control of the charterers whatever, not to be computed as part of the loading time (unless any cargo be actually loaded during such time). If detained longer, charterers shall pay demurrage at the rate of forty-eight (48) cents per net registered ton of steamer per running day or pro rata for part thereof. If any dispute or difference should arise under this charter, same to be referred to three parties in the city of New York, one to be appointed by each of the parties hereto, the third by the two so chosen, and their decision, or any two of them, shall be final and binding, and this agreement may, for enforcing the same, be made a rule of the court."

"7. The act of God, the king's enemies, restraints of princes and rulers, and perils of the seas excepted; also fire, barratry of the master and crew, pirates, collisions, strandings, and accidents of navigation, or latent defects in, or accidents to, hull and/or machinery, and/or boilers, always excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other persons employed by the shipowner, or for whose acts he is responsible, not resulting, however, in any case from want of due diligence by the owner of the ship or by the ship's husband, or manager. The owners shall not be liable for any delay in the commencement or prosecution of the voyage due to a general strike or lockout of seamen or other persons necessary for the movement or navigation of the vessel. Charterers not answerable for any negligence, default, or error in judgment of trimmers or stevedores employed in loading or discharging the cargo. The steamer has liberty to call at any ports in any order, to sail without pilots, to tow and assist vessels in distress, and to deviate for the purpose of saving life or property, and to bunker. It is also mutually agreed that this shipment is subject to all the terms and provisions of and all the exemptions from liability contained in the act of Congress of the United States, approved on the 13th day of February, 1893, and entitled 'An act relating to navigation of vessels,' etc."

Janney, Stuart & Ober, of Baltimore, Md., for libelant.
Lord & Whip, of Baltimore, Md., for respondent.

ROSE, District Judge. In this case the steamship Iolcos, belonging to the Hellenic Transport Steamship Company, a Greek corporation, was on June 9, 1920, chartered to the Archibald McNeil & Sons Company, Incorporated, to carry coal to Europe. When the ship reported at Baltimore, the charterer refused her, and she was after some delay rechartered at a much lower rate. Her owner seeks to recover the resulting loss.

The original charter was on what is known as the Americanized Welsh form, 1914, to which the parties made various amendments. The charterer defends under its third and its seventh articles, which excuse performance when failure is due to strikes or to the restraint of rulers. Before the ship arrived here, the charterer had told the owner that one or the other or both these causes would probably keep it from furnishing a cargo, but refusal to accept the ship was in the end based upon the second of them, and upon it alone. It is of no moment whether the charterer thereby precluded itself from thereafter relying upon the strike clause, for the labor disturbance set up in its answer is the same which has been described in the opinion this day handed down in No. 726, Romney S. S. Co., Ltd., v. Respondent Now at the Bar, 273 Fed. 287, and which, for the reasons therein stated, would not in any event have constituted a sufficient defense. To deal intelligently with the contention that a restraint of rulers prevented the loading of the ship, it is necessary to take up the story of Baltimore's coal trade where the opinion above mentioned dropped it.

The winter of 1919–20 had been in New England, as in many other parts of the country, one of unusual severity. To replenish its exhausted fuel supply was difficult, and many of its industrial and public services were on the verge of an enforced shutdown. The unusual industrial activity was still general throughout the country. The demand upon the railroads continued great, and they were in poor condition to respond. Full use could not be made of the water routes, for, although the tonnage under the American flag was far greater than it had ever been before, a variety of causes, including the great demand for ships to take coal to Europe, had so raised rates that from this section of the country it was cheaper to ship to New England by land than by sea.

The Interstate Commerce Commission felt that immediate action was required in consequence of the shortage of equipment, congestion of traffic, and other emergencies existing in this section of the country from which New England gets coal, and that it should use the powers conferred by paragraph 15, added to section 1 of the Interstate Commerce Act by section 402 of the Transportation Act of February 28, 1920 (41 Stat. 476). Accordingly, on the 19th of June, it issued what is known as Service Order No. 6, hereinafter referred to as "S. O. 6," to become operative on June 24th. In substance, S. O. 6 required all railroads, hauling bituminous coal to any tidewater transshipment pier

from Charleston, S. C., north, to give preference and priority to that consigned to one Storrow for transshipment to New England, and to attain that end the railroads were directed not to furnish cars to carry that kind of coal to tidewater, except upon permit from a designated agent of the Commission appointed under the authority given by paragraph 17, also added to the first section of the Interstate Commerce Act by the section of the Transportation Act already mentioned. Such permits were not to be granted unless the shipper or consignee would be able to load the coal at the port of transportation shipment without delay to the rail equipment; they were to be issued whenever the destination of the water movement of the coal was a United States coastwise port. If it was bound elsewhere, the permit was not to be given, unless the agent was satisfied that it would not impede the intended preference and priority. Each of the railroads was directed to establish such rules and regulations for loading vessels at the piers and for unloading or dumping cars as would effect the desired preference and priority.

Upon the going into effect of S. O. 6, the charterer made prompt application for a permit to bring forward coal for the Iolcos, as well as for a number of other vessels under charter to it. It was not until July 7 that any permits for the movement of export coal to Baltimore were issued, and for some undisclosed reason none was ever granted for the shipment of coal for the Iolcos. When, on July 13, that ship reported herself ready for loading, the charterer refused her. The owner declined to admit its right to do so, and warned it that it would be held for all resulting damages, costs, and expenses. In spite of S. O. 6, the owner was on July 23 able to recharter her to carry coal to Denmark or Gothenburg, Malmoe range, at $14 a ton. The rate to have been paid under the original charter here in suit had been $19 if the ship was ordered to a western Mediterranean port, or $17 if it was sent to one in the Bordeaux-Rotterdam range.

The charterer says that, under the well-known and long-established custom of the port of Baltimore, it had the right to wait until the ship was nearly due there before it started to forward coal for it from the mines. Randall v. Sprague (D. C.) 74 Fed. 247. It would have been unreasonable for it to have put coal for this purpose on the cars before June 24, and indeed against the public interest, in view of the congested condition of tracks, terminals, and rolling stock then existing, and at no time after that date, and until the rechartering of the ship, was it able to obtain the permit required by S. O. 6. It has offered evidence that it had the coal, or had perfected arrangements for procuring it, and that inability to ship from the mines to tidewater was the only reason why the ship was not loaded as the charter contemplated. Upon this showing it insists that the loading was prevented by a restraint of rulers, and that therefore it is not responsible for any loss which the owner may have suffered in consequence. The latter replies that the ship would have been bound to take any coal which the charterer chose to tender to it. It could not have inquired whether the offered cargo came from the charterer's own mines, whether it had

been purchased from some one else before it was placed on cars, or whether it had been bought after it was moved forward or even subsequently to its reaching tidewater. It is common enough for coal exporters to buy their cargoes from those having the article in cars at or near Baltimore, although the number of those so procured doubtless constitutes a small proportion of the aggregate leaving this port.

The evidence seems to show that, even during the time when S. O. 6 was in force, people who had had no coal on wheels before June 24, and who obtained no permits to send it forward after that date, got it somewhere and loaded foreign-bound ships with it. Precisely how they managed it is not made clear. Very possibly it was through some shifting of credits in the coal exchange pools, for when S. O. 6 was later revoked by Service Order No. 11, as is stated with more particularity in the opinion in No. 710, Canute S. S. Co., Ltd., v. Diamond Fuel Corporation, 273 Fed. 301, it was apparently found expedient to forbid the purchase of credits when the effect would be to relieve for export coal which would otherwise have gone to New England.

[1] The owner is right when it says that neither S. O. 6 nor any other government order then in force purported or intended to forbid the export of coal, and that it did not in fact do so. It points to the fact that while the order was in force it obtained a new coal charter, although at a much lower rate, for the very steamer the respondents refused. Its learned advocates insist that any difficulties or hindrances which the order in question put in the way of the charterer's getting coal to the ship were of too remote and indirect a character to constitute that restraint by public authority which the charterer had in mind. The order sought no more than to make New England, because of its urgent needs, a favored child. After it received what it was supposed was the daily share it required, or to which it was entitled, or which there were facilities for sending to it, the surplus might be shipped abroad.

Nor were the quantities so left available for the strangers' use mere crumbs from the children's table. They constituted by far the larger part of all that had been provided for the repast. S. O. 6 lasted but 39 days—from June 24th to August 1st, both inclusive. July was the only month during all of which it was in force. It is testified that, of all the coal which in that month was put over the Baltimore & Ohio pier, 70.7 per cent. went on foreign-bound ships. New England received 20.6, and the balance went to Chesapeake Bay and other coastwise destinations. Before the effect of the order was felt, 80 per cent. of the coal dumped over the pier went abroad. In other words, S. O. 6 cut down by one-eighth the proportion of coal which went out of the country. The figures for the Canton coal pier have not been so given as to be exactly comparable. The coal so handled constituted about one-third of that dealt with at Curtis Bay, and apparently even of this smaller quantity a still less considerable proportion went to New England.

It is true that because of S. O. 6, or for some other reason or reasons, the total tonnage of coal which came to the two piers in July was only about 75 per cent. of that which arrived in June, and about 80

per cent. of that which rolled in during August; but, even so, it compared very favorably with the figures of almost any preceding year. Export was never interrupted. There were 29 days from the 24th of June, when S. O. 6 went into force, until July 22, the day preceding the rechartering of the Iolcos. On each of 25 of them, at least one coal-carrying foreign-bound ship completed its loading at Baltimore. During the entire time, an aggregate of 57 of them were loaded, or almost precisely 2 a day, Sundays and holidays included. In the 70 days from April 15th to June 23d, 224 of them had been given cargoes, an average of 3⅕ a day.

The fact appears to be that, for the first few days after S. O. 6 had time to affect the operation of the piers, comparatively few foreign-bound colliers received cargoes, but that during the latter half of July they were loaded at the rate of almost 3 a day; that is, about as many of them were being supplied as before the order went into effect. The truth is that it was itself a consequence, and not the cause, of the difficulties in which so many coal shippers and would-be coal shippers found themselves in the spring and summer of 1920. What brought about the trouble was that the charterer in these cases, as well as dozens of others operating through this and other ports, tempted by what appeared to be an easy opportunity to make a handsome profit by shipping coal to Europe, hired more vessels to carry it than it was possible for our railroads and piers promptly to load. The limits of their capacity, as well as the shortage in their equipment, and the labor difficulties by which they were embarrassed, were well known when this charter was made.

[2] It is true that, if the government had forbade the export of coal, the charterer would be excused, although, if such prohibition had not been issued, it would for other reasons have found it impossible to furnish a cargo; but, as has been pointed out, that the government never did. Doubtless, if without prohibiting others from sending coal abroad, the public authorities had commanded it not to do so, and had been able to make the order effective, it would have been equally freed of responsibility, but that, too, was not done unless the failure or refusal to grant a permit to put the coal on cars and send it forward to this ship was equivalent thereto. Was it?

The able and industrious advocates have cited all the cases in which have been discussed or applied the principles which have some relation to those which must be here considered, and all of those referred to, as well as others, have been carefully examined. A detailed analysis and discussion of them will be little to the point here, for no one of them had occasion to pass upon a state of facts closely resembling those at bar. The charterer stresses such cases as Hudson v. Ede, L. R. 2 Q. B. 566, 3 Q. B. 412, The Sailing Ship Allerton v. Falk, 6 Asp. Marine Cases, 287, Smith v. The Rosario Nitrate Co., Ltd., 1 Q. B. Div. 174, and Furness v. Forwood Bros. & Co., 77 Law Times, N. S., 85, in which, by the established custom of the trade and the port, goods of the kind to be transported were never stored at the water side, but, until the ship was ready for them, were kept somewhere else—a few or

many miles away, so that in a certain sense this more or less distant point was the storage place of the port, and for that purpose, perhaps, might be considered as within its bounds, and when the only commercially practicable way of getting the cargo to the ship was blocked by something which was, within some aptly expressed exceptions in the charter party, as by ice in the Danube, by neaps at the juncture of the Weaver and the Mersey, by civil war, or by floods and frost along the single railroad over which the cargo had to travel.

Reference is also made to Dobell v. Green, [1900] L. R. 1 Q. B. 526, where the charter was held subject to the terms of the guaranty of the particular colliery from which the charterer had notified the ship the coal was to come, as he had reserved the right to do. On the other hand, the owner affirms, with Lord Blackburn and numerous other judges, that as a rule the undertaking of the merchant to furnish a cargo is absolute. Postlewaite v. Freeland, L. R. 5 App. Cas. 620. There are limitations upon the doctrine. One of them, applied and enforced in the case last cited, might have been important in the case here tried. The ship, unless she protects herself by an appropriate stipulation, must, at her own charges, await access according to the custom of the port to its facilities for loading and discharging.

[3] The owners offered testimony to show that, if it had at Baltimore procured a cargo for the ship, it would not have been allowed by the railroad officials to take its place at the pier until a permit to move from the mines coal specifically for it had been granted by the agent of the Interstate Commerce Commission. The owner and the charterer, by inserting a provision in the charter party that "time for loading to count from 72 hours after master has given written notice of steamer's readiness to load to charterers or their agents, whether steamer is in berth or not," had, however, agreed that the charterer, and not the owner, should assume the risks of delays in getting a berth.

[4] As the language quoted is found in a typewritten interlineation in the printed form, which constitutes the body of the charter, it is evident that the minds of the parties were specially directed to the matter with which the amendment dealt, and it is familiar law that it must be given its natural meaning, even though such a construction may limit the terms of some of the printed clauses or even be inconsistent with them. Carver on Carriage of Goods by Sea, § 173; Clyde Commercial S. S. Co. v. West India S. S. Co., 169 Fed. 276, 94 C. C. A. 551. Of course it cannot be reasonably contended that the general declaration that performance shall be excused, if prevented by restraint of rulers, is made of no effect by this particular provision. But the owner insists that the insertion shows that the parties intended that the risks of any unusual delays, not clearly within the restraint of princes and other excepting clauses, should be assumed by the charterer, and that it emphasizes the general law that, while they will be given a common sense construction, they will not be extended beyond their plain import. The India, 49 Fed. 92, 1 C. C. A. 174.

[5] In order that the contingencies specified in them shall constitute a good defense, performance must have been thereby rendered in a

practical sense impossible, illegal, or dangerous. British & Foreign Marine Insurance Co. v. Sanday, [1916] L. R. 1 App. Cas. 650; Furness Withy & Co. v. Redereaktiegolabel Banco, [1917] Weekly Notes, K. B. 215. It is not sufficient that the happening of one of them adds materially to the difficulties and embarrassment of the parties relying on it, if nevertheless it is still possible to perform. Becker Gray & Co. v. London Assurance Corporation, L. R. 2 K. B. 156, [1918] L. R. App. Cas. 101.

[6] It is true that the restraint may not have been directed against the ship or the goods. It may have had other objects, as, for example, the prevention of ingress or egress to or from a besieged or blockaded place, and in that sense may have been indirect. Carver on Carriage of Goods by Sea, § 82; Rodocanochie v. Elliott, Law Rep. 9 Com. Pleas, 519. It must, however, have been the proximate, as distinguished from the remote, cause. W. K. Niver Coal Co. v. Cheronea S. S. Co., 142 Fed. 403, 73 C. C. A. 502, 5 L. R. A. (N. S.) 126. If by itself it could not have prevented performance, it will not excuse merely because, in combination with nonexcepted clauses, it did so. Stevens v. Harris, 57 L. R. (N. S.) Q. B. 203; Adams v. Royal Mail Steam Packet Co., 5 C. B. (N. S.) 491.

[7] Still more clearly is it settled that it will not relieve from liability merely because its happening prevented the party relying upon it from getting his cargo for the ship from the source at which he had planned to obtain it, unless that was, by the terms of the charter, or in the contemplation of the parties at the time it was made, or by the well-established course of trade, the only source from which he could have been expected to get it. Grant v. Coverdale, L. R. 9 App. Cas. 470; Ardan S. S. Co. v. Weir, [1905] L. R. App. Cas. 501; Dinkam, Francis & Co. v. Witherington & Everett, [1916] Weekly Notes, K. B. 154.

The instant case is undoubtedly close, but to hold the charterer excused would extend the protection of the restraint of rulers farther than has ever before been done. In Vazalet v. Morris & Co., [1916] Court of Sessions Cases, 963, under a not dissimilar state of facts, the same question was raised, and although it was unnecessary there to pass upon it, Lord Mackenzie, who delivered the principal opinion, was evidently not impressed by a contention similar to that which the charterer here makes, and after much consideration, I find myself of like mind.

[8] It is no light matter to weaken the binding force of mercantile contracts, and the burden is heavily on him who asks that it be done. After the charterer, and others, who wished to ship coal abroad, had hired more ships than could be loaded with reasonable promptness, somebody was bound to lose heavily. W. K. Niver Coal Co. v. Cheronea S. S. Co., supra. Such miscalculations are always costly. They are less likely to be repeated, if those who make them find themselves unable to shift the burden to other shoulders.

As neither defense set up by the charterer can be sustained, it must be held liable for its failure to load the ship.

WESTERN COUNTIES SHIPPING CO., Limited, v. ARCHIBALD McNEIL & SONS CO., Inc.

(District Court, D. Maryland. May 4, 1921.)

No. 723.

1. **Shipping ⇐52—Order restricting transportation of cargo to port does not excuse failure to transport before it became effective.**
Where the chartered ship reported herself ready to load on June 14, and the loading should have been completed under the charter by June 22, the charterer is not excused for his failure to furnish a cargo for the ship by an order of the Interstate Commerce Commission restricting transportation of coal for export, which did not become effective until June 24, and did not then apply to coal on cars before that date.

2. **Shipping ⇐52—Interlined provision held to make charter binding, notwithstanding refusal to permit transportation to port.**
An interlined provision in a charter party providing that it was effective, whether permit for cargo granted or not granted, prevents the charterer from defending against liability for failure to furnish the cargo as agreed, on the ground that an order of the Interstate Commerce Commission restricting transportation of coal to the port for export was a restraint of princes, within an exception in the charter party.

In Admiralty. Libel by the Western Counties Shipping Company, Limited, against the Archibald McNeil & Sons Company, Incorporated, to recover damages for failure to furnish a cargo for a chartered ship. Decree rendered for libelant.

The charter of the Renfrew was on the Washington July, 1919, form, with clauses similar to those in the Apsley, except that the first part of clause 4 was in these words: "Lay days for loading, if required by the party of the second part, not to commence before June 10, 1920; otherwise, lay days to commence from time steamer is ready to load (or within 48 hours after readiness to load, if delayed awaiting turn at berth) and master has given notice in writing of such readiness to the party of the second part or his agent, who is to be named."

Janney, Stuart & Ober, of Baltimore, Md., for libelant.
Lord & Whip, of Baltimore, Md., for respondent.

ROSE, District Judge. This case, in its principal aspect, is on all fours with No. 726, Romney Steamship Co. v. Same Respondent, 273 Fed. 287, the opinion in which was handed down to-day.

The libelant, a British corporation, chartered its steamship, the Renfrew, to carry coal to Italy. The respondent failed to furnish a cargo for her, alleging that at first it was excused from so doing by the same strike discussed in the opinion above mentioned. The answer there given to a like contention is equally applicable here.

After Interstate Commerce Commission's Service Order No. 6 went into effect on June 24th, the charterer claimed that performance on its part was prevented by a restraint of rulers, and on July 2d requested the owner to withdraw the ship, without prejudice to any

rights it had. There are at least three reasons why the charterer must be held liable:

[1] (1) It had ample time to load the ship before the order in question could have hampered it. It takes a number of days to bring coal from the mines to tidewater, and that on cars before June 24th was not affected by the order in question. The effect of the order could not have been felt at the piers before about June 28th. The ship reported herself at least as early as June 14th, and its loading should have been completed by June 22d.

[2] (2) By interlineation in the charter party it was declared effective, whether permit for cargo was granted or not granted.

(3) As was held in the opinion in No. 724, Hellenic Transport S. S. Co. v. Same Respondent, 273 Fed. 290, handed down this day, Service Order No. 6 was not such a restraint of rulers as excused performance.

It follows that the respondent must be held liable for the breach of the charter party.

COMPAGNE NAVIGAZIONE SOTA Y AGNAR v. DIAMOND FUEL CO., Incorporated.

(District Court, D. Maryland. May 4, 1921.)

No. 709.

Shipping ⊂=52—Charterer bound regardless of export permit is liable for failure caused by refusal of permit to transport.

Where an interlineation in the charter party expressly bound the charterer to load the ship at the time specified, whether it had government exporter's license or not, the charterer is liable for the damages resulting from the failure to furnish the cargo, though such failure was caused by an order of the Interstate Commerce Commission restricting the transportation of coal by rail to the port.

In Admiralty. Libel by the Compagne Navigazione Sota y Agnar against the Diamond Fuel Company, Incorporated, to recover damages for failure to load the ship under the terms of the charter party. Decree rendered for libelant.

The Unbe Mendi was chartered on a Welsh form containing the provisions: "3. The cargo to be loaded at an average rate of not less than 1,500 tons per running day, Sundays and holidays excepted. Time to commence (regardless of whether or not charterers have government export license), at the expiration of 72 hours after notice of steamer's readiness to load, whether steamer is berthed or not, and from the time steamer is ready to load (or within 72 hours after readiness to load, if delayed waiting turn at berth), and master has given notice in writing. Any time lost through riots, strikes, lockouts, or any dispute between masters and men, occasioning a stoppage of pitmen, trimmers, or other hands connected with the working or delivery of the coal for which the steamer is stemmed, or by reason of accidents to mines or machinery, obstructions on the railway or in the docks, or by reason of floods, frosts, fogs, storms, or any cause beyond the control of the charterers, not to be computed as part of the loading time (unless any cargo be actually loaded during such time). In the event of any stoppage or stoppages arising from any of these causes continuing for the period of six run-

ning days from the time of the vessel being ready to load, this charter shall become null and void: Provided, however, that no cargo shall have been shipped on board the steamer previous to such stoppage or stoppages. In case of partial holiday, or partial stoppage of colliery or collieries from any or either of the aforenamed causes, the lay hours to be extended proportionately to the diminution of output arising from such partial holiday or stoppage. If longer detained, charterers to pay 48 cents per net registered ton per day demurrage. No deduction of time shall be allowed for stoppages, unless due notice be given at the time to the master or owner. If any dispute or difference should arise under this charter, same to be referred to three parties in the city of New York, one to be appointed by each of the parties hereto, the third by the two so chosen, and their decision, or any of them, shall be final and binding, and this agreement may, for enforcing the same be made a rule of court."

"7. The act of God, the king's enemies, restraints of princes and rulers, and perils of the seas excepted; also fire, barratry of the master and crew, pirates, collisions, strandings, and accidents of navigation, or latent defects in, or accidents to, hull and/or machinery, and/or boilers, always excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners or other persons employed by the shipowner, or for whose acts he is responsible, not resulting, however, in any case from want of due diligence by the owner of the ship, or by the ship's husband or manager. Charterers not answerable for any negligence, default, or error in judgment of trimmers or stevedores employed in loading or discharging the cargo. The steamer has liberty to call at any ports in any order, to sail without pilots, to tow and assist vessels in distress, and to deviate for the purpose of saving life or property and to bunker. It is also mutually agreed that this shipment is subject to all the terms and provisions of and all the exemptions from liability contained in the act of Congress of the United States, approved on the 13th day of February, 1893, and entitled, 'An act relating to navigation of vessels,'" etc.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City, and Janney, Stuart & Ober, of Baltimore, Md., for libelant.

W. Ainsworth Parker, R. E. Lee Marshall, and Charles R. Webber, all of Baltimore, Md., for respondent.

ROSE, District Judge. In this case the libelant, a Spanish corporation, owner of the steamship Unbe Mendi, is seeking to recover from the respondent, a corporation of Delaware, the loss occasioned by the failure of the respondent to load the ship as required by the terms of a charter party.

The charterer says it is excused by the same Service Order No. 6 of the Interstate Commerce Commission as is fully discussed in the opinion in No. 724, Hellenic Transport S. S. Co. v. Archibald McNeil & Sons Co., Inc., 273 Fed. 290, handed down this day. Even if the conclusion reached in that case be in any wise erroneous, the respondent herein would remain liable, for by an interlineation in the charter party it expressly bound itself to load the ship, whether or not it had government export license. It must make good the loss the charterer has suffered in consequence of its not having done so.

CANUTE S. S. CO., Limited, v. DIAMOND FUEL CO., Inc.

(District Court, D. Maryland. May 4, 1921.)

No. 710.

Shipping ⊂=52—Order giving priority to other shipments for first 30 per cent. of coal delivered does not excuse charterer.

A charterer is not excused for failure to furnish a cargo of coal as required by the charter party, by an order of the Interstate Commerce Commission giving priority to domestic shipments of coal in stated quantities, which left 70 per cent. of the coal arriving at the port of loading free for export.

In Admiralty. Libel by the Canute Steamship Company, Limited, against the Diamond Fuel Company, Incorporated, to recover for the failure to furnish a cargo of coal as required by charter party. Decree rendered for libelant.

The Severnmede was chartered on the Washington July, 1919, form, with conditions similar to those in the Renfrew, but without the clause: "This charter party effective, whether permit for cargo granted or not granted."

Charles R. Hickox (of Kirlin, Woolsey, Campbell, Hickox & Keating), of New York City, and Stuart S. Janney (of Janney, Stuart & Ober), of Baltimore, Md., for libelant.

R. E. Lee Marshall (of Brown, Marshall, Brune & Parker), of Baltimore, Md., and Clarence B. Smith (of Haight, Sandford, Smith & Griffin), of New York City, for respondent.

ROSE, District Judge. In this case the libelant is the Canute Steamship Company, owner of the steamship Severnmede. The respondent is the same Diamond Fuel Company which occupies a like position in No. 709, 273 Fed. 299. Defense here is taken under the restraint of rulers clause.

The ship reported ready for loading on July 29th. At that time the charterer failed to furnish a cargo, and notified the owner that it would not be able to do so, and on the 20th of August the owner withdrew the ship, with notice, however, that it would hold the charterer liable for all damages for failure to load. When the ship arrived, Service Order No. 6 of the Interstate Commerce Commission, fully discussed in No. 724, Hellenic Transport S. S. Co. v. Archibald McNeil & Sons Co., Inc., 273 Fed. 290, was still in force, although the Commission, by Service Order No. 11, hereinafter referred to as S. O. 11, had some days previously directed that Service Order 6 should cease to be effective from and after August 2d.

From what S. O. 11 said and directed, as well as from other evidence in this series of cases it would seem that not only had there been a failure to realize the hope that the fuel needs of New England might be relieved by requiring permits before cars could be loaded to carry coal to tidewater for export, but that the permit system worked unsatisfactorily. In determining to whom permits should be issued, the agents of the Commission had to take into account many different

sorts of factors, as, for example, the views of the State Department as to the relative urgency of the requirements of different European countries. It was impossible, therefore, to issue the sought for permits in any automatically operating order. Some who did not get them felt that they had been unjustly treated. In some instances, the would-be shipper who had failed to obtain permits found a way to get coal, due probably to the transfer of credits in the coal pools of the tidewater exchanges. The number of such cases was doubtless very few, but they were enough to furnish seed for rapidly growing rumors.

Apparently, therefore, the Commission made up its mind to discard altogether the necessarily somewhat arbitrary system of permits; but, as New England still needed from the mines of Pennsylvania, Maryland, and the Virginias not less than 1,250,000 tons of bituminous coal a month, and was getting not over 900,000, something had to be done. Accordingly the Commission tried to distribute mathematically the burden of meeting the requirements of that section of the country by S. O. 11, which directed that the needed coal should be furnished by New York, Philadelphia, Baltimore, and the Hampton Roads ports; 650,000 tons being fixed as the quota of the last named, 250,000 of New York, a like amount of Baltimore, and 100,000 of Philadelphia. The amount to be supplied by each of these ports was further apportioned among the railroads serving it. Of the Baltimore allotment, the B. & O. was required to haul 160,000 tons a month, the Pennsylvania 50,000, and the Western Maryland 40,000.

A still further distribution was directed among the various coal-producing districts served by these railroads, and among each coal-producing station in such districts. No producer or shipper could get cars for other destinations until he had furnished his assigned daily proportion of coal required for New England; but, after he had done so, he was free from embargoes for the remainder of the day, and he might send his coal where he chose, and to whom. Coal shipped for New England could not be reconsigned to any but a New England port. Shippers having credits in a pool in an exchange of any of the transshipment ports, obtained as the result of shipments of coal under S. O. 11, were not to be permitted to draw against the credit and ship from such pool to any destination outside of New England.

Under the operation of this order, during the month of August, 70 per cent. of the coal shipped from Baltimore went abroad. It is quite clear that, whatever may be said as to S. O. 6, S. O. 11 did not constitute any such restraint of rulers as is contemplated by the exception in the charter party.

The respondent must therefore answer for its default.

In re SALUDES LUMBER CO., Inc.

Petition of MARTELLIERE et al.

(District Court, E. D. New York. May 27, 1921.)

Bankruptcy ⟸91(2)—Verdict sustaining petition held supported by evidence.
Evidence *held* to sustain the verdict of a jury finding that an alleged bankrupt was insolvent and had committed acts of bankruptcy, and that petitioners had provable claims.

In Bankruptcy. In the Matter of the Saludes Lumber Company, alleged bankrupt. Petition of Oscar M. Martelliere and others, creditors, for allowance of claims. On motion to set aside verdict of jury on trial of issues raised by petition. Denied.

G. R. Westerfield, of New York City, for petitioning creditors.
James A. Turley, of New York City, for alleged bankrupt.

GARVIN, District Judge. This is a motion to set aside the verdict of a jury, rendered after a trial of issues raised by a petition in bankruptcy and answer of the alleged bankrupt. The jury has found that the alleged bankrupt was insolvent. This does not appear to be seriously questioned, but in any event there was ample evidence to justify such a finding. The jury has also found that the three petitioning creditors, Kemper, Andrews, and Martelliere, had provable claims against the bankrupt. Only Martelliere's claim is questioned.

The petition, which alleged that claim to be for $1,340, moneys advanced, was amended at the trial so as to include an additional claim for $1,713.76, based upon an indorsement over to him of a trade acceptance for which he had advanced the money to the bankrupt, and which trade acceptance had proved to be without value. With regard to the original claim for $1,340 for money loaned, it appears that Martelliere had agreed to purchase certain stock of the alleged bankrupt for the last-mentioned sum, and that he had actually paid over that amount, receiving in return only six certificates of stock, of the par value of $100 each. A valid claim for $740 remains, which I think may be considered as a loan, in addition to the claim for $1,713.76, which seems to be clearly established as an unconditional liability or indebtedness to Martelliere.

The alleged bankrupt urges that the finding of the jury that the acts of bankruptcy alleged in the petition were not proved was not warranted by the evidence. The petition alleges that the bankrupt had paid about $10,000 to various creditors, for the purpose and with the intent of preferring such creditors, and had assigned to creditors property amounting in value to about $1,195 with like purpose and intent. The jury has found that such preferences have been established, and it appears to me that upon the whole record there is sufficient evidence to warrant a finding that an act of bankruptcy has been committed. There was ample proof that the alleged bankrupt had assigned to various creditors accounts aggregating more than $10,000. This is in

substance a payment, and I think the proof so nearly conformed to the pleading that it would amount to a miscarriage of justice to set aside a verdict on that ground. The proof showed the transfer of a Ford sedan under such circumstances as amply justified a finding that a preferential transfer of property had been made.

Motion to set aside verdict denied.

THE CITY OF NORWICH.

(District Court, E. D. New York. May 25, 1921.)

Seamen ⇐3—Statutory penalty for delay in payment of wages not applicable to foreign vessels.

The provision of Rev. St. § 4529 (Comp. St. § 8320), which entitles seamen to a sum equal to two days' pay for each day's delay in payment of wages after discharge, beyond the time therein fixed, *held* not applicable to foreign vessels, which are governed as to the rights of their seamen by the laws of their respective counties, to be proved as facts in a suit in an admiralty court of the United States.

In Admiralty. Suit by Fazel Ahammed and others against the Steamship City of Norwich. Decree for respondent.

Silas B. Axtell, of New York City, for libelants.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City, for claimant.

GARVIN, District Judge. The importance of a speedy adjudication of the rights of the parties prompts me to express my conclusions briefly, without setting forth the facts at length. Conflicting testimony was offered as to whether there was a desertion or discharge. The fact remains, however, that after the libelants went ashore, as they insist, merely to complain to the British consul, they returned to the ship, and remained on the pier, to which she was moored, for two or three days. This is not consistent with any theory that when they left in the first instance they thereby deserted. Except for the objection to any recovery whatever, to which I shall presently refer, they would therefore be allowed two days' pay for each day's waiting time since April 7, 1921. U. S. R. S. § 4529 (Comp. St. § 8320).

I do not think the case would justify an award by way of compensation for pain and suffering because of lack of food and a proper place to sleep during the two days they spent on the dock. The officers of the ship did not compel them to remain there. In any event, damages for breach of contract do not include pain and suffering. I have been referred to no authority which holds that section 4529, supra, refers to foreign vessels. The boat in the instant case was a British ship. The only law applicable to this case is British Law and under the recent case of The Hanna Nielsen (D. C.) 267 Fed. 729, there can be no recovery thereunder, for such foreign law is a fact to be proved if material, and libelants never attempted to prove it.

The libel is therefore dismissed, but without costs.

MURPHY v. NEW YORK & CUBA MAIL S. S. CO.

LALLY v. SAME.

(Court of Appeals of District of Columbia. Submitted January 4, 1921. Decided April 4, 1921.)

Nos. 3386, 3387.

1. **Shipping ⟸166(1)—Steamship company's duty extends to all passengers.**
In connection with an alleged theft of jewels on board a steamship and a search of the staterooms of certain passengers by police officers at the port of destination, the carrier's duty extended, not only to the suspected persons, but to the passenger alleging the theft, and to the larger body of passengers not involved in the controversy, who might have been endangered or delayed by any resistance to, or obstruction of, the investigation.

2. **Shipping ⟸166(1)—Captain not bound to prevent transmission of radiogram asking officers to meet ship, or inform suspected persons.**
Where the captain of a steamship bound for Havana, to whom complaint was made of an alleged theft of jewels, refused to order a search of the passengers or of the staterooms of suspected persons, he had neither the right nor the duty to prevent the complaining passenger from sending a radiogram to the Havana police officers, asking them to meet the ship, and was under no duty to inform the suspected persons that such message had been sent.

3. **Evidence ⟸317(2), 593—Statement of police officer that search was by permission of steamship captain held hearsay.**
The statement of a police officer, while searching the stateroom of a steamship passenger suspected of theft, that he was there by permission of the captain, was hearsay, and could have no probative force against the captain, who was not present when it was made, and was dead when it was repeated at the trial.

4. **Shipping ⟸166(5)—Evidence held not to make question for jury as to captain's consent to search of stateroom by police officers.**
Where there was testimony that a steamship captain refused police officers at the port of destination permission to search the staterooms of passengers suspected of theft, but the police officers nevertheless made a search, evidence *held* insufficient to make a question for the jury as to whether the captain gave permission for the search, especially where the case was presented to, and decided by, the trial court on the theory that permission was refused.

5. **Shipping ⟸166(1)—Passenger, after reaching destination, held not member of ship's company, bound only by law of ship's sovereignty.**
Where a ship had reached her destination, and her passengers were about to disperse in various directions, and passengers suspected of theft declined to tell police officers where they intended stopping, they could not be regarded as members of the ship's company, whose internal discipline was a matter for the law of the sovereignty of the ship, but, like the ship, owed allegiance and obedience to the laws of the port, subject to any existing treaty rights.

6. **Shipping ⟸166(1)—Captain of steamship held not bound to resist search or arrest by police officers on complaint.**
Under the Cuban law, requiring every citizen to notify the police of any crime within his information, and requiring the police authority to investigate such information, where the police at Havana, to which port a steamship was bound, were notified of an alleged larceny, the agents of the steamship company were not bound to substitute their opinion of Cuban law for that of the officials, or resist the officers in searching the

staterooms of suspected persons, and in arresting them, even assuming that United States statutes and the treaty between United States and Cuba gave the suspected persons, as American citizens, a right to be tried in the United States.

Smyth, Chief Justice, dissenting.

Appeal from the Supreme Court of the District of Columbia.

Two actions, by Josephine Murphy and by Anna V. Lally, against the New York & Cuba Mail Steamship Company. From judgments on directed verdicts for defendant, plaintiffs appeal. Affirmed.

F. J. Hogan and Leo P. Harlow, both of Washington, D. C., for appellants.

F. D. McKenney, J. S. Flannery and G. B. Craighill, all of Washington, D. C., for appellee.

HITZ, Acting Associate Justice. These are appeals from judgments of the Supreme Court of the District of Columbia upon verdicts for the defendant, directed by the court at the close of all the evidence. The two cases were consolidated for trial by order of the trial court, and are presented together here by stipulation of counsel.

The plaintiffs below—appellants here—are American citizens and residents of the District of Columbia, who were passengers for hire of the defendant company upon a voyage from New York to Havana, beginning on October 25 and ending on October 29, 1913. The defendant is a corporation of the state of Maine, and a common carrier of passengers between New York and Havana.

On October 25, 1913, the plaintiffs, accompanied by a third lady and unaccompanied by any male escort, sailed from New York on the defendant's steamship Havana, together with some 137 other first-class passengers, consisting of men, women, and children of various nationalities, and including one Smith, general agent of the defendant company in Havana. The crew of the ship numbered about 130 men, including operators for the wireless telegraph instruments, with which the ship was equipped; the vessel making no stop and entering no port between New York and Havana. This party of three ladies occupied all of stateroom numbered 1 and a portion of stateroom numbered 2.

On the night of October 27, while the ship was off the American coast or on the high seas, a Cuban woman passenger complained to officers of the ship concerning the alleged loss or larceny of certain jewelry. On the morning of October 28, while the ship was off the coast of Florida, the steward mentioned to the plaintiff, Miss Lally, an alleged theft of jewelry aboard the ship; while later on the same day a Cuban woman passenger spoke to both plaintiffs regarding the same occurrence.

In the afternoon of October 28, the Cuban woman passenger complained to the captain of the loss or theft of her jewelry from the lavatory of the ship, requesting him to have all the passengers searched for her jewelry. This the captain refused to do. Then the Cuban woman asked the captain to have the American women in stateroom

numbered 1 searched, as she suspected them in connection with the disappearance of her jewels, because one of them was in the lavatory at the time they disappeared. This the captain also refused to do.

Thereupon the Cuban woman told the captain that, if he did not have the plaintiffs searched, she would send a wireless message requesting the Cuban police to meet the steamer in Havana, which the captain stated he could not prevent her from doing. Thereafter a wireless message was sent by two Cuban women to the secret police of Havana, concerning an alleged theft aboard the ship, the text of which message is not in the record.

The wireless operator testified that he had signed the ship's articles, considered himself a member of the crew, and subject to the captain's orders regarding the dispatch and receipt of messages, but that he did not call the captain's attention to the message in question, which was in the Spanish language and not clearly understood by him.

On the morning of October 29 the ship reached Havana, and while anchored in the harbor, before docking, was boarded by the port police, armed and in uniform, who requested permission of the captain to search certain staterooms in connection with an alleged larceny of jewelry. The captain refused permission for this search, he being then on the bridge and engaged in docking the ship.

The police officers thereupon left the bridge, went into the saloon, where the plaintiffs were pointed out to them by the Cuban woman, and shortly thereafter the police obtained access to the plaintiffs' stateroom, which the plaintiffs had left locked and unoccupied, placing the key on a ledge outside the door. The police then searched this room, together with the hand luggage of the plaintiffs therein.

The plaintiffs being informed by a steward that police officers were in their room, they returned there, found the key missing from the ledge, the door locked, and the Cuban police in the room. The plaintiffs protested to the police against the search and invasion of their room, and, when asked by the police where they intended stopping in Havana, declined to tell saying they had been sufficiently insulted already, and did not want their friends ashore insulted.

Plaintiffs then appealed to the captain for protection, going to him on the bridge, and telling him of the search of their room, and that they considered themselves to be under arrest. The captain replied that he could do nothing for them, but would meet them at the office of the American consul at noon. Thereupon the plaintiffs left the ship, apparently accompanied by the police officers, and found their Cuban friends on the dock, who protested vigorously against the action of the police.

Plaintiffs were then taken to a small building on the dock, where they were separately searched by a matron of the custom house; the custom house and the port police having offices on the same dock as the defendant company. After being so searched, an examination of a quasi judicial character was conducted by the police officers on the dock; plaintiffs being questioned as to any knowledge of the missing jewelry.

At the conclusion of this examination, and after being detained several hours, the plaintiffs were released and went to the American consulate at noon, where they were met by the captain of the ship, and where they made complaint against the Cuban police. On October 30, the captain of the ship sent to the captain of the port a written protest against the action of the officers, while a day or two later the plaintiffs were summoned to appear in a court of the city of Havana, where they were questioned concerning the missing jewelry, after which they were finally dismissed from the matter; nothing in the investigation having developed any guilt in the plaintiffs or their companion.

The plaintiffs complained to the American consul general and to the American minister of their treatment in the matter, which was called to the attention of the Cuban government, and which produced a letter of apology from the President of Cuba to the American minister, stating that the police officers had acted inadvisedly.

The various occurrences above related took place in the presence of sundry persons on the ship and on the dock. These cases are based on the alleged negligence of the defendant company in respect of its contract of carriage with the plaintiffs.

[1] The carrier's duty to its passengers, of course, extends equally to all its passengers, as well to the Cuban woman, alleging theft of her jewels, as to the American women, suspected of stealing them, and to the larger body of passengers not involved in the controversy, but who might have been endangered or delayed, if the officers of the ship had undertaken to resist or obstruct the investigation of the occurrence by the Cuban police at the instance of a Cuban citizen.

[2] The appellants first contend that the captain was guilty of negligence in not preventing the Cuban woman from sending the radiogram to the Cuban police, after putting him on notice that she intended doing so. Laying aside the fact that the captain had no knowledge of the actual sending of such a message, or of the contents thereof, we are of opinion that he had neither the right nor the duty to prevent its transmission in the circumstances.

The alleged theft was complained of to him by one of his passengers, who stated her suspicions of another passenger. He was asked to investigate the occurrence and make search for the goods, and when he declined to do so he could not, consistently with his duty to both these passengers, undertake to prohibit the Cuban woman from informing the Cuban police authorities at the first port which the ship should reach of the alleged crime and any grounds of suspicion which she entertained concerning it. Nor was it the duty of the captain to ascertain that such a message had been sent, and to inform the suspected persons thereof, which would only have enabled them, if guilty, to destroy the evidence of guilt and defeat the ends of justice.

While the text of the radiogram is not in evidence, it is clear from the record that a message was sent by the Cuban woman to the Cuban police, informing them of the alleged loss, requesting them to meet the ship in the harbor of Havana to investigate the occurrence, and that when they did so she pointed out to them the plaintiffs as the persons

she suspected, and whose stateroom she knew. For any mistake of fact or abuse of power on the part of the Cuban woman or the Cuban police, they, or the Cuban government, might well be responsible; but the endeavor to hold the carrier liable in this proceeding is a very different matter.

The appellants next contend that the appellee was guilty of negligence in respect of the search of the appellants' stateroom and their subsequent arrest by the Cuban officers; the second assignment of error being the refusal of the trial court to submit to the jury the issues of fact presented by the testimony. But the only resemblance to an issue of fact that we perceive in the record concerns the request of the Cuban police to the captain of the ship for permission to search the stateroom.

Under the Cuban Code, before a foreign ship may be judicially searched, permission therefor must be obtained from the captain of ship or the consul of his nation. Code of Civil and Criminal Procedure for Cuba and Porto Rico, § 561, Washington Edition, January, 1901. It is admitted that no request was made to the American consul for permission to search the ship, and that the captain died before the trial and without his testimony having been taken.

In the argument in this court it was assumed on both sides that the captain, when requested to permit the search of the appellants' stateroom by the police, refused his permission, but did nothing further to prevent such a search, or to enforce his refusal. This assumption was presumably based, in large part, on the testimony of the third officer, who was on the bridge with the captain when the police made their request, and on the captain's letter of protest to the superior police authorities against the action of the boarding officers, which was written on the day after the occurrence, and which was read into the record by the appellants.

[3] In the narrative of the proceedings below, presented by the record printed for this court, one or both of the appellants is stated to have testified that, when they returned to their stateroom and found the police in possession thereof, one of the officers said that he was there by permission of the captain. But any such remark was but the hearsay statement of a wrongdoer in justification of his wrong, and could have no probative force against the captain, who was not present when it was made, and who was dead when it was repeated at the trial.

[4] This narrative account of the trial below further states that the three ladies involved in the occurrence, after their room had been searched, after they had been placed under arrest, and while they were greatly excited, if not somewhat hysterical, went to the captain on the bridge, accompanied by one of the police officers as far as the steps of the bridge, and complained to the captain of what had been done by the police, asking his protection and assistance. These witnesses agree that the captain told them he could do nothing to help them at that time, but would meet them at the American consulate at noon.

One of these witnesses testified that the captain said that, if the same thing had happened to his own wife, he would have had to permit it; another testified that he said it was an unfortunate affair, and if his own wife was in the same fix she would have to submit; while the third testified that she could not remember what the captain told them, except that he could not help them at that time. None of these witnesses undertakes to report the precise words used by the captain, while, in view of the hurried and excited character of the conversation and the lapse of more than six years between the occurrence and the trial, it would not be reasonable to expect such a repetition.

We cannot, therefore, regard this testimony as presenting a disputed question of fact as to whether or not the captain gave his permission for the search of the room. Furthermore the case was presented to and decided by the trial court on the same theory—that the captain refused the police permission to search the stateroom on their request, but that they thereafter surreptitiously gained access to the room and made the search in disregard of the rights of the ship, of the appellants, and of certain requirements of the Cuban law.

Indeed, the opinion of the trial justice, read by him before directing the verdict, and received by both sides without exception, states that the captain refused the police permission to search the stateroom, and that he was entitled to assume that they would not attempt a search in the face of his refusal, unless he was put on notice to the contrary, which there was nothing in the evidence to indicate. The trial court further states that there was no serious dispute as to what took place, from the beginning of the occurrences complained of to the end; while counsel for the appellants stated that all the facts were so clearly established by the evidence that he would have been justified in asking for a directed verdict for the appellants as a matter of law. Consequently we hold, upon the evidence and the arguments, that the captain refused the police his permission to search the room when they asked for it.

[5] At the time of the search of the appellants' room, and of their subsequent arrest, the ship had reached her destination; her numerous passengers were about to disperse in various directions, and when the plaintiffs were asked by the police where they intended stopping in Havana they declined to state. Under these circumstances these passengers, of course, cannot be regarded as members of the ship's company, whose internal discipline is a matter for the law of the sovereignty of the ship. In the language of the Supreme Court of the United States:

"Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished by the proper authorities of the local jurisdiction. And it may not be easy at all times to determine to which of the two jurisdictions a particular act of disorder belongs." Wildenhus Case, 120 U. S. 19, 7 Sup. Ct. 385, 30 L. Ed. 565.

And the same court in the same case quotes with approval from the Court of Cassation of France:

"Considering that merchant vessels entering the port of a nation other than that to which they belong cannot be withdrawn from the territorial jurisdiction, in any case in which the interest of the state of which that port forms part finds itself concerned, without danger to good order and to the dignity of the government; considering that every state is interested in the repression of crimes and offenses that may be committed in the ports of its territory, not only by the men of the ship's company of a foreign merchant vessel towards men not forming part of that company, among themselves, whenever the act is of a nature to compromise the tranquility of the port, or the intervention of the local authority is invoked." Wildenhus Case, 120 U. S. 19, 7 Sup. Ct. 385, 30 L. Ed. 565.

But these passengers, like the ship herself, owed allegiance and obedience to the laws of the port to which they had voluntarily resorted, subject to any existing treaty rights.

"It is part of the law of civilized nations that, when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement." Wildenhus' Case, 120 U. S. 11, 7 Sup. St. 387, 30 L. Ed. 565.

[6] Now, by the Cuban law, every Cuban citizen is required under penalty to notify the Cuban police authority of any crime within his information, and such police authority is required to investigate such information and to collect all effects, instruments, and evidences of such crime. Law of Criminal Procedure for Cuba, Edition of 1901, as Reprinted by U. S. War Department, arts. 259, 262, 282, 290.

The crime alleged to have been committed on this ship occurred two days after she left her last port, and two days before her arrival in Havana, and at a point undisclosed by the record. Whatever may have been the common-law doctrine in England and America concerning the "ambulatory character" or "continuing offense" of larcency committed on the high seas, in both jurisdictions such larceny has long since been made a continuing offense by statute. St. 13 George III, c. 31, § 4; St. 7 George IV, c. 29, § 76; U. S. Penal Code, §§ 287, 288 (Comp. St. §§ 10460, 10461); U. S. Judicial Code, §§ 41, 42; 36 Statutes at Large, p. 1100 (Comp. St. §§ 1023, 1024); Perara v. U. S., 221 Fed. 213, 136 C. C. A. 623; Morris v. U. S., 229 Fed. 516, 143 C. C. A. 584; 2 Moore, Internat. Arb. 249, 250.

If the statutes of the United States and the treaty between the United States and Cuba give an American citizen, charged with having committed larceny from a Cuban citizen upon an American vessel on the high seas, a right to be tried in the United States, notwithstanding his entry and arrest at a Cuban port, upon which we express no opinion, we are aware of no provision of law which prohibits the Cuban police authorities, on the complaint of a Cuban citizen, from making a preliminary investigation into such an alleged larceny or from holding the accused person for trial or extradition in due course. On the contrary, such an investigation, promptly conducted, while witnesses and evidence are available, is advantageous to the course of justice and beneficial to all parties concerned.

The record shows that the search of the stateroom and the arrest of the plaintiffs was done by three or four known officers of the port police, armed and uniformed, after the ship had anchored in the port. The Cuban friends, whom the appellants had come to Cuba to visit, were on the dock; legal counsel was obtainable in Havana; American consular and diplomatic officers were available there; and the agents of the defendant company owed no duty to the appellants to resist known officers of the port, or to attempt to substitute their own opinion of Cuban law for that of Cuban officials.

So, where a negro, riding in a Pullman car as an interstate passenger through a state having a separate car statute, was wrongfully ejected and arrested by local police officers, although notice of his presence in the car had been telegraphed ahead to the police by the train conductor, to the knowledge of the Pullman conductor, who made no protest or objection to the arrest of his passenger, it was held by the Circuit Court of Appeals for the Eighth Circuit that it was the—

"duty of the Pullman Company to exercise reasonable care and diligence to protect the passengers in its cars from unlawful discomforts, attacks, inconveniences, insults, and injuries; but that duty did not require it or its employees to substitute their opinion of the law and of the duty of officers of the law for the judgment of the latter, and to interfere with and obstruct the discharge by these officers of their duties, and the failure of the Pullman Company and its employees to obstruct, interfere with, or prevent the arrest or removal of the plaintiff from the Pullman car by the deputy sheriff did not constitute actionable negligence." Thompkins v. Railway Co., 211 Fed. 394, 128 C. C. A. 1, 52 L. R. A. (N. S.) 791; Burton v. Railroad Co., 147 App. Div. 557, 132 N. Y. Supp. 628.

If the Cuban officials were mistaken in fact or in law, they or their government may well be responsible to the injured parties in a proper procedure. But, concluding, as we do, that there was no actionable negligence on the part of the appellee's agents disclosed by the record, and the essential facts being established by uncontradicted evidence, there was no question presented which the trial court could properly have left to the jury, and "to allow them to substitute sympathy for evidence" is reversible error. Southern Pacific Co. v. Berkshire (decided January 3, 1921) 254 U. S. 415, 41 Sup. Ct. 162, 65 L. Ed. ——; Barrett v. Railway Co., 250 U. S. 473, 39 Sup. Ct. 540, 63 L. Ed. 1092; Butler v. Frazee, 211 U. S. 459, 29 Sup. Ct. 136, 53 L. Ed. 281.

The judgments are 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.

SMYTH, Chief Justice (dissenting). Certain propositions are admitted or established in this case: (a) That it was the duty of the company, being a common carrier, to protect the appellants as passengers as far as practicable (New Jersey Steamboat Co. v. Brockett, 121 U. S. 637, 645, 7 Sup. Ct. 1039, 30 L. Ed. 1049; Washington Railway Co. v. Perry, 47 App. D. C. 90, 97); (b) that the appel-

lants, being highly respected persons, were inconvenienced, insulted, humiliated, and their stateroom and luggage searched against their will by Cuban police officers, while they were on board the appellee's ship, on the false assumption that they had committed larceny; (c) that the Cuban officers had no right to search the stateroom of the appellants without the permission of the American consul or of the captain of the vessel; and (d) that the consul had not given permission.

The law of the Republic of Cuba, found in the record, governing the right of a Cuban officer to search any of the places mentioned therein, says, in section 561:

"Nor can he enter and search foreign merchant vessels without the authority of the captain, or, if the latter should refuse it, without that of the consul of his nation."

The statute makes it clear that the Cuban officers had no right to search the company's vessel without the permission of the captain or consul. This also accounts for the officer's request for permission to make the search. There is no claim that the American consul gave his permission, or was asked to do so.

Did the captain give permission? The opinion asserts that he did not. Let us see what the record says. The captain died some time after the occurrence, and this perhaps explains why his testimony was not taken. One of the ship's officers testified that the captain positively refused to grant the Cuban officials permission to search the stateroom, and he is the only one who says so; but there is testimony in conflict with this. The two appellants said that, when they called upon the captain for protection after their stateroom had been searched, he received them in his shirt sleeves, in his quarters on the bridge, remained seated during the interview, displayed much indifference, and stated that, if it had been his own wife, "he would have had to permit it." Does this not tend to show that he did permit it in the case of the appellants? His attitude was that of a person who was not much concerned in extending to them the protection to which all passengers are entitled at the hands of their common carrier.

Is it not unlikely that the Cuban officers, knowing as they must have the law of their own nation, would, if the captain had refused permission, go directly to the stateroom in the presence of the many who stood about, open the door, and enter on a vigorous search of the appellants' effects? The stateroom steward was nearby and saw what took place, for he informed the appellants of it. The Cuban officers gained entrance to the stateroom by means of a key which they had found on a ledge above the door, where the appellants were accustomed to place it. This was known to the steward. How did the Cuban officers learn of its location, unless he informed them? Is it likely that he would have done so, unless he had assurance that the captain had given the officers permission to make the search? Finally, both appellants testified that, when they entered the stateroom and found the Cubans at work, the captain of the Cuban force said in answer to their protests: "This is by the captain's permission." Nei-

ther the steward, the Cuban police captain, nor any one else was called to contradict this. It is said the testimony is secondary. Granted. But no objection was made to it on that ground or on any other. If the appellee was satisfied with it the court should be. Had timely objection been made, the Cuban officers could have been called. They were competent to testify to what the captain had said to them. But we are told that it was assumed in the argument that the captain did not give his permission. There is no admission of that character in appellants' brief, and the record clearly presents the question, as it does all other questions affecting the sufficiency of the evidence to carry the case to the jury. I submit that the testimony and the circumstances made it a clear question for the jury as to whether or not the captain had given permission for the search.

Assume that it had been left to the jury, and that they had found that the search was made with permission of the captain, could there be any doubt that the company which the captain represented is liable for all the consequences of the permission? Certainly it could not be said with any show of reason that, in giving permission to do the thing which caused the injury, the carrier was doing all that was practicable for the protection of its passengers.

Even if it was established that the captain had refused permission, but did nothing more, it would be, it seems to me, for the jury to decide whether he had thereby performed his full duty in the circumstances. He knew the accusations that had been made against the appellants, and knew what the officers were on board for. Might not the jury have said with reason that, knowing these things, he personally, or by some proper person deputed for the purpose, if his duties kept him on the bridge, should have observed the Cuban officers while on board, and taken every step reasonably available to persuade them that they had no authority to make the search, and that, if they attempted it, they would be held to strict accountability for their act? If he had done this, the jury would be justified in saying, considering all the circumstances, that the officers would not have made the search, abused the appellants, and otherwise disobeyed the law. The question of the proximate cause of an injury is ordinarily not one of science or of legal knowledge, but a fact for the jury to determine, in view of all the accompanying circumstances. Milwaukee & St. Paul Railway Co. v. Kellogg, 94 U. S. 469, 474, 24 L. Ed. 256; In Washington Railway & Electric Co. v. Perry, 47 App. D. C. 90, this court said that the trial court made no error in leaving to the jury the question as to whether or not the conductor's failure to take any steps to quiet the boys who were misbehaving on his car was the proximate cause of the injury of one of their fellow passengers. See, also, in this respect, Anania v. Norfolk & Washington Railway Co., 77 W. Va. 105, 87 S. E. 167, L. R. A. 1916C, 439; Hutchinson Carriers, 3rd Ed., sec. 1162; Mary A. Smith v. Wilson, 31 How. Prac. (N. Y.) 272 Fed. Cas. No. 13,128; Parsons on Shipping and Admiralty, 636; Louisville & Nashville Railroad Co. v. Byrley, 152 Ky. 35, 153 S. W. 36, Ann. Cas. 1915B, 240; Southern Railway Co. v. Hanby, 183 Ala. 255, 260, 62 South. 871.

Moreover, there is nothing whatever in the evidence indicating that the police officers would have persisted in making the search if the captain had shown any opposition. They apparently were proceeding under the assumption that they had his authority and were acting entirely within the law.

There is no analogy between this case and cases like Burton v. N. Y. C. & H. R. R. Co., 147 App. Div. 557, 132 C. C. A. 628, and Thompkins v. Railway Co., 211 Fed. 391, 128 C. C. A. 1, 52 L. R. A. (N. S.) 791, where an officer, clothed with apparent authority makes an arrest or a search. It is no part of the carrier's duty, so say most of the authorities, to oppose such an officer. Here there was no question of apparent authority. The Cuban statute makes it indisputable that the officers had no authority without permission of the captain or the consul; and the captain knew this. Stress is laid on the Wildenhus Case, 120 U. S. 1, 8, 7 Sup. Ct. 385, 30 L. Ed. 565, but it is not in point. There the court decided what the law of nations was with respect to the facts before it. Here we have no such question. The matter is governed by a Cuban statute which fixed the authority of the Cuban officers.

We have nothing whatever to do with the question as to whether or not larceny is an ambulatory offense, although I may say in passing that this court in a well-considered and exhaustive opinion held that it was not. Brown v. United States, 35 App. D. C. 548, Ann. Cas. 1912A, 388. No note is made of that decision in the opinion. How are the bench and bar to regard it in the future—as overruled or as still the law of the District? Be that as it may, even if the alleged larceny was committed on the ship in the harbor, the Cuban officer could not have searched the stateroom without permission. No exception is made by the Cuban statute.

It is hardly necessary to add that, in determining whether or not this case should have been withdrawn from the jury, we must construe the evidence in the light most favorable to the appellants. Thos. R. Riley Lumber Co. v. McHarg, 47 App. D. C. 389, 399, and cases there cited. Applying that rule, I am convinced that the court erred in peremptorily instructing the jury, and that a new trial should be ordered.

Hence I dissent.

BELL v. DISTRICT OF COLUMBIA.

(Court of Appeals of District of Columbia. Submitted January 4, 1921. Decided April 4, 1921.)

No. 3412.

District of Columbia ⇐22—Statute prohibiting public vehicles from loitering near hotels held inapplicable to taxicabs furnished for hotel's use.

Act July 11, 1919, § 12, making it a misdemeanor for public cabs and vehicles to loiter around or in front of hotels, etc., and authorizing the Commissioners of the District of Columbia to revoke the license of any driver convicted of a violation thereof, did not apply to a taxicab stationed

near a hotel under a contract by the taxicab company to furnish vehicles for the exclusive use of the hotel and its guests, where the taxicab company was under the jurisdiction of the Public Utilities Commission and not of the District Commissioners, and the driver was not licensed under Act July 1, 1902, § 7, par. 11; the taxicabs being taxed under paragraph 13.

Smyth, Chief Justice, dissenting.

In Error to the Police Court of the District of Columbia.

Richard Bell was convicted of willfully loitering with a vehicle near a hotel, and he brings error. Reversed and remanded, with instructions.

G. Thomas Dunlop, of Washington, D. C., for plaintiff in error.

F. H. Stephens and Ringgold Hart, both of Washington, D. C., for the District of Columbia.

HITZ, Acting Associate Justice. This case comes to this court from the police court on a writ of error duly allowed.

The plaintiff in error, hereinafter called the accused, was prosecuted in the police court upon an information filed by the corporation counsel containing two counts. The first count charged that the accused, being the driver of a certain public vehicle, to wit, an automobile, did willfully loiter with said public vehicle in front of the Shoreham Hotel, by stopping said public vehicle in front of said hotel, which stopping was not for the purpose of taking on or discharging a passenger, in violation of an act of Congress. The second count is the same as the first, except that it does not charge that the automobile was a public vehicle.

Upon a plea of not guilty the case was presented and heard in the court below upon an agreed statement of facts, and in pursuance of a written opinion, which is in the record, the judge of the police court entered a judgment of guilty, imposing a fine, and in default of payment thereof a term of imprisonment.

The agreed statement of facts stipulates that the accused was a chauffeur employed and paid by the Terminal Taxicab Company, and that the offense charged in the information was an alleged violation of section 12 of the Act of Congress of July 11, 1919 (41 Stat. 104), which is as follows:

"That the loitering of public cabs and hacks or vehicles of all description around or in front of the hotels, theaters, or public buildings in the District of Columbia, either by stopping, except to take on or discharge a passenger, or unnecessarily slow driving, is hereby prohibited, and any driver of any such cab or hack who willfully causes the same to loiter either by stopping or slow driving as aforesaid shall be deemed guilty of a misdemeanor and punished in the police court of the District of Columbia by a fine of not less than $10 or more than $40 for such offense. The Commissioners of the District of Columbia are hereby authorized and empowered to make any regulation that may be necessary in furtherance of the purpose of this section, and are hereby given authority to revoke the license of the driver of any public hack or cab who is convicted of a violation of this section."

The agreed statement concedes that a taxicab owned by the Terminal Taxicab Company, of which the accused was chauffeur, stood against

the west curb of Fifteenth street and 15 feet north of the main entrance to the Shoreham, but in front of and on a portion of the street adjacent to said hotel; that he did not discharge a passenger upon arrival at the point in question, and while so standing he had no definite or ascertained passenger in view, but was standing at said location under orders from and authority of the owners of said hotel, for the accommodation of any of its guests who might apply to the manager or taxicab clerk of the hotel for cab service in accordance with a contract between the Terminal Taxicab Company and the Hotel Company, dated September 5, 1917, and to continue in force for 10 years. By its terms the Taxicab Company, for an agreed consideration, undertook to furnish certain automobiles or taxicabs, with chauffeurs to operate the same in the livery service of the hotel, for its exclusive use and that of its guests and patrons; the service to be under the control of the hotel, and the vehicles to be stationed in such of the streets on which the hotel had entrances as it should designate, subject to the street and traffic regulations of the District of Columbia; the hotel to provide on its premises an office for the business of letting the vehicles to its patrons exclusively. Certain requirements as to the repair and proper equipment of the machines and the storage thereof when not in use, at the expense of the Taxicab Company, are included in the contract. The cab of which the accused was in charge at the time of his arrest was furnished by the Taxicab Company under this agreement, and was subject to immediate call by and use of the hotel guests exclusively. The stipulation further shows that the number of cabs so to be furnished did not exceed reasonable provision for the demand made by the guests for such accommodations.

The cab in question was not licensed as a public hack, or other vehicle, under the provisions of paragraph 11 of section 7 of the Act of Congress of July 1, 1902 (32 Stat. 624), known as the "License Tax Act." This paragraph requires owners of passenger vehicles for hire to pay certain license taxes—automobiles, $9 per annum—and the driver thereof to wear a conspicuous badge, numbered to correspond with the license of his vehicle. Paragraph 13 of this act, under which the Terminal Taxicabs are taxed, requires the owners to pay $25 per annum for 10 vehicles, or less, and $2 additional for each vehicle in excess of that number, and the cab driven by the accused was taxed under this latter paragraph; the driver having no license and wearing no badge.

The assignments of error, five in number, claim that the trial court erred in holding that the term "public vehicle," in section 12, already quoted, included the cab here involved; in holding that said section forbids the cab in question from standing in front of and around the hotel; that the judgment was erroneous as matter of law, considered in connection with the agreed facts; in holding that the section did not have the effect of impairing the contract referred to in the stipulation; and, finally, in holding that the Taxicab Company is estopped from complaining that any reasonable regulation operates to impair the contract.

In the opinion of this court, under the conceded facts, the case is to be disposed of by a determination of the meaning of section 12 of the

act under which the information is filed. In considering the question as to whether the cab here involved can be included within the purview of the section, it is to be observed that there are two provisions which appear to be inconsistent with that view.

The first is that the Commissioners of the District, as such, are empowered to make any necessary regulations in furtherance of the purpose of the section, although, by a decision of the Supreme Court in Terminal Taxicab Co. v. Kutz, 241 U. S. 253, 36 Sup. Ct. 583, 60 L. Ed. 984, Ann. Cas. 1916D, 765, decided in 1916, that company, in its use of these cabs, was held to be a common carrier and under the jurisdiction of the Public Utilities Commission, and not under the Commissioners of the District of Columbia.

The second is that the District Commissioners are given authority to revoke the license of the driver of any public cab who is convicted of loitering, while the fact is that the accused had no license; his cab, as already shown, being taxed under paragraph 13, and not under paragraph 11, of the "License Tax Act."

Holding, as we do, that the cab driven by the accused, under the stipulation of facts, is not of the class embraced in section 12, it becomes unnecessary to pass upon any of the other questions raised by the assignments of error.

The result is that the judgment below must be reversed, with costs, and the case remanded to the police court, with instructions to enter a judgment of not guilty on the agreed statement of facts.

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.

SMYTH, Chief Justice. This court and the Supreme Court of the United States have said that the Terminal Taxicab Company is a common carrier. District of Columbia v. Fickling, 33 App. D. C. 371; Terminal Taxicab Company, Incorporated, v. Commissioners of the District of Columbia, 241 U. S. 252, 36 Sup. Ct. 583, 60 L. Ed. 984, Ann. Cas. 1916D, 765. Being a common carrier, its cabs must be public ones. It cannot be that a cab used by a common carrier in the transaction of its business is a private cab. The cabs, therefore, of the Terminal Company, clearly come within the terms of the first sentence of section 12 of the act of Congress under review (41 Stat. 104), unless a consideration we are about to examine places them outside.

The section has only two sentences. The second gives to the Commissioners of the District "authority to revoke the license of the driver of any public hack or cab who is convicted of a violation of this section." Paragraphs 11 and 13 of section 7 of an Act of Congress approved July 1, 1902 (32 Stat. 624), deal with the licensing of public hacks. It is said that paragraph 11 requires that the drivers of public hacks shall be licensed, but that paragraph 13, under which the Terminal Company's cabs are licensed, does not require that the drivers shall be licensed. From this it is argued that, since the second sentence of section 12 gives to the Commissioners authority to revoke the license of drivers in certain cases, it must refer to cabs licensed under paragraph

11, and not to those licensed under paragraph 13, and this indicates conclusively that the first sentence does not include the Terminal Company's cabs; in other words, that it shows very clearly that Congress, notwithstanding the very sweeping language which it used in the first sentence, had in mind only such cabs as those whose drivers were licensed. This argument, it seems to me, is rather attenuated. It presents a fragile base on which to rest the contention that Congress, when it wrote in the first sentence that the "loitering of *public cabs* and hacks or vehicles of *all* descriptions," etc., was prohibited, did not mean all public cabs, but only some of the public cabs in the city.

But a more serious defect in the argument is this: That paragraph 11, notwithstanding the statement to the contrary, does *not* require the drivers of vehicles to which it relates to be licensed. It says "that the proprietors or owners of hacks," etc., shall pay license, and that the driver of each hack shall wear a badge "numbered to correspond with the license of his vehicle." If a license is revoked under the authority given to the Commissioners, it must be the license of the owner, not of the driver; and this may apply to a license issued under paragraph 13, as well as to one issued under paragraph 11.

Moreover, by the construction which the court places upon the first sentence of section 12, it attributes to Congress an intention to discriminate between the public hack owners of the city. Under that construction, one class of public hackers may not loiter on the public streets, while the other may do so with impunity. It must be remembered that the purpose of the section is to regulate the use of the public streets, in the interest of the public generally. A loitering cab, licensed under paragraph 13, is, so far as the record discloses, just as much of an interference with the public safety as one licensed under paragraph 11. There is, therefore, no reason why Congress should restrict the driver of the one, and leave the driver of the other free to loiter as much as he wills.

It is further urged that the Terminal Company's cabs are under the control of the Public Utilities Commission, and from this an argument is deduced in favor of the construction adopted by the court. But are not all other public cabs, being common carriers, under the control of the Public Utilities Commission? Besides, there is no inconsistency between the power vested by the sentence in the Commissioners and that conferred upon the Public Utilities Commission. The latter has to do with the regulation of rates, service, etc., of public carriers, while the power conferred upon the Commissioners by the second sentence has to do with the use of the public streets—quite a different thing.

From whatever angle I approach the subject, I am unable to think that Congress did not mean exactly what it said when it wrote the first sentence of section 12 and therefore I must dissent.

PARKER v. DISTRICT OF COLUMBIA.

(Court of Appeals of District of Columbia. Submitted January 4, 1921. Decided April 4, 1921.)

No. 3407.

In Error to the Police Court of the District of Columbia.

James M. Parker was convicted of loitering with an automobile in front of a hotel, and he brings error. Reversed and remanded, with instructions.

S. V. Hayden and Dan Thew Wright, both of Washington, D. C., for plaintiff in error.

F. H. Stephens and Ringgold Hart, 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 by an information in two counts was charged with a violation of section 12 of the Act of Congress approved July 11, 1919. The case was heard upon an agreed statement of facts, and the trial court entered a judgment of guilty and imposed a sentence.

The facts in this case are similar to those recited in the case of Richard Bell v. District of Columbia, 50 App. D. C. 351, 273 Fed. 315, just decided, with two exceptions. In the present case the plaintiff in error was a chauffeur employed by the Auto Livery Company, and the offense charged was loitering with an automobile in front of the Washington Hotel.

The Auto Livery Company had a contract with the Hotel Company in substance the same as existed in the Bell Case between the Terminal Taxicab Company and the Shoreham Hotel, so that the question here is controlled by the Bell Case, and for the reasons given in the opinion there, the judgment of the police court must be reversed, and the case remanded to the police court, with instructions to enter a judgment of not guilty.

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.

SMYTH, Chief Justice (dissenting). For the reasons given by me in 3412, 50 App. D. C. 351, 273 Fed. 315, this day decided, I dissent.

INDEPENDENT COUNCIL NO. 2, JUNIOR ORDER OF UNITED AMERICAN MECHANICS OF THE DISTRICT OF COLUMBIA v. LUCAS et al.

(Court of Appeals of District of Columbia. Submitted March 9, 1921. Decided April 4, 1921.)

No. 3473.

1. Insurance ⇐750—Member having option of paying fraternal benefit dues at end of quarter is not in "arrears" until then.

A member of a fraternal benefit association, who had the option of paying his dues weekly, monthly, or quarterly, is not in arrears on the payment of dues until the end of the quarter, within a provision of the constitution prohibiting payment of benefits where the member is three months or over in arrears for weekly dues, since "arrears" is defined as that which is behind in payment, or which remains unpaid, though due, and therefore the association is liable on the certificate, where the member died within one month after the expiration of the first quarter for

which no payment was made, at which time he was then only 30 days in arrears.

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

2. Insurance ⊂=726—Constitution of fraternal benefit association held to exclude evidence of construction.

The provision of the constitution of a fraternal benefit company that no benefits shall be paid to a member who is three months or over in arrears for weekly dues, which he had an option to pay quarterly, is too plain and unambiguous to permit of evidence on behalf of the company that the provision was construed to prevent payment where the weekly dues had not been paid by the member during an entire quarter.

Appeal from the Supreme Court of the District of Columbia.

Action by Ernest E. Lucas and others against the Independent Council No. 2, Junior Order of United American Mechanics of the District of Columbia, a corporation. Judgment for plaintiffs, and defendant appeals. Affirmed.

George W. Dalzell, of Washington, D. C., and Alex. M. De Haven, of Philadelphia, Pa., for appellant.

Chapin Brown and C. B. Bauman, both of Washington, D. C., for appellees.

HITZ, Sitting Associate Justice. This is an appeal from a judgment of the Supreme Court of the District of Columbia, based upon a verdict in favor of the appellees.

The facts shown by the bill of exceptions are that one John W. Lucas was for some 20 years a member of the appellant corporation, which is a fraternal beneficial association, connected with two funeral benefit associations.

Under the constitution and by-laws of the appellant a member is required to pay certain dues, with the proviso that they "shall be paid weekly, monthly or quarterly."

A member in good standing is entitled to specified sick benefits, and, upon his death, the association undertakes to pay $500 to the beneficiaries or representatives of the deceased.

In this case no beneficiary was named, and upon the death of John W. Lucas, which occurred August 6, 1916, claim for the $500 was made by the appellees as his only heirs at law and next of kin.

Section 4 of article 10 of the appellant's constitution provides that no member shall be entitled to any of the benefits arising from sickness, or to funeral benefits "who is three months or over in arrears for weekly dues."

John W. Lucas had paid his dues for the quarter ending March 31, 1916, in full. He was taken sick July 14, 1916, and the financial secretary of the appellant was notified of that fact. Later it became apparent that Mr. Lucas was dangerously ill, and on the evening of August 5th, which was Saturday, his brother called at the home of the financial secretary to pay his dues, but that officer not being in, word was left with his wife as to the object of the visit, with request that the secretary call Lucas' brother over the telephone.

The secretary did so telephone on the same evening, and stated that the dues were $4.30 and could be paid by check; he undertaking to date the receipt to correspond with that of the check, which was thereupon mailed.

On the Monday following, August 7th, the secretary, with knowledge of the death of John W. Lucas the day before, visited the house and left a receipt for the above amount, dated August 5th, and reciting that the payment was "in full dues to date."

The check was never cashed, and about one month later was tendered back to the brother who drew it, which tender was refused.

The secretary was introduced as a witness by the appellees, and he testified that John W. Lucas was irregular in his payments; that he was a charter member of the appellant and secretary for a number of years; that the appellant by action repeatedly taken, with the knowledge of John W. Lucas, had never paid benefits to a member indebted for 13 weeks dues from the time of the first meeting night of the quarter; and that such was the construction placed upon its by-laws by the appellant.

No testimony was offered by the appellant, and its attorney moved the court for a directed verdict in its favor on the ground that John W. Lucas was not in good standing at the time of his death; he being indebted and in arrears for a sum in excess of one quarter's dues, reliance being also placed upon the construction of the by-laws by the appellant as above set forth.

This motion was denied, and thereupon the trial court, at the request of the appellees, directed a verdict in their favor.

There are 11 assignments of errors, but the case is to be disposed of by a determination as to whether John W. Lucas was in good standing in the order at the time of his death, under the facts presented and the proper construction of the laws of the appellant respecting the payment of dues.

[1] Leaving out of consideration the transaction between the brother of the deceased and the financial secretary of the appellant which resulted in the acceptance of the check and the giving of the receipt, with knowledge of the secretary that Mr. Lucas was very ill and not expected to live, the question is whether the member was in "arrears" at the date of his death. His dues had been paid in full for the quarter ending March 31, 1916, and by the express provisions of section 4 of article 3 of the by-laws, already referred to, it was the privilege of the member to pay the dues accruing during the three months ending June 30, 1916, either in weekly or monthly installments or at the end of the quarter, so that the payment was not overdue until July 1, 1916, nor could the member be said to be in arrears until the last-mentioned date, at which time the condition of being in arrears would necessarily commence.

No difference can be perceived between this situation and that arising from the giving of a note payable on or before 90 days after date. In such a case the maker of the note would have the option of payment before maturity, but he would not be in arrears with respect to his obligation until after the note became due.

In this case the constitution of the appellant, quoted in the statement of facts, expressly provides that no funeral benefits shall be payable where the member "is three months or over in arrears for weekly dues," and we hold that to bring Mr. Lucas within the disqualification of this provision his death must have occurred, without any payment, after the expiration of 3 months from June 30, 1916, which was not the case.

Aside from the plain meaning of the word "arrears," as commonly understood, and the definition by Webster, which is "that which is behind in payment, or which remains unpaid, though due," the exact point was decided in the case of Wiggin v. Knights of Pythias (C. C.) 31 Fed. 122, in accordance with this decision.

[2] But it is said that there was evidence of a construction placed upon the word "arrears" by the appellant with the knowledge of Mr. Lucas.

Here, however, the language is so plain and unambiguous, and the word in question has such a well-understood meaning, that a court should not be bound by such a narrow construction in its own favor made by the appellant, while using the word without any qualification or indication that it is not to be taken and acted upon according to its common acceptation.

The result is that the judgment below must be affirmed, with costs, and it is so ordered.

Mr. Justice HITZ, of the Supreme Court of the District of Columbia, sat in place of Mr. Justice ROBB in the hearing and determination of this appeal.

REAMY v. DISTRICT OF COLUMBIA.

(Court of Appeals of District of Columbia. Submitted January 4, 1921. Decided April 4, 1921.)

No. 3411.

Municipal corporations ⇐707—Driver of taxicab, standing on private property of terminal company, does not violate statute against improper use of street.

The driver of a taxicab, which, according to the agreed statement of facts, was standing at a place opposite an entrance to the Union Station, on the private property of the terminal company, where it had a right to be under a contract between the company and the owner of the taxicab, was not guilty of violating Act July 11, 1919, § 12, directed against the improper use of public streets and avenues.

Writ of Error from the Police Court of the District of Columbia.

Otis N. Reamy was convicted of willfully loitering around a public building, by stopping his vehicle opposite the entrance thereof, and he brings error. Reversed and remanded, with instructions to enter a judgment of not guilty on the agreed statement of facts.

G. Thomas Dunlop, Edmund Brady, G. E. Hamilton, and J. J. Hamilton, all of Washington, D. C., for plaintiff in error.

F. H. Stephens, and Ringgold Hart, 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, by an information in two counts, was charged with a violation of section 12 of the act of Congress approved July 11, 1919 (41 Stat. 104), in that being the driver of a certain public vehicle, to wit, an automobile, he did willfully loiter around a certain public building, the Union Station, by stopping said vehicle opposite the west entrance thereof; said stopping not being for the purpose of taking on or discharging a passenger. The case was heard upon an agreed statement of facts, and the trial court entered a judgment of guilty and imposed a sentence.

The stipulation shows that the defendant is a chauffeur, employed and paid by the Terminal Taxicab Company, and on the date charged in the information the taxicab of which he was driver was standing upon the space opposite the west entrance and under the west covered porch of the Union Station, upon property belonging in fee simple to the Washington Terminal Company, owner of the said Union Station. By a contract between the Washington Terminal Company and the Terminal Taxicab Company, running for 10 years from May 15, 1918, this space was granted to the Taxicab Company for its exclusive use for the purpose of operating and maintaining a cab service for hire at the station.

A consideration, not set forth in the stipulation, is received by the Terminal Company under this contract, which is stated to be made for the better convenience of passengers and others lawfully using the station, and to protect them from the annoyance and solicitation of irresponsible hackmen. The space was policed by special officers of the police force of the District, employed at the instance of and whose compensation was paid by the Terminal Company, and the land constituting the space was assessed for taxation in the name of said company.

While standing in this space, the plaintiff in error was subject to the orders of the company, and had no definite or ascertained prospective passenger in view. The taxicab thus located was one of those owned by the Terminal Taxicab Company, and was licensed and taxed under the provisions of paragraph 13 of section 7 of the act of Congress approved July 1, 1902, known as the "License Tax Act" (32 Stat. 624), and the tax prescribed by this section was paid by the Taxicab Company.

As the space upon which this cab was standing at the time of the arrest of its driver is stipulated to have been the private property of the Washington Terminal Company, by whose authority and permission he was there, it follows that he was not then upon any public street or avenue, and consequently that his presence there did not

fall within the purview of an act directed against the improper use of public streets and avenues.

Consequently the judgment below must be reversed, and the case remanded to the police court, with instructions to enter a judgment of not guilty on the agreed statement of facts.

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.

RACKEY v. DISTRICT OF COLUMBIA.

(Court of Appeals of District of Columbia. Submitted January 4, 1921. Decided April 4, 1921.)

No. 3410.

Writ of Error from the Police Court of the District of Columbia.

Clarence Rackey was convicted in the Police Court of the District of Columbia of willfully loitering around a public building, by stopping his vehicle opposite the entrance thereof, and he brings error. Reversed and remanded, with instructions to enter a judgment of not guilty.

Edmund Brady, G. Thomas Dunlop, G. E. Hamilton, and J. J. Hamilton, all of Washington, D. C., for plaintiff in error.

F. H. Stephens and Ringgold Hart, 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 from the police court. The information here and the stipulated facts are similar to those in the case of Otis N. Reamy v. District of Columbia (No. 3411) 50 App. D. C. 359, 273 Fed. 323, just decided, and this case is controlled by that decision.

The result is that the judgment of the police court must be reversed, and the case remanded to the police court, with instructions to enter a judgment of not guilty.

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.

HAYES v. DAVISON.

(Court of Appeals of District of Columbia. Submitted March 16, 1921. Decided April 4, 1921.)

No. 1401.

1. **Patents ⟸106(1)—Party last to file held senior party, when application was for reissue of patent on prior application.**
   The party whose application for a patent was last filed was the senior party to an interference proceeding, where his application was for the reissue of a patent issued on an application filed prior to the other party's filing date.
2. **Patents ⟸106(1)—Interference will not be suspended for purpose of considering public use or intervening rights.**
   An interference, being for the sole purpose of determining priority, will not be suspended, after testimony has been taken, for the purpose

of considering public use or intervening rights, as these questions cannot properly be considered.

Appeal from a Decision of the Acting Commissioner of Patents.

Interference proceeding in the Patent Office between Edward Hayes and Guy S. Davison. From a decision awarding priority to Davison, Hayes appeals. Affirmed.

Dyer Smith, of New York City, for appellant.

Frank Toohey, of Boston, Mass., for appellee.

SMYTH, Chief Justice. Hayes appeals from the decision of the Acting Commissioner of Patents awarding Davison priority in an interference relating to an invention expressed in the following count:

The combination, with the transmission and drive shafts of a motor vehicle, of mechanism adapted to lengthen the wheel base of said vehicle, comprising means to extend the rear wheels, supporting axle, and transmission shaft operatively connected therewith, from the motor drive shaft rearwardly, means carried by the side frames to support and maintain the transmission shaft at substantially the same angle with the rear axle, in said moved position, as in the former position, and means to connect the motor drive shaft with said transmission shaft in its new position.

[1] Hayes filed June 28, 1915, and Davison, May 4, 1916. The application of the latter was for a reissue of patent dated December 14, 1915, and issued on an application filed April 14, 1915. Davison is, therefore, the senior party by virtue of the filing date of his original application.

At first there were four parties to the interference—Howard, Beauchemin, Hayes, and Davison. Hayes moved to dissolve on the ground that neither Davison nor Howard had a right to make the claim, for reasons stated. The motion was denied by the Law Examiner.

[2] Hayes and Davison only took testimony. The Examiner of Interferences, the Examiners in Chief and the Acting Commissioner united in awarding priority to Davison. Hayes says that Davison should not prevail, because of the bar of public use and of intervening rights. But it has been held many times, as shown by the opinion of the Examiners in Chief, that an interference, being for the sole purpose of determining priority, will not be suspended, after testimony has been taken, for the purpose of considering public use or intervening rights. These questions cannot properly be considered in an interference. Burson v. Vogel, 29 App. D. C. 388; Norling v. Hayes, 37 App. D. C. 170.

It is further contended that Davison has no right to make the claims, because the invention is not disclosed in his application. The Acting Commissioner, approving the decision of the law examiner on this point, correctly held that the invention of the issue was disclosed in the application of both parties.

With respect to the argument that Davison's reissue application is not for the same invention as that disclosed in his original application, the Acting Commissioner, in line with the lower tribunals, held that it was directed to the same generic end as the narrower claims of the

first application, and therefore refused to yield to the argument. No reason appears for even doubting the correctness of this conclusion. A careful consideration of the other points raised by Hayes fails to reveal any reason for disturbing the decision of the Acting Commissioner, which is in harmony with that of each of the lower tribunals upon every point considered, and therefore it 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.

JOHN SEXTON & CO. v. SCHOENHOFEN CO. (two cases).

(Court of Appeals of District of Columbia. Submitted March 15, 1921. Decided April 4, 1921.)

Nos. 1390, 1391.

1. **Trade-marks and trade-names ⇐61—Grape juice and root beer or ginger ale are not goods of same descriptive properties.**
   Grape juice, a fruit beverage, and ginger ale or root beer, cereal beverages, are not goods of the same descriptive properties, so that the owner of a trade-mark for grape juice cannot prevent its registration for root beer or ginger ale.
2. **Trade-marks and trade-names ⇐61—Use of root beer compound does not establish prior use of beverage.**
   The use of trade-marks on a compound from which the beverage of root beer can be made does not establish prior use of the trade-mark on the beverage.
3. **Trade-marks and trade-names ⇐61—User of trade-mark on beer can extend it to root beer and ginger ale.**
   The user of a trade-mark for beer can extend his trade-mark to root beer and ginger ale, or other cereal beverages, which fall within the natural expansion of its business, especially since the Eighteenth Amendment has compelled transition from the production and sale of alcoholic beverages to nonalcoholic beverages, which calls for liberal protection of rights affected by this enforced change.

Appeals from the Commissioner of Patents.

Applications by the Schoenhofen Company for the registration of the word "Edelweiss" as a trade-mark for root beer, and for the registration of the same word as a trade-mark for ginger ale, opposed in each case by John Sexton & Co. From decisions allowing the registration, the opposer appeals. Affirmed.

Walter F. Murray, of Cincinnati, Ohio, for appellant.

William O. Belt, of Chicago, Ill., for appellee.

VAN ORSDEL, Associate Justice. These are trade-mark oppositions, in which appellant Sexton & Co., in case No. 1390, opposes the registration of the word "Edelweiss" as a trade-mark for root beer, and, in case No. 1391, the registration of the same word as a trade-mark for ginger ale.

[1] It appears that appellant company has never used the mark on ginger ale, and the only use has been on a compound from which root beer is made. It has never used the mark on root beer as a beverage. Its position, therefore, is confined to its use of the mark on grape juice. In the case of Schoenhofen Brewing Co. v. John Sexton & Co., 41 App. D. C. 510, we held that grape juice and beer were not goods of the same descriptive properties. This distinction is not alone based upon the theory that one is an alcoholic and the other a nonalcoholic beverage, but that one is a cereal and the other a fruit beverage. The same distinction applies in the present case, and is determinative of the issue before us.

[2, 3] The alleged trade-mark use by appellant of "Edelweiss" on a root beer compound cannot be used as a basis for establishing prior use on the beverage. Besides, the prior use by appellee of the mark on beer would protect it in the extension of its use to other cereal beverages, which would fall within the natural expansion of its business. The Eighteenth Amendment to the Constitution and the laws for its enforcement, relating to the subject of prohibition, have compelled transition from the production and sale of alcoholic beverages to nonalcoholic beverages, which calls for liberal protection of trade-mark rights affected by this enforced change.

The decisions are affirmed.

Affirmed.

Mr. Justice HITZ, of the Supreme Court of the District of Columbia, sat in place of Mr. Justice ROBB in the hearing and determination of this appeal.

BERGHOFF BREWING ASS'N v. POPEL-GILLER CO., Inc.

(Court of Appeals of District of Columbia. Submitted March 16, 1921. Decided April 4, 1921.)

No. 1402.

1. **Trade-marks and trade-names ⇐26—Use of abbreviation by customers is not adoption of trade-mark.**
   The use of the word "Burg," as an abbreviation for the word "Burgmeister," in conversation, or in written orders for goods, by the customers of the owner of the trade-mark "Burgmeister," without proof that the owner of the trade-mark ever applied the abbreviation to its goods, does not establish the adoption of the abbreviation as a trade-mark.

2. **Trade-marks and trade-names ⇐61—Use of trade-mark in extension of business applies only to goods of same descriptive properties.**
   The rule relating to the use of trade-marks in the natural development of business applies only to the use of the same mark on goods of the same descriptive properties.

3. **Trade-marks and trade-names ⇐61—Right to extend use applies only to particular mark.**
   The right to extend the use of a trade-mark in the natural extension of the owner's business applies only to the extension of the particular mark, and not to a similar mark, so that the use of the trade-mark "Burg" on nonalcoholic beverages would not come within the rule as an extension of the trade-mark "Burgmeister" used on beer.

4. Trade-marks and trade-names ⇐59(5)—"Bergo" not infringement of "Burg Brau."

The use of the trade-mark "Bergo" on nonalcoholic cereal beverages would not cause confusion with the use of the trade-mark "Burg Brau" on lager beer, or its extension to nonalcoholic cereal beverages.

Appeal from the Commissioner of Patents.

Trade-mark interference proceeding between the Berghoff Brewing Association and the Popel-Giller Company, Incorporated, which had applied for registration of similar trade-marks for goods of the same descriptive properties. From a decision allowing the registration by the Popel-Giller Company, Incorporated, the Berghoff Brewing Association appeals. Reversed.

H. J. Jacobi, of Washington, D. C., and James L. Steuart and S. R. Perry, both of New York City, for appellant.

Arthur E. Wallace, of Chicago, Ill., for appellee.

VAN ORSDEL, Associate Justice. This is a trade-mark interference, in which the appellant, Berghoff Brewing Association, applied to register the word "Bergo" as a trade-mark "for a nonalcoholic, maltless, cereal beverage, sold as a soft drink." Appellee, Popel-Giller Company, Incorporated, applied to register the word "Burg" as a trade-mark for a "nonintoxicating, nonalcoholic, cereal, maltless beverage sold as a soft drink." It is conceded, as, indeed, it must be, that the goods are of the same descriptive properties, and that the marks are deceptively similar. Appellant adopted and used the mark "Bergo" in 1917, while appellee did not show use of its mark "Burg" prior to 1918.

[1] At this point, the controversy could be easily disposed of in appellant's favor; but it appears that in 1916 appellee company was using the word "Burgmeister" as the dominating feature of a mark for beer. It appears that customers occasionally ordered "Burgmeister" beer by the abbreviated name of "Burg." It is therefore urged that appellee company has established a prior use of the word "Burg," and should be accorded registration. On this point the Examiner of Interferences turned the case in favor of appellee company.

We are not impressed by this contention. The mere use of "Burg," as an abbreviation for the word "Burgmeister," in conversation, or in written orders for goods, is not sufficient to establish a trade-mark use.

"It is settled law in this court that a trade-mark is not acquired by the invention or discovery of a word or symbol, or by advertisement. It only becomes a trade-mark by attaching or affixing it to certain articles of merchandise." Consumers' Co. v. Hydrox Chemical Co., 40 App. D. C. 284.

There is no proof that appellee ever attached the word to goods of the kind for which it is sought to register it as a trade-mark prior to 1918. Its adoption, if adopted at all, was by its customers, not as a mark to designate the goods, but as a name to designate goods bearing the mark "Burgmeister." This did not, therefore, constitute a trade-mark use. Coca-Cola Co. v. Branham (D. C.) 216 Fed. 264.

[2] There is no room for the assumption of confusion between the

marks "Bergo" and "Burgmeister." There is testimony however, by witnesses for appellee, that since 1907 it has used the trade-mark "Burg Brau" on lager beer. It is accordingly insisted that it may now claim "Burg" as a logical extension of the use of the original mark to nonalcoholic cereal beverages. The rule relating to the use of marks in the natural development of business extends only to the use of the same mark on goods of the same descriptive properties. In the case of In re Independent Breweries Co., 39 App. D. C. 118, we held that beer and a beverage containing less than one-half of 1 per cent. alcohol are goods of the same descriptive properties, and in Sexton & Co. v. Schoenhofen Co., 50 App. D. C. 363, 273 Fed. 327, this day decided we held cereal beverages, alcoholic and nonalcoholic, to be goods of the same descriptive properties within the Trade-Mark Act (Comp. St. § 9492). We also upheld the right of the owner of a trade-mark to extend its use from alcoholic to nonalcoholic cereal beverages

[3, 4] But the right of extension applies only to the specific mark, and not to a similar mark. The extension of the mark "Burg Brau" on beer to "Burg" on nonalcoholic beverages, would not come within the rule, since the marks are radically different. Nor would the use of the mark "Burg Brau" on lager beer, or its extension to nonalcoholic cereal beverages, lead to confusion with the use of the mark "Bergo" on nonalcoholic cereal beverages.

It therefore follows that registration should be accorded appellant company, and denied to appellee company.

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.

HENRY v. UNITED STATES.

(Court of Appeals of District of Columbia. Submitted April 5, 1921. Decided May 2, 1921.)

No. 3471.

1. **Principal and agent ⇐102(1)—Authority to sell stock includes authority to employ an agent to sell.**
   A power of attorney to transfer title to stock impliedly authorized the agent to do all things necessary in the usual course of business to effectuate the sale, including the employment of a subagent to make the sale, and the subagent employed would be the agent of the principal, and not of the agent.
2. **Embezzlement ⇐44(1)—Evidence held to show agency.**
   In prosecution for embezzlement of stock certificates, evidence *held* to show that accused was employed as agent to sell the certificates.
3. **Embezzlement ⇐10—Property coming into agent's possession contemporaneously with creation of agency may be embezzled.**
   Under Code of Law, § 834, defining embezzlement, agency need not exist prior to the coming into accused's possession of the property alleged to

have been embezzled; but, if the agency came into existence contemporaneously with the delivery of the property in question, this is enough.

4. **Embezzlement ⇐10—Property need not be received by agent from his principal; "under his care."**
Under Code of Law, § 834, defining embezzlement, it is not essential that the converted property should have been received by the agent from a person other than his principal, as the phrase "under his care," in the statute, covers property received either from a third person or from the principal.

5. **Criminal law ⇐829(1)—Refusal of requested charges already covered not error.**
When a subject is fully covered by the court's charge, it is not error to refuse a request for an instruction with respect to the same matter.

6. **Criminal law ⇐655(5)—Action of court in checking counsel's argument, based on different view of law from that charged, held not erroneous.**
In an embezzlement prosecution, the action of the court in preventing counsel for defendant from proceeding further in argument, based on a different view of the law from that which the court had announced, *held* not erroneous.

7. **Criminal law ⇐656(1)—Remark of court that it would not "let this man out" held not prejudicial.**
In an embezzlement trial, remark of the trial court, when overruling motion for peremptory instruction to acquit defendant, that "I am not going to take the responsibility of taking the view of the law you present, and letting this man out, but I shall let the Court of Appeals decide the law points you make," was not prejudicial, in using the phrase "letting this man out," since that was exactly what the court was asked to do.

8. **Criminal law ⇐801—Whether requested charge shall be given in advance of the argument held discretionary.**
Whether a requested charge shall be given the jury in advance of counsel's argument rests in the sound discretion of the court, and where the requested charge relates to a familiar principle, about which there can be no doubt, so that counsel might well assume that such is the law, and argue accordingly, the refusal so to charge is not an abuse of discretion.

9. **Criminal law ⇐785(16)—Instruction on right to disregard the entire testimony of willfully falsifying witness held proper.**
In an embezzlement prosecution, an instruction as to the jury's right to entirely disregard the testimony of a witness, if willfully falsifying in any material matter, but cautioning that this rule does not apply where one makes an honest mistake as a witness, *held* correct.

10. **Embezzlement ⇐5—Intent to restore property converted no defense.**
An intent at the time of the conversion to restore the embezzled money is not a defense.

11. **Criminal law ⇐1119(4)—Statements of counsel must be preserved, to show discrimination of court in dealing therewith.**
The appellate court cannot consider accused's claim that the trial court discriminated in favor of the prosecuting attorney and against accused's attorney, in that the court overruled objections to the prosecuting attorney's statement and sustained an objection to the statement of counsel for accused, where neither statement is given, so as to show the correctness or otherwise of the court's ruling with respect to them, since the appellate court cannot assume that such ruling was incorrect.

12. **Criminal law ⇐656(2)—Court's suggestion as to form of answers of witness held proper.**
During the cross-examination of prosecuting witness in an embezzlement trial, he answered, in response to questions whether he did not testify so and so at the former trial of the case, "If the record states that, probably I did." The court intervened and admonished him not to put his

answers in that way, as counsel was searching his recollection, "not as to the fact, but as to what you said before. Have you any recollection as to how you testified before?" and, on the witness' answer, "No, I have not," the court said, "Well, that answers that, then." *Held*, the court's action was not improper.

13. **Embezzlement ⇐48(1), 52—Case properly submitted on both counts of indictments charging one offense.**

Where two counts of an indictment charged the embezzlement of the property of different persons, but by a single act, there was only one offense committed, and on verdict on both counts the trial court, in sentencing accused, properly treated the two counts as one, but the case was properly submitted to the jury on both counts.

Robb, Associate Justice, dissenting.

Appeal from the Supreme Court of the District of Columbia.

John William Henry was convicted of embezzlement and appeals. Affirmed.

See, also, 49 App. D. C. 207, 263 Fed. 459.

Dan Thew Wright and Philip Ershler, both of Washington, D. C., for appellant.

John E. Laskey and J. B. Archer, both of Washington, D. C., for the United States.

SMYTH, Chief Justice. From a judgment sentencing him to a term of six years in the penitentiary for embezzling as an agent four certificates of stock valued at $4,000, Henry appeals.

At the time of the transaction complained of Henry and one Woodruff were copartners, engaged in the banking and brokerage business in Washington under the name of Lewis Johnson & Co. One certificate for two shares of stock belonging to John Helmus, and three certificates, representing 18 shares owned by his mother, were delivered by Helmus to the copartnership at its banking house for the purpose of being sold for a price named. At the same time authority to transfer the title to the purchaser was given to the company. Shortly afterwards Henry hypothecated them for the use of the firm and never accounted to the owners for the certificates or their proceeds.

Henry and Woodruff were indicted in four counts. The first charged that they were agents of John Helmus, and that by virtue of their employment his certificate came into their possession and was wrongfully and feloniously converted by them to their own use and embezzled. In the second count they were charged with larceny after trust of the same certificate. The third count is like the first, and the fourth like the second, save that each deals with the certificates belonging to Mrs. Helmus. In other words, the first and third counts charge embezzlement, and the second and fourth, larceny after trust. Woodruff was not brought before the court and therefore needs no further attention.

Henry was tried and convicted on the first and third counts, and acquitted on the second and fourth. He appealed, and this court reversed the case and ordered a new trial. Upon the second trial he was again convicted on the first and third counts and sentenced as we have

stated. He now contends that if he was guilty of any offense it was larceny after trust—the crime of which he was acquitted at the first trial—and not embezzlement.

Section 834 of the Code, on which counts 1 and 3 are based, provides:

"If any agent * * * of a private person * * * shall wrongfully convert to his own use * * * anything of value which shall come into his possession or under his care by virtue of his employment or office, whether the thing so converted be the property of his master or employer or that of any other person, * * * he shall be guilty of embezzlement. * * *"

A motion for a directed verdict, on the theory that there was a variance between the charge in the indictment and the proof, made at the close of the government's testimony, was overruled. At the bar Henry's counsel stressed the contention that the proof did not show that he was the agent of the Helmuses before the certificates came into his hands, and that because of this an important element of the crime alleged was not established.

[1] Helmus was the agent of his mother for the sale of the stock. She says so. He held her powers of attorney to transfer the title. Under this authority he was empowered to do all things necessary in the usual course of business to effectuate the sale, including the employment of an agent. Dispatch Printing Co. v. National Bank of Commerce, 109 Minn. 440, 450, 124 N. W. 236, 50 L. R. A. (N. S.) 74; Benjamin v. Benjamin, 15 Conn. 347, 355, 39 Am. Dec. 384; Kaufman Bros. Co. v. Farley Mfg. Co., 78 Iowa, 679, 685, 43 N. W. 612, 16 Am. St. Rep. 462; 21 Ruling Case Law, § 33, p. 853; 1 Mechem on Agency (2d Ed.) §§ 316, 332; Strong v. West, 110 Ga. 382, 385, 35 S. E. 693; Renwick v. Bancroft, 56 Iowa, 527, 530, 9 N. W. 367; Broom's Legal Maxims, 816. The agent thus employed would be the agent of Mrs. Helmus, not of her son. See authorities just cited. Helmus, therefore, had the power to constitute Henry the agent of his mother.

[2] The day before the certificates were delivered Helmus called at the office of the banking house and made known to Lammond, the bookkeeper, that he desired to dispose of certain certificates of stock belonging to himself and his mother. Lammond advised him to speak to Mr. Henry about it, and he brought Mr. Henry into the corridor, where he introduced Helmus to him as a member of the firm. Helmus told Henry substantially what he had said to Lammond, and, in addition, that he desired $210 a share for the stock, but would take $208 for a quick sale; that three of the certificates belonged to his mother and one to himself, and that his mother had given him two powers of attorney to dispose of her certificates. There was some question as to whether or not the powers were sufficient, but Henry said he thought they were. On the reverse side of the son's certificate was a form of assignment, without the assignee's name, which was signed by the son. One of the powers of attorney signed by the mother was blank as to the name of the attorney. The next morning Helmus brought in the certificates with the powers of attorney in the condition stated, and

delivered them to Henry in person. Henry took them and later hypothecated the certificates.

Many decisions have been brought to our attention defining in the abstract the elements of embezzlement and larceny after trust. Abstract principles are easy to find, but sometimes it is difficult to apply them to a given state of facts. Our attention has not been called to any authority which holds that under a state of facts similar to those in the case at bar an agency was not established, nor have we found any.

[3] We think the testimony warranted the jury in finding that, on the day before the certificates were delivered, Henry impliedly agreed to sell them for the Helmuses on the conditions named, to accept from the Helmuses the power to transfer the title to the purchaser, and to account to them for the proceeds; that this constituted him the agent of the Helmuses, and that when the certificates were handed to him the next day he received them by virtue of his agency. There is no other reasonable hypothesis upon which the testimony can be explained; but, even if there were, it would be for the jury, not for us, to adopt it. We must not be understood, however, as holding that a pre-existing agency was necessary. If the agency came into existence contemporaneously with the delivery of the certificates, that would be enough.

[4] By comparing the testimony with section 834, under which the verdict was returned, we will find that it responds to each element of the crime defined in the section. It discloses that Henry was the agent of a private party (the Helmuses); that he wrongfully converted to his own use a thing of value, which belonged to his employer and which came into his possession or under his care by virtue of his employment. There is nothing in the section which warrants the construction for which counsel contends, namely, that if "the agent converts property, which he received *from* his master," he cannot be convicted of embezzlement. Some embezzlement statutes may be open to that construction, but not this one. Criminal statutes, like other statutes, are to be construed reasonably.

"There is no more reason why courts should allow themselves to be misled by mere names and shadows in the administration of justice in criminal than in civil cases." Calkins v. State, 18 Ohio St. 366, 371, 98 Am. Dec. 121, 125.

Even if we admit that Henry had only the custody of the certificates, and that their possession was in the Helmuses, whose agent he was at the time of the conversion, it would make no difference, because they were certainly "under his care." Mr. Freeman, speaking upon the subject, in a note to Calkins v. State, supra, says:

"The phrase 'under his care' will cover property merely in his custody, and therefore, under such a statute, it is immaterial whether he receives possession of the property from a third person or from his master; for in either case the property is under his care, and if he converts it he is guilty of embezzlement." 98 Am. Dec. 130—citing People v. Dalton, 15 Wend. (N. Y.) 581, 583; People v. Hennessey, 15 Wend. (N. Y.) 147, 151; Ker v. People, 110 Ill. 630, 51 Am. Rep. 706; Territory v. Maxwell, 2 N. M. 250; Calkins v. State, supra; Gibbs v. State, 41 Tex. 491; State v. Wingo, 89 Ind. 207.

Nor is it necessary for us to inquire what facts would constitute a violation of Code, § 851b, which deals with larceny after trust, for a jury at the first trial found that Henry was not guilty under that section. It is sufficient for us to know that the record amply sustains the verdict of the jury that Henry is guilty of the crime defined by section 834.

[5] Defendant requested the court to charge that before the jury could convict him the evidence must prove beyond a reasonable doubt that he was the agent of the Helmuses and that he received the certificates by virtue of such agency. The agency element was fully covered by requests 16 and 18, which were granted, and the other element by the charge of the court. In the charge the jury were told that they could not convict the defendant under the first count unless they found beyond a reasonable doubt that the certificate of Helmus, the son, had come into his possession as agent, and this instruction was made applicable to the third count, the one relating to Mrs. Helmus' certificates. When the subject is fully covered by the court's charge, it is not error to refuse a request for an instruction with respect to the same matter. Washington Railway & Electric Co. v. Upperman, 47 App. D. C. 219, 228; Washington & Rockville Railway Co. v. La Fourcade, 48 App. D. C. 364, 368; Sinclair v. United States, 265 Fed. 991, 49 App. D. C. 351, 352.

[6] While counsel for the defendant was arguing to the jury that his client could not be convicted unless agency pre-existed the delivery of the certificates, he was interrupted by the court and told that he was taking a different view of the law from that which the court had announced. He disclaimed any intention of doing so. After some further interchange of remarks, the court said:

"Stop now, if you please. * * * If you will take your seat a moment, we will have this thing straightened out right now. You asked me to charge that agency must have existed before these certificates were brought to Lewis Johnson & Co., and I refused to so charge. Now, you are arguing to the jury that that is the law, and you must not do it any further."

Counsel protested that he had not had time to read the instructions which had been refused. To this the court responded that he would then give him time to read them, but counsel declined to do so, saying:

"I have torn away those that were refused, and have only those that were given."

It will be noticed that counsel did not deny that he was presenting to the jury a different view of the law from that which the court had adopted, but sought to excuse himself by saying that he had no intention of doing so. We think it was entirely proper for the court to prevent him from indulging further in that line of argument. Hyde v. United States, 35 App. D. C. 451.

As a part of the same colloquy, counsel asked the court to permit him to argue to the jury that Henry was not the agent of Mrs. Helmus. The court answered:

"The points to be argued are sufficiently intimated by the granted instructions, and you know perfectly well what they are."

Of course this was true, because the court had a short time before informed him as to which requests were granted and which refused. Counsel did not deny knowledge, but answered:

"I have always thought that one might argue the elements of crime charged in the indictment; and before undertaking to do that, I will ask your honor whether I can argue that question now."

The court again said:

"You know perfectly well what the point is and what the court has held."

There was nothing in the ruling of the court which required counsel to solicit this permission. He was simply forbidden to argue that there could be no conviction unless agency existed before the certificates were brought to Henry, because the court had ruled otherwise. As to the other matter, he was perfectly free to discuss it or not, as he thought proper.

At the conclusion of the court's charge the subject was brought up again, counsel asserting that he had been denied the right to argue to the jury the question whether or not Henry was the agent of the Helmuses. This the court denied, saying:

"We will have no misunderstanding about this. I think the record makes it perfectly clear. Will you please sit down? I have something to say which may be of importance hereafter, and it embarrasses me to have you stand while I state it."

The court then related what had taken place substantially as we have already given it, and concluded with the statement that as to whether or not Henry was holding the stock as the agent of Mary or John Helmus:

"I never was called upon to say anything, and, of course, I had no objection to that being argued. *Counsel may argue it now if he wants to.*"

But counsel refused to avail himself of the permission. We think the court committed no error in anything it said or did in this connection.

It is urged that the manner in which the court handled the situation discredited counsel in the eyes of the jury and thereby prejudiced the cause of his client. If so, it was not the court's fault. It could not have done less than it did, for surely no one will attempt to maintain that it should have allowed counsel to proceed in his argument to the jury on a theory of law in conflict with its ruling. In some jurisdictions, but not in this, the jurors in criminal cases are the judges of the law as well as of the fact. The language employed by the court was polite and considerate throughout and in every way proper. We do not think that what took place had any tendency to injuriously affect the interests of appellant. Jurors are intelligent, and understand that a defendant at the bar should not be prejudiced because his counsel's course is not always approved by the court.

[7] When overruling the motion for a peremptory instruction to the jury to acquit the defendant the court said:

"I am not going to take the responsibility of taking the view of the law you present and letting this man out; but I shall let the Court of Appeals de-

cide the law points you make. I am going to let the jury say whether the man did this thing and did it with the intent charged."

Exception is taken to the phrase "letting this man out," but that is precisely what defendant asked the court to do, though he used different language. No prejudice could have resulted.

[8] The defendant requested the court to charge that the testimony given by John Helmus with respect to whether or not he handed the certificates to Henry personally or to Lammond related to a material matter, and that if they believed he had willingly testified falsely with respect to it they were at liberty to disregard his testimony entirely. This was coupled with a request to give the instruction before the argument. Both requests were refused. Our attention has not been called to any statute or rule of practice requiring the court to charge the jury in advance of the argument. Whether he should or not relates to a matter of procedure and rests in the sound discretion of the court. Unless that discretion is abused, nothing occurs to invoke the power of this court. Consaul v. Cummings, 30 App. D. C. 540, 547; Central National Bank v. National Metropolitan Bank, 31 App. D. C. 391, 396, 17 L. R. A. (N. S.) 520. We see no reason for saying it was abused here. It was not necessary that the court should have given the charge in advance of the argument, in order that counsel might discuss before the jury the point covered by it. It related to a familiar principle, one about which there could have been no debate. Counsel might well have assumed that such was the law and have proceeded accordingly.

Earnestly counsel argued that the testimony of Helmus at this trial was different from that which he gave at the former trial, and that the failure of the court to give the instruction before the argument restricted him in his discussion of the matter before the jury, much to the disadvantage of his client. As we have said, we do not think he was limited in that respect. But is the testimony of Helmus at this trial materially different from what it was at the former one? Undoubtedly it is different in matters of detail. In essentials, however, it is the same. The point to which it is directed is whether or not Henry knew at the time the certificates were converted that they belonged to Helmus and his mother, and not to him or his partner. Helmus testified at this trial, as we have already pointed out, that he handed the certificates to Henry personally in the corridor of the bank. At the former trial he said:

"I left the securities at the window of the bookkeeper with Mr. Lammond. who in turn handed them over to Mr. Henry," who was "standing right back of Lammond. * * * Lammond immediately passed the certificates to Mr. Henry. * * * He [Henry] took the certificates, and the only thing I remember now is that they [Henry and Lammond] came around into the reception room, and there was a talk as to whether these two powers of attorney would cover the three certificates of stock belonging to mother."

According to the testimony in both cases, the certificates reached Henry's hands in circumstances which warranted, if they did not compel, the conclusion that he knew they belonged to the Helmuses and knew the conditions under which they parted with them to him. The

testimony at the one trial was as effective in that regard as at the other. It was utterly immaterial whether they were handed to him in the corridor, behind the bookkeeper's window, or in the reception room.

[9] Whether or not Helmus told the truth was a question of fact for the jury, not for the court, and it was left to that body by the general charge, which reads:

"Now, I am asked to charge you upon another subject, which I do not feel like alluding to, unless requested, because you might infer from it what I think about some feature of the case, and I do not wish to give you the slightest impression as to what I think about the case, because, as a matter of fact, that is your province, and you are entirely competent to decide the case without any information from the court or anybody else. It is a rule of law, and I am asked to tell it to you, that whenever a witness upon the stand before you willfully and intentionally testifies falsely as to any material matter, you have the right to disregard all his testimony, if you find that to be the fact. If a witness cannot be trusted to observe his oath in one particular, you have the right to say that you cannot believe or trust him in any other particular; but that implies that you find that he has intentionally testified falsely. It makes no difference who the witness is, of course; but do not infer from that that I give any intimation that I think anything of that sort has happened or has not happened in the case. I am simply stating a rule of law, because I am requested to do so. That is true in every case, because all you have to rely upon is the oath of the witness; but you must not get that mixed up with a man making an honest mistake as a witness, because he might be mistaken about one part and correct as to another part."

This is a commendably fair, full, and correct statement of the law bearing on the point.

We have already seen that no error can be predicated on the failure to give a requested instruction, where the subject is completely covered, as here, by the court's general charge. See cases supra. In addition it should be noticed how careful the learned justice was to say that he did not desire to convey to the jury the notion that he had any view either one way or the other upon the question. In Corberth v. Great Atlantic & Pacific Tea Co., 36 App. D. C. 569, 575, Mr. Justice Robb, speaking for this court, used the following language:

"Owing to the weight given to [by] the jury to any expression of opinion by the trial judge, the interests of justice require that he should 'be careful to avoid any remarks which might tend to convey the impression to the jury that he has an opinion with respect to the proof of any disputed fact that has been submitted to them for decision' "—and cited Washington Gaslight Co. v. Poore, 3 App. D. C. 139.

Evidence was offered tending to show that in the early fall of 1914 Henry had made an application for a loan of $100,000; that a young man then in the employ of Lewis Johnson & Co., desirous of becoming a member of the firm, made application to insurance companies to borrow $100,000 for the purpose of purchasing an interest in the firm; that his ability to procure the money depended upon certain conditions, which, so far as the record shows, were not fulfilled. The loans were not procured. It appears from a letter dated September 18, 1914, more than a month before the conversion of the certificates took place, that the applications had been abandoned. There is nothing which shows that Henry, if the money had been procured, would or could have utilized it for the purpose of redeeming the certificates, or that

he relied upon the receipt of this money for that purpose, or that he had any intention at the time of the conversion of redeeming the certificates.

[10] However, that is immaterial, because evidence of an intent at the time of the conversion to restore the embezzled money is not admissible. If Henry converted the property with the necessary criminal intent, it would avail him nothing to show that at the same time he had the purpose of returning it at some future date, if he could procure the means with which to do it. Nearly every one who embezzles property does so with intent of returning it. If proof of such an intent would constitute a defense, the statute would become a nullity. In such a case the guilt of the defendant would depend, not upon the fact that he had converted the property with a criminal intent, but upon his ability to replace the thing taken.

"In other words, it is not the blameworthiness of the act or of the mind, but the result of the hazard, or the skill in the actor in playing the game, which decides its legal quality. Such a doctrine offers temptation to a thousand thousand custodians of trust funds, whose temptations are great enough at best; it encourages the reckless and unfortunate to commit crime, whereas the very purpose of the statute is to deter the tempted fiduciary from a breach of his trust and to protect society from the evils of a practice which has become well-nigh epidemic. If the law be given such a loose interpretation and be so feebly enforced, public faith and credit will be impaired, and the stability of the financial institutions of the state will be in jeopardy."

Thus spoke the Supreme Court of Ohio in State v. Baxter, 89 Ohio St. 269, 278, 104 N. E. 337, 334 (52 L. R. A. [N. S.] 1019, Ann. Cas. 1916C, 60). See, also, National Life & Accident Insurance Co. v. Gibson, 101 S. W. 895, 31 Ky. Law Rep. 101, 103, 12 L. R. A. (N. S.) 717; State v. Silva, 130 Mo. 440, 463, 32 S. W. 1007; Commonwealth v. Tuckerman, 76 Mass. (10 Gray) 173, 206, 207.

Some of the authorities cited by appellant on this point do not support his contention, and others hold that, "to make such a defense available, there must not only be the intent, but the ability, to redeem." Blackburn v. Commonwealth (Ky.) 89 S. W. 160. There is no evidence of such ability on the part of the appellant. Anyhow, we prefer to follow the rule of the Baxter Case, and those supporting it, supra.

[11] It is claimed that the court discriminated in favor of the United States attorney and against the counsel for the defense. When the former was making his statement to the jury, the latter objected on the ground that what he was saying had nothing to do with the charge in the indictment. The court overruled the objection and advised the jury that they should pay no attention to statements of counsel, unless they were subsequently supported by evidence. Later on, when counsel for the defendant was making his statement, objection was made that he was arguing the case, to which the court replied:

"I think, perhaps, counsel has gone far enough to indicate the importance of that; that is, the bearing of it."

Neither statement is given. For aught that appears, the ruling of the court with respect to both was correct. We cannot assume that it was not (Cliquot's Champagne, 3 Wall. 114, 140, 18 L. Ed. 116;

Sturges v. Carter, 114 U. S. 511, 522, 5 Sup. Ct. 1014, 29 L. Ed. 240), and therefore cannot say that there was any discrimination.

[12] During the cross-examination of Helmus he was asked repeatedly if he did not testify so and so at the former trial, to which he answered, "If the record states that, probably I did." The court intervened and admonished him not to put his answers in that way; that counsel was searching his recollection, "not as to the fact, but as to what you said before. Have you any recollection as to how you testified before?" To this witness answered, "No; I have not." The Court: "Well, that answers that, then." No objection was made at the time to the court's interfering, and the cross-examination proceeded at considerable length. Now it is said that the "entire purpose and effect of the cross-examination was destroyed" by the court's action. There is no basis for such contention. In federal jurisdictions the judge presiding at a trial "has a right, and, indeed, it is his duty, to see that the facts of the case are brought intelligibly to the attention of the jury, and to what extent he will intervene for this end is a matter of discretion." New York Transportation Co. v. Garside, 157 Fed. 521, 524, 85 C. C. A. 285, 288. See, also, Berwind-White Coal Mining Co. v. Firment, 170 Fed. 151, 153, 95 C. C. A. 1; Adler v. United States, 182 Fed. 464, 472, 104 C. C. A. 608 and Budd v. United States, 48 App. D. C. 332, 336.

[13] As heretofore stated, the first count charged the embezzlement of the son's certificate, and the third the embezzlement of the mother's certificates; but, since both were embezzled by a single act, we held, when the case was here before (49 App. D. C. 207, 263 Fed. 459), that there was but one offense committed. The learned trial justice at this trial took a verdict on both counts, but when he sentenced the defendant he, in accordance with our opinion, treated the two counts as one. Complaint is now made of the action of the court in submitting the case to the jury on both counts. In doing this the court did not err.

Other points have been raised by the appellant, but, after careful consideration, we find no merit in them. Appellant has had a fair trial throughout, and the judgment must be and it is affirmed.

ROBB, Associate Justice (dissenting). The most material witness at the trial of this case was John Helmus, for he it was who made all the arrangements with the firm of Lewis Johnson & Co. concerning the shares of stock for the embezzlement of which Henry stands convicted. In the first trial of this case, when, presumably, the recollection of Mr. Helmus was fresher than several years later, at the second trial, he testified as follows:

"I left the securities at the window of the bookkeeper with Mr. Lammond, who in turn handed them over to Mr. Henry."

The witness then was asked where Mr. Henry was standing at the time, and answered:

"Standing right back of Mr. Lammond."

At the second trial this witness, testifying with reference to the same transaction, said:

"When I handed over the securities to Mr. Henry it was in the corridor.
"Q. You handed over the securities personally to Mr. Henry, did you? A. Yes.
"Q. And that was in the corridor? A. Yes.
"Q. Whereabouts in the corridor were you standing? A. Just about in front of the bookkeeper's window; Mr. Lammond's window. * * *
"Q. Was Mr. Lammond in the corridor at the time? A. Yes."

No explanation was vouchsafed by the witness for this material change in his testimony. Prior to the argument, counsel for Henry, acting well within his rights, requested the court to grant a number of instructions, among them the following, which counsel brought directly to the court's attention:

"If you find that any witness testified before you to a material fact in a way so different from his testimony given at a prior trial as that he could not honestly be mistaken about it, then you are justified in finding that this witness willfuly testified falsely, and you may disregard his testimony either in whole or in part."

This request was refused, without any intimation from the court that it would be covered in the general charge. As the majority opinion discloses, when counsel for Henry was making his argument before the jury, the trial justice, conceiving that he was going beyond the granted instructions, sharply reprimanded him, saying:

"The points to be argued are sufficiently intimated by the granted instructions, and you know perfectly well what they are."

Whatever may have been in the mind of the trial judge when he refused to grant this instruction, which was peculiarly applicable to the situation, the result was to deprive counsel of the right to bring sharply to the attention of the jury the fact that the most material witness in the case had changed his testimony on a material point, and hence that his credibility had been seriously affected. No reason whatever has been advanced as to why this perfectly proper prayer should not have been granted, and none is apparent to me. That the trial justice made an apologetic effort to cover the point, *after argument,* is beside the question, for through the court's abuse of discretion counsel had been deprived of the valuable right of bringing the matter to the attention of the jury. The acquittal of Henry at the first trial, under the two counts charging larceny after trust, may or may not have influenced the testimony of this witness at the second trial. He may have been honestly mistaken in his testimony at the first trial, and right at the second trial; but those questions were for the jury, and not for the court.

A reading of the whole record compels the belief that Henry was not accorded that fair and impartial trial guaranteed him under the laws of the land, and that, in the particular matter to which I have adverted, his rights were seriously invaded. I therefore am constrained to dissent from the opinion and judgment of the court.

BREMMERMAN v. GEORGETOWN & T. RY. CO.

(Court of Appeals of District of Columbia. Submitted April 4, 1921. Decided May 2, 1921.)

No. 3476.

1. **Street railroads ⟸102(1)—Negligent failure to warn pedestrian, apparently unconscious of danger, proximate cause of accident.**
   Where it is apparent to a reasonably prudent person that a pedestrian is unconscious of the approach of a street car, and that unless his attention is attracted he in all probability will be killed or injured, the negligence of the motorman in failing to give warning of the danger, and to arrest the speed of the car, if that is necessary and possible, is the proximate cause of the accident.
2. **Street railroads ⟸103(2)—Motorman must exercise care to overcome pedestrian's negligence.**
   A street car motorman has the duty of exercising reasonable care to overcome the consequences of a pedestrian's negligence, whose peril is actually or constructively known to the motorman.
3. **Street railroads ⟸117(11)—Negligence as to pedestrian at fault held for jury.**
   In an action for the death of a pedestrian, struck by a street car while he was crossing the track diagonally away from the approaching car, evidence *held* to entitle plaintiff to have the case submitted to the jury on the theory that it should have been apparent to the motorman that decedent was not aware of the approach of the car, and therefore did not appreciate his peril, so that the failure of the motorman to sound a warning or to attempt to check the speed of his car until the accident was unavoidable was negligence proximately causing the injury.
4. **Street railroads ⟸93(3)—Motorman must watch tracks for pedestrians.**
   It is the motorman's duty, in running a street car, to watch the track ahead of him, and, so far as he is able, to avoid killing or maiming pedestrians.

Van Orsdel, Associate Justice, dissenting.

Appeal from the Supreme Court of the District of Columbia.

Action by Thomas H. Bremmerman, administrator of the estate of J. Schafer, deceased, against the Georgetown & Tennallytown Railway Company, a corporation. Judgment for defendant on a verdict directed by the court at the conclusion of plaintiff's case, and plaintiff appeals. Reversed and remanded.

L. J. Mather, of Washington, D. C., for appellant.

S. R. Bowen and Roger J. Whiteford, both of Washington, D. C., for appellee.

ROBB, Associate Justice. Appeal from a judgment for the defendant, appellee here, upon a verdict directed by the court at the conclusion of plaintiff's (appellant's) case, in a suit for the recovery of damages for the death of plaintiff's intestate through the alleged negligence of the defendant.

The accident occurred in the afternoon of September 24, 1915, on Wisconsin avenue, in the District of Columbia, at a point, according to the evidence, opposite Shoemaker lane. This lane, for the

past 30 years, and particularly in the summer months, has been used by pedestrians to quite an extent. The double tracks of appellee run north and south along the avenue, and are crossed diagonally by this lane, which, on the east side of the tracks, is nothing more than a path. A pedestrian, when within 4 feet of the west or outside rail on the south-bound track, could plainly see a car 200 feet away, approaching from the south on the easterly track, and, of course, could be as plainly seen from that car.

On the day in question Mr. Bremmerman, a man 68 years of age, with hearing slightly, though not seriously, impaired, who was thoroughly familiar with that locality, approached the tracks along Shoemaker lane from the west, carrying a bag of cantaloupes. There was a car going north on the easterly track, about two per cent. down grade at that point. Decedent proceeded diagonally across the south-bound track and across the 8 feet separating the two tracks, and was about to step upon the north-bound track, before the motorman of the car, approaching under power, made any attempt either to warn him or arrest the speed of the car. According to one witness, a former conductor who was in the front end of the approaching car:

"There was no signal sounded by the motorman at all until he was within 10 feet of the man, when he hollered and tried to stop at the same time, and that was the first attempt he made to stop the car; the motorman did not attempt to do anything until he was within 10 feet of the man [decedent]; decedent did not look towards the car at all. * * * The car ran about 45 or 50 feet north after striking the decedent. * * * It was on eight points all the way from the car barn out up until he [the motorman] got within 10 feet of the man before he cut it off; that witness saw him cut it off when decedent 'was within say a foot inside of the inside rail when he cut it off'; at the time he stepped over the west rail of the north-bound track, the car was just about 10 feet away; saw decedent from the time he came out of the lane, and he walked across the south-bound track without looking down towards the car, and he walked over the space between the two tracks without looking towards the car; and stepped over the west rail without looking; he never looked at the car at all. * * * He had his back towards the car when the car struck him."

Another eyewitness testified that the motorman sounded the whistle just as decedent was about to step in front of the approaching car. The car was running at a speed of 15 or 20 miles an hour.

The negligence of the decedent being admitted, the sole question for our consideration is whether the last clear chance doctrine is applicable to the facts of this case. In Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270, it was ruled that the negligence of the party injured will not preclude recovery by him, "if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence." This rule was reaffirmed in Grand Trunk Railway Co. v. Ives, 144 U. S. 408, 429, 12 Sup. Ct. 679, 36 L. Ed. 485.

In Capital Traction Co. v. Apple, 34 App. D. C. 559, this court ruled that the motorman on a street railway car has a right to assume that a pedestrian who is apparently conscious of the approach of the car will not attempt to cross the track immediately in front of it. The court further ruled that a railway company, having no ex-

clusive right to the use of those parts of the street occupied by its tracks, and being under obligation to exercise reasonable care for the protection of pedestrians, must, notwithstanding the prior negligence of a pedestrian, take all reasonable precautions to avoid injuring him. And in Washington-Virginia R. Co. v. Himelright, 42 App. D. C. 544, this court said:

"Where the negligence of the defendant, in failing to keep a proper lookout, intervenes between the negligence of the plaintiff and the accident, the negligence of the former may be regarded as the proximate cause of the injury, while the negligence of the latter may be considered as the remote cause or condition. Necessarily, if it is found that the negligence of the plaintiff was merely the remote cause or condition, it cannot be said to have been contributory, since negligence, to be contributory, must be one of the proximate causes."

[1] In the eyes of the law, where it is or should be apparent to a reasonably prudent person that a pedestrian is unconscious of the approach of a car, and that unless his attention is attracted he in all probability will be killed or injured, the negligence of the motorman, in failing to employ the means at his command to give warning of the danger which then is or should be apparent to him, and to arrest the speed of the car, if that be necessary and possible, is the immediate or proximate cause of the accident.

[2] The peril of the pedestrian, if actually or constructively known to the motorman, places upon the latter the duty of exercising reasonable care and prudence to overcome "with consequences of the plaintiff's negligence." Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 555, 558, 11 Sup. Ct. 653, 655, 35 L. Ed. 270. And if the motorman does not use such care and prudence, the consequences may be attributable to his negligence. As was said in Hartley v. Lasater, 96 Wash. 407, 165 Pac. 106:

"Last clear chance implies thought, appreciation, mental direction, and the lapse of sufficient time to effectually act upon the impulse to save another from injury, or the proof of circumstances which will put the one charged to implied notice of the situation."

[3, 4] So, in this case, we think it should have been apparent to a reasonably prudent person, situated as was the motorman on the rapidly approaching car, that the decedent was not aware of the approach of the car, and therefore did not appreciate his peril. The plainest dictates of humanity and common sense demanded the employment by the motorman in these circumstances of the agencies immediately at his command to avoid running down the decedent; but he failed to do anything, either to warn the decedent or arrest the speed of the car, until the accident was unavoidable. It is common knowledge that the crossing and recrossing of street car tracks tends to dull one's sensibility to the ordinary manifestations of danger, while the shrill sound of a whistle may bring a realizing sense of peril. It is the motorman's duty, in running his car, as has been repeatedly stated, to watch the track ahead of him, and, so far as he is able, avoid killing or maiming pedestrians.

In the present case, had he seasonably sounded a warning and the

decedent had given evidence of hearing it, the motorman's duty would have ended and the accident would not have occurred. Had the decedent given no evidence of hearing the alarm thus sounded, and the motorman then had vainly used all reasonable means to check the speed of the car, the accident could not have been attributed to any failure of duty on the part of the motorman. He, however, did neither, and we therefore are of opinion that the court erred in directing a verdict for the defendant; the question of whether the motorman was guilty of negligence, and, if so, whether that negligence constituted the proximate cause of the injury, being for the jury.

The judgment is reversed, with costs, and the case remanded for a new trial.

Reversed and remanded.

VAN ORSDEL, Associate Justice (dissenting). The negligence of the deceased is conceded. Should the jury find that the railway company was negligent in the operation of the car, it would make out, at most, a case of concurring negligence, upon which there could be no legal recovery.

TAYLOR et al. v. JACKSON et al.

(Court of Appeals of District of Columbia. Submitted April 4, 1921. Decided May 2, 1921.)

No. 3475.

1. **Religious societies ⇐12(5)—Judicial review of expulsion limited to determining question of compliance with rules.**
   In a suit to compel a religious society to restore complainants to membership, where no temporal rights of complainants are involved the court's inquiry must be confined to a determination of whether there has been a substantial compliance with the rules of the church.
2. **Religious societies ⇐7—Rules held to entitle member to copy of charges only on demand.**
   Church rules giving any one tried by the church an opportunity to vindicate himself and giving him a right to demand and receive copies of all charges against him requires the church authorities to furnish the member with copies of the charges only when the member makes request therefor.
3. **Equity ⇐373—At hearing on bill and answer, averments of answer must be taken as true.**
   Where the hearing in the court below was upon bill and answer, the averments of the answer must be taken as true.
4. **Religious societies ⇐7—Member held expelled without notice.**
   Proof that a church officer went to the home of a member, and, when he stated he was from the church on official business, was informed that the member was in bed and would not open the door, whereupon the officer attempted to push under the door the notice of the meeting to hear the charges against the member, does not show that the member was given the notice of the hearing of the charges against him required by the church rules.

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5. Religious societies ⇐7—Members declining to receive notice cannot object to service.

Members of a church, declining to receive notices of meeting for the hearing of charges against them after they knew the purport of the notices, cannot object that the notices were not properly served, especially where they stated they would not appear at the hearing and that the church could take any action it chose.

6. Religious societies ⇐7—Expulsion of member without notice void.

Where church member was not given the requisite notice and opportunity to be heard before he was expelled on charges, the order of expulsion was void.

Appeal from the Supreme Court of the District of Columbia.

Suit by James A. Jackson, Joseph S. Burke, and others against William A. Taylor, Pastor of the Florida Avenue Baptist Church, and others, to restore complainants to the roll of membership in the church. Decree for complainants, and defendants appeal. Affirmed as to complainant Burke, and reversed as to the other complainants.

Armond W. Scott, of Washington, D. C., for appellants.

Royal A. Hughes and Thomas L. Jones, both of Washington, D. C., for appellees.

ROBB, Associate Justice. Appeal from a decree in the Supreme Court of the District, directing appellants, as pastor and deacons, respectively, of the Florida Avenue Baptist Church (colored), in this city, to restore appellees to the roll of membership in the church.

At a prearranged meeting of the church, appellees were dropped from its roll of membership. They then filed their bill in the court below, alleging, inter alia, that the proceedings resulting in their expulsion "were unlawful and irregular," in that appellees were not furnished copies of the specific charges against them, that they "were never informed of their accusers," and "were given no opportunity of meeting face to face their accusers or of hearing the witnesses against them nor of presenting witnesses in their defense."

In the answer to the petition it is alleged that appellees were duly notified of the time and place of the above meeting, and attached to the answer are two affidavits showing the manner of service upon appellees. In the first affidavit it is set forth, by the member designated to make service upon appellees Burke and Dickinson, that he went to Burke's home and knocked on the door; that Burke inquired who it was, and affiant replied, "Glenn, from the deacon board of Florida Avenue Baptist Church, on official business." Burke responded that he had "gone to bed" and declined to come to the door, whereupon affiant made an unsuccessful attempt to push a copy of the charges under the door. Next morning affiant went back to Burke's home, with the same result.

As to the service on Dickinson, it is stated that affiant went to the place where he boarded, was informed that he was in bed, and made a request that he be called; that Dickinson came to the window and, when affiant asked to see him, suggested that affiant could tell him what he wanted. Affiant then told him he had a notice for him from the

deacon board of his church, and affiant asked to "see him at the door and give it to him," to which Dickinson replied "that he did not care to be bothered with that stuff." Thereupon affiant—

"threw the notice and copy of the charges into the hall on the floor and left; the said notice and charges being notice of the time and place of trial and charges filed against him by the deacon board for disturbing public worship, peace, and harmony of the Florida Avenue Baptist Church."

In the second affidavit affiant says he went to the home of appellee Jackson and informed him that affiant had charges from the church, which affiant undertook to present to him; that Jackson answered—

"that he knew that I had charges, and that he would not accept any charges from any one, and that he did not care what the church did; he was not going to appear, and that he would have nothing to do with any of it, and he dared any one to give him any charges of any description; that he would not recognize the charges, and would not let me leave them on the premises; after having fully explained the nature of the said charges, then I left; that he would not attend the meeting set for the investigation of said charges, and he said that he did not care what action the church took in the matter."

Affiant had substantially the same experience with the appellee Porter.

It is agreed that Hiscox's Directory for Baptist Churches prescribes the procedure to be followed in Baptist Church trials. It is there provided (note 4) that—

"any one tried by a church should be allowed every opportunity, both as to time, place and circumstance, to vindicate himself."

Note 5 provides:

"That every person so tried has a right to demand and receive copies of all charges against him, the names of the accusers and witnesses, both of whom shall have the privilege of meeting face to face, hearing their statements," etc.

[1, 2] No temporal rights of appellees being involved, our inquiry must be confined to an examination of the rules of the church organization, for the purpose of determining whether there has been a substantial compliance with those rules. Satterlee v. Williams, 20 App. D. C. 393. Note 4 of Hiscox's Directory contemplates that there shall be given a member against whom charges have been preferred a notice, either verbal or written, as to the time and place of the trial. Note 5 confers upon the person to be tried the right "to demand and receive copies of all charges against him." In other words, it is not incumbent upon the church authorities to furnish the member with copies of charges unless requested by him.

[3-5] In the present case, the hearing in the court below having been upon bill and answer, the averments of the answer must be taken as true. As to the service on appellee Burke, it does not appear that he actually was notified of the pendency of the charges and trial, and although his attitude when service of the charges was attempted to be made upon him indicates that he may have known of both, we may not assume that knowledge existed. Appellee Dickinson was told by the member designated to make service that this member "had a notice from the deacon board of his church for him." He, however, not

only declined to come to the door, but declared "that he did not care to be bothered with that stuff." Thereupon the paper containing the notice of the time and place of the trial, together with the charges, was thrown into the hall. In the circumstances, this was sufficient. When a brother member of the church informed appellee of the character of his mission, it clearly was appellee's duty to receive the communication from the church authorities. Having prevented the actual handing of the notice to him, he is not now in a position to take advantage of the fact that it was left in the hall. The attitude of appellees Jackson and Porter is still less defensible, for they positively declined to accept any charges, declared they would not attend any hearing, and expressed indifference as to what the church might do.

[6] It results that appellee Dickinson, Jackson, and Porter, having had the notice required by the church regulations, are not in position to challenge the action of the church at the hearing. As to the appellee Burke, however, we are constrained to hold that he was not given requisite notice, and hence that he has had no opportunity to be heard. The order expelling him therefore was void. Canadian Religious Ass'n v. Parmenter, 180 Mass. 415, 62 N. E. 740; Jones v. State, 28 Neb. 495, 44 N. W. 658, 7 L. R. A. 325; Jennings v. Scarborough, 56 N. J. Law, 401, 28 Atl. 559; Bouldin v. Alexander, 15 Wall. 131, 140, 21 L. Ed. 69.

The decree will be reversed as to appellees Dickinson, Jackson, and Porter, with direction to remand the case and dismiss the bill as to them. As to the appellee Burke, the decree will be affirmed. Costs will be divided equally between appellants and appellees.

Reversed as to appellees Dickinson, Jackson, and Porter.

Affirmed as to appellee Burke.

J. E. HANGER, Inc., OF WASHINGTON, D. C., v. FITZSIMMONS.

FITZSIMMONS v. J. E. HANGER, Inc., OF WASHINGTON, D. C.

(Court of Appeals of District of Columbia. Submitted April 4, 1921. Decided May 2, 1921.)

Nos. 3468, 3469.

1. **Master and servant ⊂=20—Employment not specifying duration terminable at will.**

A contract of employment of a sales agent, in which there is no express or implied provision as to its duration, is terminable at the will of either party.

2. **Evidence ⊂=461(1)—Acts before and after signing of contract, showing construction of its terms, are admissible.**

In an action for breach of a contract of employment of a sales agent to represent a corporation in a foreign country under the direction of its authorized representative, evidence that the company delayed signing the contract until the person who was to accompany the agent could be present, and correspondence after the signing of the contract showing the construction of the parties that such person was to be the com-

pany's authorized representative, was admissible to aid in construing the contract; the effect of such evidence not being to vary the contract's terms.

3. Contracts ⇐131—Employing agent to sell goods and procure loan from foreign country held valid.

A contract employing an agent to sell a company's goods in a foreign country and to procure a loan from that country, if possible, in which there was no intimation that any influence, except legitimate salesmanship, was to be exerted, is not void as against public policy.

Smyth, Chief Justice, dissenting in part.

Appeal from the Supreme Court of the District of Columbia.

Action by Ralph E. Fitzsimmons against J. E. Hanger, Incorporated, of Washington, D. C. From a judgment for plaintiff on the second count, after the first count was withdrawn from the consideration of the jury, both parties appeal. Judgment affirmed on each appeal.

Milton W. King, Theodore D. Peyser, and L. Koenigsberger, all of Washington, D. C., for plaintiff.

J. S. Easby-Smith and Ralph B. Fleharty, both of Washington, D. C., for defendant.

ROBB, Associate Justice. Fitzsimmons, appellee in No. 3468 and appellant in No. 3469, brought suit in the court below against J. E. Hanger, Incorporated, appellant in No. 3468 and appellee in No. 3469; the declaration being in two counts, the first of which was for the recovery of loss of profits and commissions that might have been earned under the contract alleged to have been breached by the corporation, and the second count for expenses and reasonable compensation between the date of the contract and its alleged breach by the corporation. The court withdrew from the consideration of the jury the first count, but permitted a recovery on the second count.

The contract is in writing and in substance provides, as stated in the brief for Fitzsimmons, "for the employment of the plaintiff" as agent of the corporation to sell to the Russian government or others artificial limbs manufactured by the corporation; compensation being dependent upon the securing of a contract or loan from the government of Russia or orders from any source "in the Russian empire." The contract does not specify the time during which it shall continue.

In this contract it is provided that the agent must devote his entire time to the interests of the manufacturer, under its direction "or its authorized representative in Russia." It appears that prior to the signing of this contract the corporation telegraphed Fitzsimmons, delaying "final conclusion on account absence from city for a few days of the party who would be expected to make the trip to Russia in the event the deal [contract] is closed." The party mentioned in this telegram was a Mr. Thomas, who was present when the contract was entered into. Over the objection and exception of the corporation, there was introduced in evidence correspondence following the signing of the contract, which clearly showed that the understanding of the parties as to the meaning of the contract was that Thomas should accom-

pany Fitzsimmons to Russia as the corporation's "authorized representative" there. The correspondence further showed that arrangements were completed by Fitzsimmons, with the concurrence of the corporation, for the passage to Russia of Thomas and himself. Thomas, who was an expert in fitting artificial limbs, had prepared to take with him to Russia several crates of artificial limbs, together with tools and materials "for doing necessary work in adjusting and fitting legs to prospective persons." Finally the corporation notified Fitzsimmons that Thomas was at their headquarters and would "be ready to sail on 29th" (July). Fitzsimmons arranged for the passage, but Thomas did not appear, and Fitzsimmons was compelled to pay 10 per cent. of the amount of the passage money. After sending several telegrams and a letter to the corporation, Fitzsimmons finally received a letter from it, advising him that "Thomas had absolutely refused to go to Russia" and that the corporation had "no other man available for this mission." The letter also stated that the corporation was willing to supply whatever was reasonable in the way of models, measuring outfits, etc., and was "entirely willing to be governed by the terms of our agreement with you."

[1] This being a contract of employment, in which there is no express or implied provision as to its duration, we agree with the trial court that it was terminable at the will of either party. McCullough v. Carpenter, 67 Md. 554, 11 Atl. 176; Staroske v. Pulitzer Publishing Co., 235 Mo. 67, 138 S. W. 36, and Kirk v. Hartman, 63 Pa. 97. It results that the action of the court in withdrawing from the jury the first count of the declaration was correct.

[2] Of the three assignments of error by the corporation, the first and third challenge the action of the trial court in admitting evidence as to Thomas. While, of course, preliminary negotiations are merged in the contract itself, they may, as in this case, tend to enlighten the court as to the sense in which the parties understood the terms employed in the contract. The letter preceding that instrument, wherein the corporation delayed the interview at which the contract was made "until the party who would be expected to make the trip to Russia" as the representative of the corporation could be present, does not contradict or vary the terms of the contract but tends to elucidate its provisions. The correspondence subsequent to the contract, similarly, is in entire harmony with its provisions, and furnishes the best evidence as to the meaning placed upon it by the parties themselves while their relations were harmonious. This contemporary construction placed upon the contract by both parties, therefore, was properly received in evidence.

[3] The second and remaining assignment of error challenges the action of the trial court in submitting the second count of the declaration to the jury; the contention being that the contract is contrary to public policy. We think counsel have misconceived the scope of Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539, cited by them. There an attempt was made, by an official of a foreign government, to recover upon a contract for the personal influence of that official with another official of his government. The court characterized that con-

tract as corrupt in its origin and tendencies. Here, however, the contract on its face is legitimate and free from all taint or suspicion, for it simply provides for the services of an agent, and the evidence is in harmony with the terms of the contract. Certainly there was nothing sinister in agreeing to represent a corporation in the sale of artificial limbs, and the alternative proposition as to securing a loan was to be in furtherance of the same design. The only influence contemplated by the contract was the proper influence of a salesman.

Finding no merit in the contentions of the corporation as to the second count of the declaration, it results that the action of the trial court with respect to it must be accepted.

The judgment in each case will be affirmed; costs to be divided equally between the parties.

Affirmed.

NOTE.—Mr. Chief Justice SMYTH dissents as to No. 3468, and concurs in No. 3469.

HAY et al. v. ASSOCIATION OF COLLEGIATE ALUMNÆ.

(Court of Appeals of District of Columbia. Submitted October 11, 1920. Decided May 2, 1921.)

No. 3342.

1. **Specific performance ⇐108—When defendants ousted complainant pending suit, order restoring possession was proper.**
   Where, pending a suit for specific performance, in which complainant sought to compel the execution of a lease by defendants of premises of which complainant had possession, defendants took the law into their own hands and ousted complainant, an order restoring complainant to the possession was proper, though no injunction had been obtained restraining defendants from interfering with complainant's possession.

2. **Specific performance ⇐108—Defendants, doubting complainant's ability to respond in damages for possession pendente lite, should apply to court for protection.**
   Where defendants, sued for specific performance of an agreement to execute a lease by a party in possession, doubt complainant's ability to respond for intervening damages, if allowed to retain possession pending the suit, they should apply to the court for an order protecting their interests, instead of taking the law into their own hands and ousting complainant.

Appeal from the Supreme Court of the District of Columbia.

Suit by the Association of Collegiate Alumnæ against Clarence L. Hay and others. From an order restoring complainant's possession of certain premises, defendants appeal. Affirmed.

J. M. Carlisle, W. B. Howe, and S. E. Swayze, all of Washington, D. C., for appellants.

Clarence R. Wilson and William G. Johnson, both of Washington, D. C., for appellee.

ROBB, Associate Justice. This is an appeal from a decree in the Supreme Court of the District, restoring to the complainant, appellee

here, possession of premises No. 1607 H Street, Northwest, in this city, pending the determination of a prior suit by the appellee against appellant Hay to require him to execute a lease of the same premises, conformable to an agreement set forth in the petition.

From an examination of the petition herein and supporting affidavits, and the answer and supporting affidavits, we are content to adopt the ruling of the trial justice that appellee's possession of the premises in question was disturbed by appellants during the pendency of the original suit for specific performance. The sole question with which we shall now concern ourselves, therefore, is whether the appellee was entitled to the order of restoration.

[1] In the original petition, as we have intimated, appellee sought an order requiring Mr. Hay, the owner of the premises, to execute a lease thereof. Pending the determination of that suit, involving as it does the right to possession of these premises, certain of these appellants took the law into their own hands and caused the ouster of the appellee. The order from which this appeal was taken does no more than restore the status quo. Appellee sought specific performance of a contract that would insure to it the possession of the premises for a stated time. The right to possession was the very subject-matter of the suit, and that right, it seems clear to us, was directly and seriously affected by the action complained of herein.

It is suggested that appellee had filed no petition for an injunction restraining appellants from interfering with its possession, and therefore that there could be no violation of any order of the court. Let us see. If it be supposed that appellee was not in possession of the premises when its suit for specific performance was filed, may it be said that appellee would have had the right forcibly to dispossess appellants and take possession of the premises? In such circumstances, of course, appellee would have been prejudging the case, deciding for itself for the time being the very subject-matter of the controversy, namely, the right to possession, and yet that is precisely what appellants did. Again, what would have been the attitude of the court had appellants filed a suit in ejectment, after the equity court had taken jurisdiction of the suit for specific performance? Clearly, appellants would have been remitted to their remedy in the equity suit, wherein the precise question was involved.

[2] Appellee, being in possession, had a right to assume that appellants would respect the dignity and authority of the court whose jurisdiction had been invoked. There was no necessity, therefore, for a restraining order against appellants. This being an equity suit, if appellants entertained any doubt as to the ability of appellee to respond for intervening damages, the court was open to them, and we must assume that any proper application would have resulted in an order adequately protecting their interests.

That a party to litigation may not anticipate and forestall the action of the court with respect to the subject-matter of that litigation was ruled in Farmers' Loan & Trust Co. v. Lake Street Elevated R. Co., 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667, Merrimack River Savings Bank v. Clay Center, 219 U. S. 527, 31 Sup. Ct. 295, 55 L. Ed. 320,

Ann. Cas. 1912A, 513, and Toledo Newspaper Co. v. United States, 247 U. S. 402, 38 Sup. Ct. 560, 62 L. Ed. 1186. See, also, Daniel v. Ferguson, [1891] L. R. 2 Ch. 27, Pokegama Co. v. Klamath River, etc., Co. (C. C.) 86 Fed. 528, and Cooke v. Boynton, 135 Pa. 102, 19 Atl. 944.

Counsel for appellants have cited Drew v. Hogan, 26 App. D. C. 55, 6 Ann. Cas. 589. That case involved a church quarrel, in which an injunction had been issued against certain individuals, without requiring complainants to file an undertaking to make good any damages that might be sustained by the defendants. This court found that under the rules of the trial court such a restraining order was void. The difference between that case and the one at bar is too plain to require discussion, for here appellee was in possession, and, as we have suggested, the court was open to appellants for the full protection of their interests. Instead of resorting to the court, however, their mistaken zeal caused them to take the matter into their own hands, and the court clearly was right in correcting their mistake.

As to the suggestion that appellants still are without adequate protection, we repeat that the court below is open to them, in the original suit, where we must assume their interests will be fully protected.

The decree must be affirmed, with costs.

Affirmed.

EARLES et al. v. GOMBER.

(Court of Appeals of District of Columbia. Submitted March 21, 1921. Decided May 2, 1921.)

No. 1411.

1. Patents ⇐106(2)—**Testimony to support motion to amend preliminary statement as to date of invention must be convincing.**
   A motion in interference proceedings under Patent Office Rules of Practice, rule 113, for leave to amend the preliminary statement, so as to claim an earlier date of invention, made after knowledge of the date claimed by the adverse party, will not be sustained, unless the testimony to support it is convincing and free from suspicion.

2. Patents ⇐106(2)—**Objection to delay in applying for reissue cannot be raised in interference proceedings.**
   In interference proceedings between an applicant for an original patent and an applicant for reissue, the objections, that the reissue application sought to broaden the claims more than two years after the original patent was granted, and that it was for a different invention, are not available to the original applicant.

3. Patents ⇐90(1)—**Later inventor cannot claim patent, notwithstanding dedication by earlier inventor.**
   Even if the prior inventor of the device, delaying to apply for reissue after placing the device on the market, is estopped by dedication to the public, that fact does not aid an adversary in interference proceedings, whose conception and exhibition to the public were subsequent to the other's.

Appeal from the Commissioner of Patents.

Interference proceeding between Fred E. Earles and another and George W. Gomber. From a decision of the Commissioner of Patents,

awarding priority of invention to Gomber, Earles and another appeal. Affirmed.

Joshua R. H. Potts and Brayton G. Richards, both of Chicago, Ill., for appellants.

E. G. Siggers, of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. Appeal from the decision of the Commissioner of Patents, awarding priority of invention to appellee Gomber, the senior party. The issue is in the following count:

"A fly-killing device, comprising a handle and the flap on said handle, formed of a perforated sheet of soft, flexible nonabrasive material."

[1] A patent was granted appellants April 2, 1918, upon an application filed May 29, 1915. Appellee is here on an application filed August 6, 1918, for the reissue of a patent granted November 23, 1915, on an application filed March 4, 1915. Appellants alleged conception and reduction to practice in 1912, and appellee alleged a date of 1910. The preliminary statement of appellants claiming the above date was filed September 20, 1918. On February 17, 1919, they filed a motion under rule 113 of the Rules of Practice of the Patent Office seeking to amend their preliminary statement to show conception and reduction to practice in 1904. We agree with the tribunals of the Patent Office that the evidence is wholly inadequate to sustain the motion. Testimony to support such a motion must be convincing and free from suspicion.

"It is always a suspicious circumstance in a case of interference that, after the claim of one of the parties has been fully disclosed and fixed as of a specified date, the other should then seek by amendment of his preliminary statement to show a date of invention different from that in the original statement and prior to it and to the date of his opponent. Amendment upon so important a point should not be allowed in such a case, unless it is shown that the interests of justice plainly demand it; for upon the determination of these dates it depends, in the majority of cases, which party is entitled to the patent, and a change of memory is comparatively easy, when self-interest dictates a different date." Parker v. Appert, 8 App. D. C. 270.

[2] Appellee's reissue application is assailed on the ground that it is barred by intervening rights, in that it seeks to broaden the claims more than two years after the original patent was granted and is for a different invention. These questions are not available in an interference proceeding. Norling v. Hayes, 37 App. D. C. 169.

[3] But it is contended that appellee is estopped under the rule announced in Chapman v. Wintroath, 252 U. S. 126, 40 Sup. Ct. 234, 64 L. Ed. 491. This contention is based upon alleged commercial exploitation of the invention by appellants in the years 1915 to 1918, and knowledge by appellee late in 1916 that such a device was on the market. Assuming that two years elapsed between the date when such knowledge came to appellee and the date of his reissue application, which is not satisfactorily established, it is conclusively shown that appellee had the invention on the market in large quantities early in 1915, at a date prior to appellants' filing date or their invasion of the market with the manufactured product. Appellee was the prior inven-

tor, and it was from him that the public first derived knowledge of the invention due to his placing it upon the market. In such circumstances, there is no hypothesis on which an award of priority to appellants could be justified. If appellee delayed too long in applying for reissue after placing the device upon the market, he might be barred by dedication to public use; but this is not available to appellants in this proceeding.

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.

WRIGHT v. HALLE et al. WAHL v. BARRETT et al. BARRETT v. WAHL et al.

(Court of Appeals of District of Columbia. Submitted March 14, 1921. Decided May 2, 1921.)

Nos. 1383–1385.

1. **Patents ⇐106(2)—Priority held properly adjudged to senior party on the record.**
   Where junior parties to an interference, in their preliminary statements, failed to allege a date of conception prior to the senior party's filing date, priority was properly adjudged to the senior party on the record.
2. **Patents ⇐113(6)—Error in holding machine operative must clearly appear.**
   Error in the holding of the Patent Office tribunals that the machine disclosed by a party to an interference was so clearly operative that it was unnecessary to take testimony on the question must clearly appear to justify judicial intervention.
3. **Patents ⇐90(5)—Necessity for correction of minor defects does not establish false concept.**
   The necessity for the correction of minor structural defects in the machine disclosed by a party to an interference does not necessarily establish a false inventive concept.

Appeals from a Decision of the Commissioner of Patents.

Interference proceeding between Walter Wright, Hiram Joseph Halle, Glenn J. Barrett, and John C. Wahl. From a decision awarding priority to Halle, the other parties separately appeal. Affirmed.

B. C. Stickney and Louis E. Giles, both of New York City, for Wright.

B. G. Foster and Louis G. Julihn, both of Washington, D. C., Robert Fletcher Rogers, of New York City, and Frederick P. Fish, of Boston, Mass., for Halle.

Joseph H. Milans and Calvin T. Milans, both of Washington, D. C., for Wahl.

William W. Dodge, of Washington, D. C., and D. A. Carpenter, of New York City, for Barrett.

VAN ORSDEL, Associate Justice. These appeals are from a decision of the Commissioner of Patents awarding priority of invention to appellee Halle in an interference arising between the applications of Halle, filed October 11, 1902, Wright, filed April 20, 1908, Barrett, filed December 13, 1909, and Wahl, filed May 23, 1911.

[1] Appellants in their preliminary statements, failed to allege a date of conception prior to Halle's filing date. In accordance with the practice of the Patent Office, appellants were notified by the Examiner of Interferences that Halle would be awarded priority on the record, unless cause was shown why such a course should not be pursued. Wahl and Barrett moved to dissolve the interference, on the ground that the machine disclosed by Halle was inoperative. The motions were denied by the Examiner, and appeal was taken to the Commissioner, where the decision of the Examiner was affirmed. The Examiner then adjudged Halle entitled to priority on the record. This procedure is approved in Ewing v. Fowler Car Co., 244 U. S. 1, 37 Sup. Ct. 494, 61 L. Ed. 955.

[2] The present appeals are based chiefly upon the alleged error of the tribunals below in holding the Halle device operative. The issue involves improvements in combined typewriting and adding machines, which is suggestive of technical mechanism. The experts of the Patent Office are unanimous in holding that Halle's machine is operative. So clearly was it held to be disclosed that a motion to take testimony on the question of operativeness was denied. On this point we have held that error must be clearly apparent to justify judicial intervention.

[3] Appellants, however, have constructed a machine following, it is claimed, the Halle disclosure. Affidavits are produced to show that the machine so constructed would not work. This sort of attack is usually looked upon with suspicion, since the test has been conducted wholly by the enemy. The necessity for the correction of minor structural defects does not necessarily establish a false inventive concept. Here we think the structural defects pointed out are subject to mechanical correction.

The decision of the Commissioner of Patents is affirmed. All costs on the writs of certiorari are taxed against the moving parties.

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.

DE FERRANTI v. HARMATTA.

(Court of Appeals of District of Columbia. Submitted March 21, 1921. Decided May 2, 1921.)

No. 1412.

1. **Patents ⇐109—Applicant not entitled to make claims more than two years after issuance of patent to another, notwithstanding intervening patent.**
   Where claims in a patent issued in 1909 were appropriated by H., and, on interference, awarded to him, D. could not make such claims more than two years after the issuance of the patent in 1909, though within two years after the issuance of the patent to H.
2. **Patents ⇐109—Applicant charged with constructive notice of issuance of patent to another.**
   One having an application for a patent pending had constructive notice of the issuance of a patent to another containing claims which he subsequently attempted to make.

Appeal from a Decision of the Commissioner of Patents.

Interference proceeding between Sebastian Z. De Ferranti and Johann Harmatta. From a decision for the latter, the former appeals. Affirmed.

Melville Church, of Washington, D. C., for appellant.

Frederick P. Fish and J. L. Stackpole, both of Boston, Mass., for appellee.

VAN ORSDEL, Associate Justice. This appeal is from the decision of the Commissioner of Patents, awarding priority of invention to appellee Harmatta. The interference involves the application of De Ferranti, filed December 29, 1911, which was divisional of his earlier application of May 14, 1904, and the application of Harmatta, filed December 3, 1903, which eventuated into a patent December 3, 1912.

The invention relates to what is known as "spot welding." This is accomplished by passing an electric current through the parts joined in such manner as to confine it to a small spot, thus making a correspondingly small weld.

[1, 2] It is not necessary to enter into the details of the invention, since we think the case can be disposed of by the consideration of a single point. It appears that a patent was issued to one Rietzel on July 20, 1909, in which the claims of the present issue originated. Harmatta appropriated these claims, which led to an interference, resulting in an award of priority of Harmatta. The Thompson Electric Welding Company was the assignee of both the Rietzel and Harmatta applications. After the Harmatta patent was issued on December 3, 1912, the counts of that interference were disclaimed in the Rietzel patent.

De Ferranti first made the claims in issue July 29, 1913, more than four years after the issue of the Rietzel patent. It is sharply contended that De Ferranti's delay in making the claims in interference can only be counted from the date of the Harmatta patent. But we are

not impressed by this contention. De Ferranti filed his present application December 29, 1911, more than two years after the issue of the Rietzel patent, of which he had constructive notice. He is, therefore, clearly estopped to make claims against Rietzel. The Harmatta claims were derived from the Rietzel patent by reason of his being adjudged the prior inventor.

The limitation of two years within which claims may be taken from a patent arises from the application of a sound principle of public policy for the prevention of the undue extension of monopoly by procrastination in the assertion of adverse rights against one already in possession.

This situation is not different by analogy from a reissue case, where the public is in adverse possession. In both instances, the applicant has stood by and permitted others to assert rights which he now negligently seeks to monopolize for himself.

"Monopolies are inherently obnoxious, and it is solely because of ultimate benefit to the public that a conditional form of monopoly is permitted an inventor. When the element of diligence or good faith in an applicant is lacking, there is no valid reason for such a construction of the patent laws as would effect an extension of the limited monopoly granted upon prescribed conditions which include those very elements. Inasmuch as even diligence and good faith do not entitle one to a monopoly upon a monopoly, it is not perceived why delay and the lack of good faith should do so." In re Fritts, 45 App. D. C. 211, 217.

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.

VALERIUS et al. v. PFOUTS.

(Court of Appeals of District of Columbia. Submitted March 18, 1921. Decided May 2, 1921.)

No. 1408.

Patents ⇐113(6)—Concurrent findings by Patent Office tribunals not reversed, unless clearly wrong.

Where the three tribunals of the Patent Office concurred in awarding priority to the same party, in interference proceedings which turned on a question of fact, the decision will be affirmed, unless clearly wrong.

Appeal from the Commissioner of Patents.

Interference proceeding between Theodore L. Valerius and another and Leroy S. Pfouts. From a decision of the Commissioner of Patents, awarding priority to Pfouts, Valerius and another appeal. Affirmed.

George E. Tew, of Washington, D. C., for appellants.

Edward R. Alexander and George B. Pitts, both of Cleveland, Ohio, for appellee.

SMYTH, Chief Justice. Valerius and Larsen appeal from a decision of the Commissioner of Patents in an interference proceeding relating to an improvement in ice cream freezers, whereby flavoring material may be admitted into the freezing cylinder at any stage in the freezing process without interfering with the introduction of the next batch of cream mixture into the feed tank. The case turned upon a question of fact, and the three tribunals of the Office concurred in awarding priority to Pfouts.

We cannot find that this ruling is clearly wrong, and hence, according to the well-established practice (Dunham v. Dyson et al., 50 App. D. C. 338, 272 Fed. 206, and cases there cited), we affirm the decision of the Commissioner of Patents. All costs on the writ of certiorari issued at the instance of Pfouts are taxed against him.

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.

ANGLADA v. MOYER et al.

BRYANT v. CARROLL et al.

(Court of Appeals of District of Columbia. Submitted March 18, 1921. Decided May 2, 1921.)

Nos. 1409, 1410.

Patents ⇐113(6)—Concurrent decision of Patent Office tribunals affirmed, unless palpably wrong.

Where the question involved in interference proceedings is one of fact, as to which of the three tribunals of the Patent Office concurred, the decision of the Commissioner will be affirmed, unless the record reveals palpable error.

Appeal from the Commissioner of Patents.

Interference proceedings between Joseph A. Anglada, Fredellia H. Moyer, Dallas C. Carroll, and Richard S. Bryant. From a decision of the Commissioner of Patents, awarding priority to Moyer, Anglada and Bryant separately appeal. Affirmed.

In Case No. 1409:

Arthur W. Nelson, of Chicago, Ill., for appellant.

Charles S. Grindle and James A. Watson, both of Washington, D. C., and Bert M. Kent, of Cleveland, Ohio, for appellees.

In Case No. 1410:

Bert M. Kent, of Cleveland, Ohio, for appellant.

Charles S. Grindle and James A. Watson, both of Washington, D. C., and Arthur W. Nelson, of Chicago, Ill., for appellees.

SMYTH, Chief Justice. These appeals are from a decision of the Patent Office in an interference case relating to a locking device for

a demountable tire rim for automobiles. There are four interferants. Moyer was successful before each of the three tribunals of the Office. Anglada and Bryant appeal—Anglada against Moyer, Carroll, and Bryant; and Bryant against Carroll, Anglada, and Moyer.

The question involved is one of fact, and a careful study of the record fails to reveal palpable error on the part of the Commissioner. Therefore, following the rule announced in Valerius et al. v. Pfouts, 50 App. D. C. 394, 273 Fed. 358, this day decided, his decision in awarding priority to Moyer 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.

JENKS et al. v. GEIGER.

(Court of Appeals of District of Columbia. Submitted March 23, 1921. Decided May 2, 1921.)

No. 1420.

1. **Patents ⟸90(5)—Applicant first to conceive and first to file entitled to priority, in absence of actual reduction to practice.**
   The party to an interference proceeding, who was first to conceive and first to constructively reduce to practice by filing his application, is entitled to priority, where neither party claims actual reduction to practice.
2. **Patents ⟸90(6)—Original sketch of senior party to interference held to disclose invention in issue.**
   In an interference proceeding involving a side bearing for railway cars, where neither party claimed actual reduction to practice, the senior party's original sketch *held* to disclose the invention in issue, so as to entitle him to priority, where he was the first to conceive.

Appeal from a Decision of the Commissioner of Patents.

Interference proceeding between Charles D. Jenks and another and William A. Geiger. From a decision awarding priority to Geiger, the other parties appeal. Affirmed.

C. E. Mehlhope, of Chicago, Ill., for appellants.

George I. Haight and Joseph Harris, both of Chicago, Ill., and H. N. Low, of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. Appellants, Jenks and Perry, appeal from the decision of the Commissioner of Patents awarding priority of invention to appellee, Geiger, for an invention defined in the following count:

"In a side bearing for railway cars, the combination with a bolster and having an upper bearing surface, of a roller-carrying member having a bottom wall and vertically extending spaced side walls, said bottom wall being provided on its under side with a bearing surface co-operable with said first named bearing surface, an antifriction roller carried by said member and

disposed between said vertical side walls, said roller having journals supported by said side walls and rotatable about a relatively fixed axis, means for holding said member in operative relation with said bolster, said bearing surfaces permitting said member to tilt in a direction at right angles to the axis of rotation of said roller."

[1] Appellants filed their application March 15, 1915, and appellee filed November 18, 1916, a renewal of his original application filed October 22, 1914. Neither party claims actual reduction to practice. Appellee has been awarded June 27, 1914, as a date of conception and disclosure. This is earlier than any date claimed by appellants. Since appellee was the first to constructively reduce to practice by filing his application, he is the first to conceive and reduce to practice. Nothing appears in the record to impeach appellee's position in this respect.

[2] Appellants, however, contend that appellee's original sketch does not disclose the invention in issue. The side bearing, which supports the car, when in a swinging motion or rounding a curve, consists of a roller, with which the car comes in contact. This roller is supported by a member attached to the truck bolster. It must be so constructed that, when the car comes in contact with the roller, the member will tilt in a right-angular direction to the axis of rotation of the roller, so that the roller will receive the weight and friction of the car equally throughout its length. The tilting motion of the member adjusts the roller to properly contact with the car.

Appellee, in his application, discloses the member carrying the antifriction roller bolted to the truck bolster in such manner, it is contended, as will not admit of the tilting action. The drawing discloses the bolt holes larger than the bolts, and the under face of the heads curved, so as to permit of the tilting motion. It is argued that, since the bolts must be drawn tight to hold the parts firmly together, the friction would be too great to permit of the movement required. The count does not call for free movement, and we think the great weight of the car would force the slight tilt required to adjust the face of the roller to the under bearing of the car. The adjustment of the size of the bolt holes and the bolts to accomplish this result would require only mechanical skill.

We find nothing to warrant us in disturbing the concurrent decisions of the three tribunals of the Patent Office in awarding priority of invention to appellee, Geiger.

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.

Application of PRUDEN.

(Court of Appeals of District of Columbia. Submitted March 22, 1921. Decided May 2, 1921.)

No. 1419.

1. Patents ⟸62—Application for apparatus for mixing fuel with air held anticipated.
An application for patent for a device for mixing comminuted fuel with air, the claimed novelty of which was the introduction of the air in currents across the path of the fuel, so as to promote the mixing, *held* anticipated by other patents, which disclosed the same feature.

2. Patents ⟸20—Elongation of fuel-mixing chamber is not invention.
The fact that applicant for a patent for a device for mixing comminuted fuel and air shows an elongated mixing chamber, while that in the anticipating patent was short, does not establish invention.

Appeal from the Commissioner of Patents.

Application by Harry B. Pruden for a patent. From a decision of the Commissioner of Patents, denying the application on the ground of anticipation, the applicant appeals. Affirmed.

A. V. Cushman, of Washington, D. C., for appellant.

T. A. Hostetler, of Washington, D. C., for Commissioner of Patents.

VAN ORSDEL, Associate Justice. This appeal is from the refusal of the Commissioner of Patents to grant a patent upon a device which he describes as follows:

"The appellant's invention is a device designed for mixing comminuted fuel with air and conveying the same to a burner. Briefly described, it comprises an elongated mixing chamber, with perforations distributed longitudinally of the chamber, through which air under pressure is admitted from a surrounding chamber. The currents of air so admitted are directed substantially transversely of the mixing chamber, and in their passage across it they meet and intimately commingle with a jet of comminuted fuel which is being projected longitudinally of the chamber by an air blast from one end thereof to the other, where the burner is situated."

[1] The Commissioner found that the invention of appellant is anticipated by a number of patents. We have examined the references, and find the anticipation most complete in a patent to one Fogler, of December 14, 1915, and a patent to one Caracristi, of February 6, 1917.

Appellant contends that the distinction between his invention and the prior art consists in the induction of cross-currents of air, which mix the air and fuel so that a complete combustion takes place immediately upon the delivery of the fuel in the furnace. It is urged that in prior inventions the air was injected into the cylinder through which the fuel was driven longitudinally in the same direction with the fuel, and, instead of mixing with the fuel, it enveloped the fuel, and thus prevented combustion until it had passed from the cylinder a considerable distance into the furnace.

Appellant forces the air into the cylinder transversely, with the result that combustion takes place immediately when the fuel enters

the furnace. While the transverse injection of the air in the Fogler device is not so marked as in appellant's machine, the induction of the air is from a surrounding chamber into a nozzle-like mixing chamber, with considerable transverse direction, which, we think, would tend to mix the air and fuel for immediate combustion upon entering the furnace.

In the Caracristi device, the air jets are admitted from the air chamber, apparently in almost as transverse direction as in appellant's machine. This feature of appellant's invention, which is about all there is to it, is clearly anticipated by these two patents, as well as by other references cited, though in a less pronounced degree.

[2] Stress is laid upon the fact that appellant shows an elongated mixing chamber, while, for example, in Caracristi the chamber is short. Elongated chambers are not new in the art, as appears in a reference to a patent issued to one Martindale, December 31, 1912. The mere enlargement of the fuel-mixing cylinder, either in length or diameter, does not constitute invention. Edison et al. v. Alsen's American Portland Cement Works, 219 Fed. 895, 135 C. C. A. 559.

"If the act or improvement be the mere modification, variation, or carrying forward of the principle involved in a previous invention or discovery, a patent will be denied. No patent should issue, nor will it be valid if issued, for an improvement which is merely a new application of knowledge already possessed by those skilled in the art." In re Klemm, 21 App. D. C. 186, 190.

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.

HAY v. MALONE.

(Court of Appeals of District of Columbia. Submitted March 24, 1921. Decided May 2, 1921.)

No. 1422.

1. **Trade-marks and trade-names ⇐43—Single feature of mark, not used independently of other features, cannot be registered.**
On an application for registration of a trade-mark, consisting of an arbitrary name in connection with two portraits inclosed in a circle, opposed by the prior user of a trade-mark consisting of a different word similarly placed, the right of the applicant to register the word selected by him as a trade-mark need not be considered, where there was no proof that he had ever used it apart from the other features of the trade-mark, since there must be actual trade-mark use to entitle the owner to registration.

2. **Trade-marks and trade-names ⇐43—Opposition sustained, where prior user of similar mark shows injury would result from registration.**
Where the prior user of a trade-mark shows that she would be injured by the registration of applicant's trade-mark, because of the similarity to hers, the opposition to the registration should be sustained.

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

Appeal from the Commissioner of Patents.

Application by Clarence C. Hay for the registration of a trade-mark, opposed by Annie M. Malone, doing business under the style and name of Poro College. From a decision of the Commissioner of Patents, denying registration, the applicant appeals. Affirmed.

Peyton Gordon and Hugh M. Sterling, both of Washington, D. C., for appellant.

John D. Rippey and L. C. Kingsland, both of St. Louis, Mo., for appellee.

VAN ORSDEL, Associate Justice. This is a trade-mark opposition proceeding, brought under section 6 of the Trade-Mark Act of February 20, 1905 (Comp. St. § 9491), and involves the right of appellant Hay to register the words "Hay-Po" as a trade-mark for hair dressing. The following is an illustration of the mark as actually used in trade:

The mark of the opposer, Malone, consists of substantially the same portraits "Before" and "After," with the word "Poro" printed above, all inclosed within a circle. Opposer has established prior use of her mark.

[1] It is unnecessary to pass upon appellant's right to register the word "Hay-Po" alone, since it does not appear that he has ever used it in trade independent of the other features of the mark as above shown. There must be actual trade-mark use to entitle the owner to registration. Hence appellant must stand or fall upon the actual use of the mark.

In a former proceeding, appellant attempted to register the mark above illustrated with the "Before" and "After" features, and was successfully opposed by appellee. On this point, the Commissioner, in his opinion, said:

"An applicant should not be allowed to register one feature of his mark when it discloses other prominent and material features. Such practice would enable an applicant using a compound mark, when rejected on a previous compound mark, to select the feature not shown in the prior mark and register it, and thus evade the rejection, although actually using a mark that infringed the prior mark. This would evidently lead to intolerable results."

[2] We think appellee has clearly established that she would be injured by the registration of appellant's mark, and, where that fact is shown, the opposition should be sustained.

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.

RANSDALL v. JAHNS.

(Court of Appeals of District of Columbia. Submitted March 22, 1921. Decided May 2, 1921.)

No. 1416.

1. Patents ⇐112(4)—Senior applicant derives no benefit in interference from allowance while junior application was pending.
The senior applicant derives no benefit in interference proceedings from the granting to him of the patent, when the junior application was pending at the time the patent was granted.

2. Patents ⇐109—Claims taken from interfering application 20 months after application are in time.
The prior inventor does not lose his rights by delay in taking the claims in issue from the application of the other party for 20 months after that application was filed and 15 months after the prior inventor had knowledge thereof, since such claims were taken well within the 2-year period allowed by the rule, as construed by the Supreme Court.

3. Patents ⇐106(2)—Prior, but less efficient, disclosure of counts in issue, is sufficient.
A disclosure of the counts in issue by the prior inventor is sufficient to sustain his rights in interference proceedings, though his disclosure was less efficient than that of the subsequent inventor.

Appeal from the Commissioner of Patents.

Interference proceeding between Harry W. Ransdall and William H. Jahns. From a decision of the Commissioner of Patents in favor of Jahns, Ransdall appeals. Affirmed.

E. W. Bradford, of Washington, D. C., for appellant.

Jos. H. Milans and Calvin T. Milans, both of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. The invention in interference relates to leak-proof piston rings, described in the opinion of the Board of Examiners in Chief as follows:

"The invention at issue relates to leak-proof piston rings and includes an inner slip expander ring having outer inclined faces and being of a width to fill the opening of the groove in a piston. Outer triangular split metal packing rings fit the inclined faces of the inner ring and are of thin cross-section, so as to be forced into contact with the wall of the cylinder by the expander ring."

[1] Appellant, Ransdall, filed his application December 31, 1914, on which a patent was granted April 4, 1916. Appellee, Jahns, filed his application May 10, 1915. Appellant, the senior party, derives no benefit in this proceeding from the granting of the patent, since, when it was granted, the Jahns application was pending.

[2] The finding below that Jahns conceived the invention and reduced it to practice before Ransdall came into the field is clearly supported by the evidence. The claims in issue were taken by Jahns from the Ransdall patent almost 20 months after the patent was issued, and 15 months after Jahns admits that he had notice of the patent. It was claimed below that Jahns should be held estopped to contest the in-

terference for failure to make the claims of the patent within the time limited by the rule controlling this procedure in the Patent Office. But Jahns was well within the 2-year period, the limitation recently fixed by the construction placed upon the rule in Chapman v. Wintroath, 252 U. S. 126, 40 Sup. Ct. 234, 64 L. Ed. 491.

[3] Ransdall sought, by a belated motion to dissolve, to challenge Jahn's right to make the claims, on the ground that they did not read upon his original disclosure. Notwithstanding the delay in filing the motion, which technically disposes of the contention, we have investigated this point, and conclude upon the testimony that while, perhaps, the Ransdall device was more efficient, nevertheless the Jahns rings, constructed in compliance with his disclosure, were operative, and came within the counts of the issue. This is all that is required, since we are not basing our opinion upon a competitive test of efficiency. The present claims read upon Jahns' original disclosure as set forth in his application, and this entitles him to priority.

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.

WALKER v. GISH.

(Court of Appeals of District of Columbia. Submitted April 4, 1921. Decided May 2, 1921.)

No. 3482.

1. **Appeal and error ⇐1099(8), 1195(3)—Ruling on former appeal is law of the case for both trial and appellate court.**
   In a suit to recover compensation for the use of a party wall, the decision on a former appeal that it was for the jury to determine whether defendant had used the party wall, and, if so, what the reasonable value of the part used was, is the law of the case, not only for the trial court, but for the Court of Appeals.

2. **Party walls ⇐9(1)—Purchaser of lot succeeds to builder's right to compensation from adjoining owner subsequently using wall.**
   The purchaser of a lot with a party wall on it, in which the adjoining owner has not exercised his right, succeeds to the rights of the builder, and is entitled to compensation when such wall is used by the adjoining owner.

Appeal from Supreme Court of the District of Columbia.

Action by Genevieve K. Gish against Ernest G. Walker. Judgment for plaintiff, and defendant appeals. Affirmed.

S. Herbert Giesy, of Washington, D. C., for appellant.

Henry F. Woodard, of Washington, D. C., for appellee.

ROBB, Associate Justice. Appeal from a judgment for the plaintiff, appellee here, in the Supreme Court of the District, in a suit to recover compensation for the use of a party wall.

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[1] The bill of exceptions recites:

"The court charged the jury in accordance with the opinion of the Court of Appeals in the case of Genevieve K. Gish v. Ernest G. Walker, 48 App. D. C. 42, namely, that the jury should determine whether there had been a use of the party wall by the defendant, and, if they determined that issue in the affirmative, that they should then ascertain the reasonable value of such part of the party wall as was used; that, if they found that the party wall was not used, their verdict should be for the defendant."

The former decision has become the settled law of the case, "not only for the trial court, but for this court also." Warner v. Grayson, 24 App. D. C. 55, 57; Thompson v. Maxwell Land-Grant Co., 168 U. S. 451, 18 Sup. Ct. 121, 42 L. Ed. 539.

[2] It is contended, however, that in the prior appeal it did not appear that the builder of this party wall was a predecessor in title to plaintiff below, and hence that the plaintiff was without right to bring suit. In Eberly v. Behrend, 20 D. C. 215, and Halpine v. Barr, 21 D. C. 331, it was ruled that the purchaser of a lot with a party wall on it, in which the adjoining owner has not exercised his right, succeeds to the rights of the builder, and is entitled to compensation when such wall is used by the adjoining owner. There is nothing inconsistent with the rule thus announced in Fowler v. Koehler, 43 App. D. C. 349, wherein we held that the building owner might reserve to himself, when he conveyed his lot, the right to compensation for the use of the party wall.

We are not disposed to disturb the rule that has been in force in this District for almost 30 years, and, there being no reservation in appellant's deed, it follows that the judgment must be affirmed, with costs.

Affirmed.

BEECHNUT CEREAL CO. v. BEECH-NUT PACKING CO.

(Court of Appeals of District of Columbia. Submitted January 16, 1920. Decided May 2, 1921.)

No. 1283.

Trade-marks and trade-names ⊜43—Substantial part of corporate name of existing corporation cannot be registered.

"Beechnut," as a trade-mark for cereal breakfast food, was not entitled to registration, on opposition by the Beech-Nut Packing Company; it being a substantial part of the corporate name of the opposing company, which company was organized long prior to the applicant's entry into the field.

Appeal from the Commissioner of Patents.

Application by the Beechnut Cereal Company for the registration of a trade-mark, opposed by the Beech-Nut Packing Company. From a decision of the Patent Office, sustaining the opposition, applicant appeals. Affirmed.

Vernon E. West, of Washington, D. C., and S. W. Banning, of Chicago, Ill., for appellant.

Joseph H. Milans and Calvin T. Milans, both of Washington, D. C., for appellee.

PER CURIAM. Appeal from a decision of the Patent Office sustaining the opposition of the Beech-Nut Packing Company, appellee here, to the registration by the appellant of the term "Beechnut" as a trade-mark for cereal breakfast foods.

"Beech-Nut" being a substantial part of the corporate name of the appellee company, which was organized long prior to appellant's entry into the field, the case is ruled by prior decisions of this court. Mansfield Tire & Rubber Co. v. Ford Motor Co., 44 App. D. C. 205; In re United Drug Co., 44 App. D. C. 209; Burrell v. Simplex Electric Heating Co., 44 App. D. C. 452; Howard Co. v. Baldwin Co., 48 App. D. C. 437.

The decision is affirmed.

In re REID BROS.

(Court of Appeals of District of Columbia. Submitted January 13, 1920. Decided May 2, 1921.)

No. 1273.

Trade-marks and trade-names ⇐3(5)—"Efficiency" is descriptive word.

The word "efficiency," as a trade-mark for hot-water bottles and other hospital supplies, is more descriptive than suggestive, and therefore not registerable as a trade-mark.

Appeal from the Commissioner of Patents.

Application by Reid Bros. for registration of a trade-mark. From a decision of the Patent Office refusing registration, the applicant appeals. Affirmed.

H. C. Robb, of Washington, D. C., for appellant.

T. A. Hostetler, of Washington, D. C., for Commissioner of Patents.

PER CURIAM. Appeal from a decision of the Patent Office refusing to register as a trade-mark for hot-water bottles, ice bags, and certain other hospital supplies, a shield bearing the word "Efficiency" in ordinary block type; the ground of the decision being that the mark is descriptive.

We are constrained to hold that this case is controlled by our decision in Re Crosby Steam Gage & Valve Co., 47 App. D. C. 382, in which it was ruled that the words "High Efficiency" were not registerable as a trade-mark for safety relief valves, because "more descriptive than suggestive."

Accordingly the decision is affirmed.

UNITED VERDE EXTENSION MINING CO. v. KOSO.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1921. Rehearing Denied June 6, 1921.)

No. 3580.

1. **Master and servant 289(34)—Evidence held to warrant submission of miner's negligence to jury.**
In an action for injuries to a miner resulting from a fall of rock on him, plaintiff's testimony that the rock fell from the roof which was too high for him to reach with his pick, and that he was shoveling waste rock when the accident occurred, is sufficient to warrant the jury in finding that the injury was not caused by his negligence, so that employer was liable under the Arizona Employers' Liability Act (Civ. Code 1913, par. 3154), imposing liability unless the servant was negligent, which is always a question for the jury under paragraph 3159, and Const. Ariz. art. 18, § 5.

2. **Evidence ⟸364—Mortality tables admissible notwithstanding injured person was in hazardous occupation.**
Where plaintiff claimed permanent injuries, standard mortality tables were admissible in evidence as tending to establish his expectancy of life, though such tables were prepared for average persons, and plaintiff was engaged in the hazardous occupation of mining.

3. **Damages ⟸216(5)—Charge on effect of mortality tables held correct.**
In an action for personal injuries to a miner, where the evidence was conflicting as to whether plaintiff's injuries were permanent, a charge that mortality tables were admitted to aid the jury to determine the probable duration of plaintiff's life, which was an essential element if the inquiry was permanent, that the jury should consider that plaintiff was engaged in a more hazardous employment than the average man, with reference to whom the tables were made up, that, while they were not an absolute guide, they might be considered in connection with all the other evidence in the case, but that, if the jury concluded the injuries were temporary, and not permanent, then the tables should not be considered at all, was correct and sufficient, in the absence of requests for more explicit instructions.

4. **Appeal and error ⟸273(7)—Exception is necessary to review of charge on damages.**
Asserted error by the court in its instruction as to the elements of damages cannot be considered, where no exception was taken to the part of the charge covering that subject.

5. **Appeal and error ⟸1004(3)—Denial of new trial for excessive damages not reviewed.**
The ruling of the trial court in denying a motion for a new trial, based on the ground that the amount of the verdict was excessive, will not be disturbed by the Circuit Court of Appeals.

6. **Appeal and error ⟸501(1)—Overruling of motion to require security for costs not reviewed, in absence of exception in record.**
Error assigned to the overruling of defendant's motion that plaintiff be required to give security for costs presents no question for decision, where the record fails to show that defendant saved an exception to that ruling.

7. **Appeal and error ⟸1040(1)—Failure to rule on demurrer to whole complaint held not prejudicial after election.**
Where defendant demurred to the whole complaint, which contained two counts, one based on the state Employers' Liability Law and another upon the common law, and also filed a general demurrer to the first

count, the failure of the court to rule on the demurrer to the whole complaint was not prejudicial to defendant, where the demurrer to the first count covered the main points of the other demurrer, and plaintiff, under order of the court elected to stand on the first count and dismiss the second count, especially where defendant made no request for a ruling on the demurrer to the whole complaint before the trial, and reserved no exception to the failure of the court to rule.

8. **Limitation of actions ⊂=118(1)—Delay in ruling on demurrers does not defeat right to prosecute action.**

Under Employers' Liability Act (Civ. Code Ariz. 1913, par. 3162), and Civ. Code Ariz. 1913, par. 710, requiring an action for personal injuries to be commenced and prosecuted within two years after the cause of action shall have accrued, an action for personal injuries, begun within the two years, is not barred because the court's delay in ruling on the demurrers postponed the trial until after the two years had elapsed.

In Error to the District Court of the United States for the District of Arizona; William H. Sawtelle, Judge.

Action by Mike Koso against the United Verde Extension Mining Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Mike Koso, defendant in error here, brought action under the Arizona Employers' Liability Law (Civ. Code 1913, §§ 3153–3179) and recovered judgment against the United Verde Extension Mining Company for injuries received during his employment in the mine of that company. The only testimony offered by Koso as to the accident was his own. He said that he had had 18 years' experience in mining; that he went to work for the defendant on the night of December 14, 1917, and was hurt about 6:30 the next morning; that he was shoveling into a mine car about 15 feet from the face of the drift, on the 1,200-foot level, in which he had been told to work by the foreman; that he was bending to get a shovelful when rock fell from the roof and knocked him down; that he lay there for perhaps 15 minutes or half an hour; that he got up and walked against the wall into a station and lay down; that after about an hour they put him on the cage and took him to the dry house, where they pulled off his clothes and put on clean ones, and tried to wash his neck and back which were full of rocks; that he was then sent to the hospital, where he remained about 20 days. On cross-examination he said that he did not know the height of the roof of the tunnel at the place where he was working, but he could not reach it with a pick; that he was working in waste, and did not know what kind of a tunnel it was; that where the rock fell it was not timbered, and that he saw no timbering in the tunnel, though there may have been some back 50 feet; that the rock that hit him was soft, and fell from both sides. Plaintiff then introduced the evidence of a physician as to physical injuries.

The only testimony as to the accident which defendant presented was also very brief. The man who had been jigger boss for the mining company when Koso was hurt said: That he had charge of five levels, and worked from 11:30 p. m. to 7:30 a. m.; that he went with Koso to his place of work on the 1,200-foot level, which was a ventilation drift 7 feet wide and 5 feet 4 inches across the top; that Koso was working at the face of the drift with two other men; that the drift was timbered to within less than 3 feet of the face, and that there was no room for another set; that the roof was 7 feet 10 inches high, just within reach of a pick, and the timbers came up to within 2 inches of the roof, with the lagging placed on top of them; that there were no open spaces in the lagging in timbers; that he instructed Koso to pick down the loose rock, even if it took him the whole shift, and then to go ahead and muck; that Koso said he was a miner; that it was 500 or 600 feet from the face where he was working back to the station; that he was making his rounds and saw Koso coming out, and that Koso told him he had been hurt;

that afterwards he examined the place where Koso was hurt, and found about a bushel of fine dirt, with no lumps as big as his fist; that it was waste, soft material; that the roof was in good condition, just a little hole where the stuff had fallen from. On cross-examination the witness said that the small hole in the roof was made by the bushel of rock; that the earth was perfectly even, and that the hole was not there when he put Koso to work; that when he met Koso he did not complain of pain or say he was unable to walk. Several physicians testified in defendant's behalf.

At the conclusion of all the evidence defendant moved for a directed verdict. The motion was denied, and exception was saved. The court submitted the case to the jury, and verdict was found for the plaintiff.

Favour & Cornick, of Prescott, Ariz., for plaintiff in error.

F. C. Struckmeyer and W. L. Barnum, both of Phœnix, Ariz., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] It is argued that there was no evidence tending to show that plaintiff was not negligent, or that his negligence did not cause the accident. The Employers' Liability Act of Arizona (chapter 6, title 14, Revised Statutes of Arizona of 1913, § 3154) provides that, to protect the safey of an employee in mining, the employer shall be liable for the injury—

"caused by any accident due to a condition or conditions of such occupation, * * * in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured."

By section 3159:

"The question whether the employee may have been guilty of contributory negligence, or has assumed the risk, shall be a question of fact and shall at all times, regardless of the state of the evidence relating thereto, be left to the jury, as provided in section 5 of article XVIII of the state Constitution: Provided, however, * * * the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

Section 5, art. 18, of the Arizona Constitution is as follows:

"Sec. 5. The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury."

The statutes cited were considered in Calumet & Arizona Min. Co. v. Chambers, 20 Ariz. 54, 176 Pac. 839, where the court held that it was incumbent upon one who relies upon the Employers' Liability Law to prove that while engaged in the performance of duties required of him he was injured, and that the injuries were caused by an accident due to a condition of such employment, and not caused by the negligence of plaintiff.

Plaintiff's evidence met the obligation imposed. Assuming that he was telling the truth, he was on his first shift, shoveling waste from the floor where he was told to work. The place was about 15 feet from the face of the drift; he did not know the height of the tunnel, except that the top was too high for him to reach with his pick; there was no timbering at the point above him, and while bending over to get a shovel

full of waste there was a cave-in from above, waste fell upon him, and he was injured. If credible, this evidence negatived any reasonable deduction that the accident was caused by negligence on the part of the plaintiff, and the court correctly held that the case was one for submission to the jury under appropriate instructions. If it had appeared that it was part of the duty of Koso to pick down the loose rock, as well as to collect it after it was down, and that he was injured by the falling of the rock which he picked, it might be argued with much force that he contributed to the injury he suffered. But it is not reasonably to be inferred from the testimony of Koso that it was his duty to do more than to shovel waste after it came from the face of the tunnel. It is true that defendant's witness said that Koso was told to pick down loose rock and then go ahead and "muck"; but, as different conclusions could reasonably be drawn from the evidence, the ascertainment of the truth was for the jury.

[2] A physician testified that he examined Koso just before the trial and found a hernia starting on the right side, loss of half the power of his right hand, and fractures of lumbar vertebra and marks of injury to the shoulder blade. The testimony covered some injuries not included in the complaint, especially the hernia and loss of power in the hand; but no objection at all was made to the testimony of the doctor. After the physician testified, plaintiff offered in evidence the American Mortality Tables. Defendant objected, on the ground that, in the absence of proof, the tables do not apply to miners engaged in mining, as the tables are based on the law of averages, and without some explanation the mortality of men engaged in such hazardous work would not fall within the law of averages. In view of the fact that there was evidence tending to show that the injuries which plaintiff said he had received were permanent in character, we are of opinion that it was within the sound discretion of the court to permit the introduction of the mortality tables, notwithstanding the fact that the plaintiff was engaged in a hazardous calling. Wilkins v. Flint, 128 Mich. 262, 87 N. W. 195; Richmond R. R. Co. v. Garner, 91 Ga. 27, 16 S. E. 110; Tweedy v. Inland Brewing Co., 75 Wash. 25, 134 Pac. 468.

[3] The court instructed the jury that the tables were admitted in order to enable them to determine the probable duration of the plaintiff's life, and that in actions for personal injuries, if the injury is of a permanent character, in estimating damages, expectancy of life is an essential element, and that to show such expectancy standard mortality tables are admissible; that it was proper that the jury should consider the nature of the employment of the person injured, and that he was engaged in a more hazardous employment than the average men with reference to whom the tables were made up; and that, while the tables were not an absolute guide for the judgment of the jury, they might, however, be considered in connection with all the other evidence in the case. The court carefully charged that consideration of the mortality tables was only proper if the jury reached the conclusion that the injuries received by Koso were permanent, and that if they concluded that his injuries were "temporary, and not permanent," then

the tables as to his expectancy of life should not be considered at all. Defendant below made no requests for more explicit instructions with respect to the mortality tables, and we find no error in the charge explaining their relation to the issues. Vicksburg R. Co. v. Putnam, 118 U. S. 545, 7 Sup. Ct. 1, 30 L. Ed. 257; L. & N. R. Co. v. Burns, 242 Fed. 411, 155 C. C. A. 187.

[4] It is said the court erred in its instruction as to what elements could be taken into consideration by the jury in considering what damages, if any, plaintiff might recover. But, no exception having been taken to the part of the charge covering that subject, defendant cannot complain that it has been prejudiced. We may say, however, that upon the question of damages the instructions show that the court told the jury explicitly that they should consider whether the injuries, if any, were permanent, to what extent, if any, plaintiff had suffered, whether he had been disabled or incapacitated to earn a living at all, the age of plaintiff, what his occupation and income were, and whether his employment would have continued.

[5] The point that the amount of the verdict was excessive was presented on motion for new trial, which was overruled by the court. This court will not disturb the ruling. Copper River & N. W. R. Co. v. Reeder, 211 Fed. 280, 127 C. C. A. 648.

[6] Error is assigned because the court overruled defendant's motion that plaintiff be required to give security for costs. The affidavit in support of the motion was made by the claim agent of the defendant, who stated that to the best of his knowledge and belief, "and so far as he has been able to ascertain, the plaintiff, Mike Koso, is not the owner of any property out of which costs could be met by execution sale." Plaintiff's counsel objected to the motion, on the ground that the application did not comply with the laws of the state of Arizona, and did not show that the plaintiff was not the owner of property out of which costs could be met by execution sale. The statute (section 643, c. 24, R. S. of Arizona) provides that:

"At any time before trial, on motion of defendant, supported by affidavit showing that the plaintiff is a nonresident of the state, or that the plaintiff is not the owner of property out of which the costs could be made by execution sale, the court shall order the plaintiff to give security for the costs; and if the plaintiff fails so to do within ten days next after the order is made, the case shall stand dismissed."

Inasmuch as the record fails to show that the defendant saved an exception to the ruling of the court, there is no question for decision. It would seem, however, that an affidavit "showing" that plaintiff is not the owner of property out of which the costs could be made ought to contain more than the mere statement that, so far as affiant is able to ascertain, plaintiff is not the owner of any property.

[7] The complaint, when filed, contained two counts, the first based upon the Employers' Liability Law of Arizona, and another founded upon the common law. Defendant demurred to the "whole complaint," upon the ground of the improper joinder of two several causes of action, and also filed a general demurrer to the first cause of action, on the grounds that no negligence was pleaded and that the constitutional

rights of defendant were being invaded without due process of law. A few days before the trial, March 22, 1920, by order of court, plaintiff elected to proceed under the Employers' Liability Act, and dismissed the other cause of action, to which action defendant excepted. Defendant argues that the court erred in not ruling upon the demurrer to the "whole complaint." Inasmuch as the ruling upon the demurrer to the first cause covered the main points, no prejudice could have resulted. Moreover, defendant made no request of the court for a ruling before it proceeded to trial, and reserved no exception to the failure of the court to rule.

[8] It is said that action under the Employers' Liability Act (section 3162) cannot be "maintained" unless commenced within two years from the day the cause of action accrued, and that section 710 of the statutes of Arizona provides that an action for personal injuries shall be "commenced and prosecuted" within two years after the cause of action shall have accrued. As the cause of action in the present instance accrued in December, 1917, and trial was not had until March, 1920, we are asked to hold that the limitation of the statute has been rendered ineffectual.

We cannot agree with that position. Plaintiff below, having commenced his action within two years after the cause accrued, ought not to be denied a right to proceed with it merely because the court delayed ruling upon the demurrers or failed to make an order of election until more than two years passed after the accrual. After careful examination of the record, we find no prejudicial error, and must affirm the judgment.

Affirmed.

F. A. MFG. CO., Inc., v. HAYDEN & CLEMONS, Inc.

(Circuit Court of Appeals, First Circuit. April 26, 1921. Rehearing Denied June 3, 1921.)

No. 1499.

1. **Abatement and revival ⇐41, 48—Cause of action abates at law, but not in equity, on death or assignment of interest.**
   At common law and apart from statute, on the death of a sole party plaintiff or the assignment of his entire interest in the subject-matter of a suit, the cause of action abated or ceased to exist; but in equity it did not abate, if it was of a nature that survived, but was merely suspended until the representative of the deceased party or the purchaser became a party to the litigation.

2. **Abatement and revival ⇐68—Doctrine of abatement without application to judgment or decree.**
   A cause of action ceases to exist on being merged in a judgment or decree, and so long as the decree remains in force the doctrine of abatement is without application.

3. **Appeal and error ⇐330(1)—Purchaser of patent and of causes of action for infringement entitled to appeal from decree adverse to patentee.**
   Where, after a decree for defendant in a suit for infringement of a patent, the patentee sold the patent and assigned to the purchaser all causes of action or claims for infringement, with a right to sue in the

name of the patentee, the purchaser, by its purchase, and by filing a sworn petition for an appeal and an appeal bond, and the allowance of each, became privy to the record as the real party in interest, and was entitled to appeal.

4. **Appeal and error ⇐330(1)—Appellate court may inquire into purchaser's right to appeal, or direct inquiry by District Court.**
If one claiming the right to appeal from a decree for defendant in a patent infringement suit as a purchaser of the patent and all rights of action for infringement thereof is not the real owner of the patent and of the right to appeal, or purchased such rights for an ulterior purpose, with a view to carrying on vexatious litigation, the Circuit Court of Appeals has power to inquire into such matters, or to direct an inquiry to be made in the District Court.

On Petition for Rehearing.

5. **Appeal and error ⇐330(1)—One taking assignment after final decree may appeal.**
One taking an assignment of a cause of action after final decree may appeal in his own name, on making himself a party by appropriate application, or in the name of his ancestor without being made a party; he being bound by all that was done before the assignment.

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

Suit by the Brockton Heel Company, Incorporated, against Hayden & Clemons, Incorporated. From a decree for defendant, the F. A. Manufacturing Company, Incorporated, assignee of the Brockton Heel Company, appeals. On motion to dismiss the appeal. Motion denied.

William Quinby, of Boston, Mass., for appellant.

Odin Roberts and Roberts, Roberts & Cushman, all of Boston, Mass., for appellee.

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

BINGHAM, Circuit Judge. In a suit brought by the Brockton Heel Company, Incorporated, against Hayden & Clemons, Incorporated, for infringement of letters patent No. 14,476, in the District Court for Massachusetts, a decree was entered for the defendant. After the decree was entered the F. A. Manufacturing Company, Incorporated, purchased from the Brockton Company the patent, and took assignments of it and of "all causes of action or claims for damages or profits arisen or accrued by reason of any infringement of said letters patent prior to the date of said assignments," with a right "to sue for and collect said damages and profits in the name of the Brockton Heel Company, Incorporated." Having thus obtained the right and title of the plaintiff in suit, the Manufacturing Company, within the statutory period (26 Stat. at Large, 829, § 11), presented a petition for an appeal in the District Court, in which it alleged the purchase of the patent, an assignment of all causes of action or claims for damages or profits which had accrued, a right to sue and collect the same in the name of the Brockton Heel Company, Incorporated, and prayed

that it be allowed to file and prosecute an appeal from the decree in the name of the Brockton Heel Company, Incorporated. The Manufacturing Company signed the petition by its vice president, who made oath to the truth of the facts therein alleged and that the copies of the assignments annexed to the petition were correct and exact copies of the original assignments. The judge sitting in the District Court allowed the petition as of the date of its filing. Assignments of error and an appeal bond were filed; the latter also being approved by the court.

After the case was docketed in this court the defendant, Hayden & Clemons, Incorporated, appeared specially and for the sole purpose of filing a motion to dismiss the appeal, assigning the following reasons: (1) That it appears, by admissions contained in the petition for appeal, that the plaintiff, Brockton Heel Company, Incorporated, by which the original bill of complaint was filed in the District Court of the United States for the District of Massachusetts (Equity No. 906), parted with its entire interest in the subject-matter of the suit after entry of the final decree therein, and as to the Brockton Heel Company, Incorporated, the suit abated; (2) that said Brockton Heel Company, Incorporated, has taken no appeal; (3) that the petitioner named in the petition for appeal, viz., the F. A. Manufacturing Company, Incorporated, is a stranger to the cause, and had, at the time the petition was filed, no standing as a party, and no right of appeal; (4) that there is no lawful appeal before this court; and (5) that the foregoing reasons appear of record.

The defendant by its motion in effect says that this court is without jurisdiction over the cause, for the reason that the facts disclosed by the record show that no appeal has been taken to this court by one entitled to prosecute an appeal from the decree of the District Court.

In Ex parte Cutting, 94 U. S. 14, 22 (24 L. Ed. 49), it is said that "only parties, or those who represent them, can appeal;" and in Bayard v. Lombard, 9 How. 530, 551 (13 L. Ed. 245), that "it is a well-settled maxim of the law that 'no person can bring a writ of error to reverse a judgment who is not a party or privy to the record.'"

In Guion v. Liverpool, London & Globe Ins. Co., 109 U. S. 173, 3 Sup. Ct. 108, 27 L. Ed. 895, an appeal was dismissed for want of jurisdiction, the special reasons assigned being: (1) That the appellant was not a party to the suit in which the decree was entered, as his petition asking to be admitted as a party had been denied; and (2) that, if he were a party, he had not perfected his appeal by giving bond and security for costs.

In Ex parte Cockcroft, 104 U. S. 578, 26 L. Ed. 856, it was held that, inasmuch as the petitioner was not made a party to the suit, either by an express order of the court or by being treated as such, he could not prosecute an appeal.

In Fitzgerald v. Evans, 49 Fed. 426, 428, 1 C. C. A. 307, the appeal was dismissed, as the record before the court did not show that Fitzgerald had any interest in the subject-matter of the suit. It is there said that, if Fitzgerald had become interested in the proceeding by purchase or otherwise and desired to be heard in opposition to the

allowance and payment of the claim appealed from, "he should, by petition, have intervened in the cause, and have obtained recognition as a party in interest."

In Elwell v. Fosdick, 134 U. S. 500, 513, 10 Sup. Ct. 598, 33 L. Ed. 998, the bank, the holder of $14,000 out of $955,000 of bonds secured by a mortgage, and whose petition to intervene and become a party to the suit had been denied, was permitted to appeal in the name of Elwell, the trustee named in the mortgage, from a decree which it was claimed affected its interests. It appeared from evidence dehors the record that at some time before the appeal was taken the trustee had executed a release of his right to appeal from the decree, and that the court below had found that there was no proof showing that the trustee had not acted in good faith in the prosecution of the suit. It was held that, inasmuch as the bank was not a party to the suit, "its right to appeal depended entirely upon the action of the trustee," and that, having been allowed to prosecute the appeal in the name of the trustee, the bank was "bound by all the preceding acts of the trustee, done in good faith"; that "on the facts of the case the appeal must be considered as the appeal of the trustee, and as barred by his release executed long before the appeal was granted."

Bowden v. Johnson, 107 U. S. 251, 264, 2 Sup. Ct. 246, 27 L. Ed. 386, was a suit brought by Bowden, as receiver of a national bank, to charge the defendant with individual liability as a stockholder under section 12 of the Act of June 3, 1864 c. 106 (13 Stat. 99). In that case the court said:

"In June, 1878, Orson Adams was appointed receiver of the bank, in place of Bowden, the plaintiff. The decree of the Circuit Court was not made till January, 1879. The appeal to this court was taken in the name of Bowden; Adams not having been substituted as plaintiff. Adams became surety in the appeal bond, and thus treated the decree as valid and adopted the appeal. Adams now moves to be substituted as plaintiff and appellant in place of Bowden, without prejudice to the proceedings heretofore had. The appellees and their counsel first heard of the appointment of Adams from the papers served on the motion for substitution, and the appellees now move to dismiss the appeal, on the ground that none was ever lawfully taken. We think that the motion of Adams should be granted, and that of the appellees denied. Adams prosecuted the appeal in the name of Bowden, who was and is in life, and had a representative capacity. The power of amendment to this extent is authorized by section 954 of the Revised Statutes. It is of the same character as that exercised by this court in Gates v. Goodloe, where a writ of error was sued out by two bankrupts after their discharge in bankruptcy, and this court, on a motion to dismiss the writ, and a counter motion by the assignee in bankruptcy to be substituted as the plaintiff in error, denied the former motion and granted the latter. 101 U. S. 612."

[1] At common law and apart from statute, upon the death of a sole party plaintiff or the assignment of his entire interest in the subject-matter of a suit, the cause of action abated; that is, it ceased to exist. 1 Ruling Case Law, p. 20, § 11. In equity, however, it did not abate, if it was of a nature that survived but was merely suspended until the representative of the deceased party or the purchaser became a party to the litigation. Brown v. Fletcher, 146 Mich. 401, 109 N. W. 686, 15 L. R. A. (N. S.) 632, 123 Am. St. Rep. 233; 1 Ruling Case Law, p. 20, 10; Story's Eq. Pl. § 354.

[2, 3] But we have here no question of abatement. A cause of action ceases to exist on being merged in a judgment or decree, and so long as the judgment or decree remains in force the doctrine of abatement is without application (1 Ruling Case Law, p. 38, § 35); and the real question is whether the Manufacturing Company, by purchasing the patent and the right to prosecute the appeal, and by filing the sworn petition for appeal and the bond, and the allowance of each, became privy to the record as the real party in interest and entitled to appeal. We think that it did, and that to hold otherwise would be to resort to technicalities that are not justified, that the appeal would have to be dismissed, and that the probable result would be to preclude the Manufacturing Company from ever prosecuting an appeal as the time within which it could be taken has long since passed.

[4] If the Manufacturing Company is not the real owner of the patent, and of the right to prosecute the appeal, or purchased the right for an ulterior purpose, with a view to carrying on vexatious litigation, this court is not without power to make inquiry into such matters itself (Dakota County v. Glidden, 113 U. S. 222, 226, 5 Sup. Ct. 428, 28 L. Ed. 981; American Wood Paper Co. v. Heft, 131 U. S. Appendix, p. xcii; Board of Liquidation v. Louisville, 109 U. S. 221, 226, 3 Sup. Ct. 144, 27 L. Ed. 916; Bowden v. Johnson, supra; Ridge v. Manker, 132 Fed. 599, 67 C. C. A. 596; Lord v. Veazie, 8 How. 251, 12 L. Ed. 1067), or to direct an inquiry to be made in the District Court (United States v. Hopewell [First Circuit] 51 Fed. 798, 800, 2 C. C. A. 510; Fred Macey Co. v. Macey, 135 Fed. 725, 729, 68 C. C. A. 363; Fitchburg R. Co. v. Nichols, 85 Fed. 869, 29 C. C. A. 464).

Entertaining these views, we think the motion to dismiss must be denied. Washington County v. Durant, 131 U. S. Appendix, lxxx.

If, however, the defendant desires to contest the validity of the assignments, or the purpose for which they were procured, it may do so by presenting an application looking to that end, and this court will then determine whether it will hear the questions thus raised, or retain the case and send them to the District Court for decision.

The motion to dismiss the appeal is denied.

On Petition for Rehearing.

PER CURIAM. [5] As pointed out in our previous decision of April 26, 1921, no question of abatement is presented, as, at the time the assignment was made to the Manufacturing Company, the cause of action had merged in a decree. In this respect the case does not stand differently from one where a defendant pendente lite has assigned his interest in the litigation. In such a case the assignment "does not necessarily defeat the suit," for the assignee of a defendant, pendente lite, "is bound by all that is done, whether a party by name or not." Ex parte Railroad Co., 95 U. S. 221, 226, 24 L. Ed. 355. In that case, in speaking of an assignment by a defendant and the rights of the assignee in pending litigation, the court said:

"The assignee may, at his own election, come in by an appropriate application, and make himself a party, so as to assume the burden of the litigation in his own name, or he may act in the name of his assignor. A pendente lite

assignment carries with it an implied license by the assignor for the use of his name in the cause by the assignee to protect the rights assigned. Of this, the plaintiffs in the action cannot complain, because the assignee is bound by all that is done, whether a party by name or not."

As an assignment by a defendant pendente lite does not defeat the action, and the assignee is bound by all that is done, whether he is a party by name or not, and may prosecute the defense in the name of the assignor, there would seem to be no reason, in the case of an assignment by a plaintiff after a final decree, there being then no question of abatement and the assignee being bound by the decree as well as the assignor, why the assignee of a plaintiff may not prosecute an appeal in the name of the assignor. And as the assignee in either case, under the circumstances here stated, may make himself a party by an appropriate application, or may act in the name of his assignor without being made a party, it would seem to be merely formal which method is adopted, as in such case he is bound by the decree, and the defendant cannot be harmed.

If the assignor, the Brockton Company, had itself prosecuted the appeal, instead of the appeal having been prosecuted in its name by the Manufacturing Company, and the defendant had moved to dismiss in this court on the ground that the assignor had parted with its entire interest in the patent and its rights or obligations under the decree, there would seem to be no question but that the court might receive evidence dehors the record for the purpose of ascertaining whether it was being imposed upon or not, and if it appeared that it was not, and that the assignor was prosecuting the suit for the benefit of the assignee, might proceed to determine the cause on its merits. And if this is true, we fail to see wherein the court may not exercise a like power, the appeal having been taken by the assignee in the name of the assignor.

The defendant, in its motion to dismiss and in its present motion for a rehearing, takes inconsistent positions. In the former it asserts that it appears from the record that the Brockton Company has assigned its entire interest in the decree to the Manufacturing Company, while in the latter it asserts that there is nothing in the record which shows that the Manufacturing Company has by assignment acquired the interest of the Brockton Company in the benefits and burdens of the decree, and therefore cannot appeal in the name of the Brockton Company. Either one or the other of these positions must be correct, and we are of the opinion that it is the former.

We reassert the position taken in our former opinion that the defendant may present affidavits, if it desires, asserting that the interposition of the Manufacturing Company is fictitious; that is, that it has no valid assignment, or, if it has a valid assignment, that it was procured for the sole purpose of protracting the litigation and is vexatious. It must be the inherent right of all courts to consider such a question.

The motion for rehearing is denied.

KNAPP v. WILL & BAUMER CO.

(Circuit Court of Appeals, Second Circuit. March 9, 1921.)

No. 118.

1. **Patents ⇐28, 43—Patentable design must disclose novelty and invention.**
Though the design patent law was intended to encourage the decorative arts, and deals with the appearance of the thing designed rather than with its structure, uses, or functions, in a design patent, as in a mechanical patent, the subject-matter must be novel, and must have called for an exercise of invention.

2. **Patents ⇐43—Square instead of round shape for candle does not disclose novelty of design.**
The right to make any article round or square, or in any other standard form or shape, is inherently open to all, and novelty cannot be predicated of a design for a square candle, instead of the ordinary round one.

3. **Patents ⇐28—Invention in design requires as much originality as in utility patents.**
Design patents stand on as high a plane as utility patents, and require as high a degree of exercise of the inventive or original faculty, and making a candle square, instead of round, does not involve the exercise of such faculty.

4. **Patents ⇐112(3)—Burden is on person attacking patent to show conclusions of Patent Office were wrong.**
The grant of the patent by the Patent Office makes a prima facie case for the successful applicant, and one who attacks the patent has the burden of showing that the Patent Office reached a wrong conclusion concerning it.

5. **Patents ⇐328—44,480 for design for candles held invalid for want of invention.**
The Knapp patent, No. 44,480, for a design for a candle, which consisted in taking the ordinary coach candle, making it square and giving it a fluted tapering base, both of which were known to the art before, does not show invention because of the bell-shaped top, which was similar to the top of the coach candle.

6. **Patents ⇐28—New combination of old elements patentable design only if it discloses invention.**
Though design invention may reside in the new combination of old elements, a new combination of such elements is only patentable if it is beyond the capacity of the ordinary routine designer.

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

Suit by Edward J. Knapp against the Will & Baumer Company for infringement of a design patent. From an interlocutory decree for complainant (253 Fed. 191), defendant appeals. Reversed, and bill dismissed.

Howard P. Denison and Eugene A. Thompson, both of Syracuse, N. Y., for appellant.

Wordsworth B. Matterson and Frank T. Miller, both of Syracuse, N. Y., and William G. Henderson, of Washington, D. C., for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. This is a suit in equity arising under the patent laws of the United States. The plaintiff is the owner of letters

patent No. 44,480, issued to him by the United States Patent Office on August 13, 1913, and is a design patent for an improvement in candles.

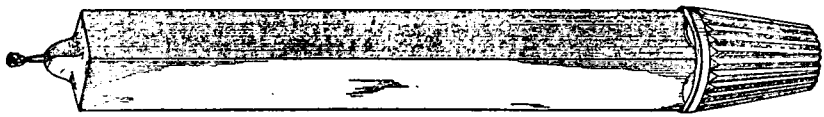
The patent has never been assigned, and the plaintiff is now and always has been the sole owner of the patent. He has caused large numbers of candles embodying the patented design to be made and sold under his license by the Edward J. Knapp Candle Company, a corporation existing under the laws of the state of New York, with its principal place of business at Syracuse in said state. The plaintiff is a large stockholder in the company, as well as its president and manager, and alleges that he derives large profits from the manufacture and sale of the patented candles. The license is personal, and not assignable, and not in writing.

In his application for the patent the plaintiff states that the following is a specification, reference being had to the accompanying drawing, forming a part thereof:

"The figure is a perspective view of a candle, showing my new design. The design as illustrated in the drawing is a pillar or column substantially square in cross-section, mounted upon a substantially cylindrical longitudinally fluted pedestal and surmounted by a bell-shaped cap, with its base lines set back from the square edges of the pillar top.

"I claim: The ornamental design for a candle, as shown and described."

The following is a fac simile of the drawing filed with the application:



The court below entered a decree holding that the patent was valid and infringed by the defendant. 253 Fed. 191. The case was heard again in that court on new and additional evidence, for the introduction of which the prior decree was opened. But at the second hearing the court adhered to the former decision. "I regard this," said the District Judge, "as a close case, but on consideration of the evidence heretofore taken and the new and additional evidence I am constrained to adhere to the decision made."

The application for this patent was filed February 3, 1911, and on March 11, 1911, was rejected, by the Examiner in the Patent Office, on the state of the art cited. The Examiner declared: "There is held to be nothing patentably novel set up in this application." On April 19, 1911, it was again rejected by the Examiner on the ground of want of any patentable novelty. On October 10, 1911, another application was filed; the original having been amended. On November 23, 1911, the applicant was informed that the application was again rejected, and was informed that—

"It must be again held that applicant's design fails to present anything patentably novel from an ornamental standpoint over the reference of record. * * * The claim is accordingly again and finally rejected on the state of the art cited."

The case was then appealed to the Board of Examiners in Chief. On July 10, 1913, the board sustained the application and reversed the examiner. They said:

"There appears to us to be a certain unity in design between a rectangular form of a candle and that of the tip, which possesses some degree of novelty and invention, which is sufficient to support a design patent, and we therefore reverse the decision of the Examiner."

On August 12, 1913, the patent was accordingly issued.

[1] The design law was intended to encourage the decorative arts. It therefore deals with the appearance of the thing designed, rather than with its structure, uses, or functions. But in a design patent, as in a mechanical patent, the subject-matter must be novel, and must have called for an exercise of the inventive faculties. If either of these essentials is absent, the patent cannot be sustained.

[2, 3] In order that there may be novelty, the thing must not have been known to any one before. Mere novelty of form is insufficient. O'Reilly v. Morse, 15 How. 62, 14 L. Ed. 601. The patent in suit is a square candle. But any one had as much right to make a candle square as to make it round. There are some standard forms and shapes that are known to every one and inherently open to any one to use. The right to make any article round or square is open to all. Novelty cannot be predicated of either. But it is equally plain that to make candles square, instead of round, does not involve any exercise of the inventive faculties, and invention is required as much in design patents as in other kinds of patents. It has been held that design patents stand on as high a plane as utility patents and require as high a degree of exercise of the inventive or original faculty. Perry v. Hoskins (C. C.) 111 Fed. 1002; Myers v. Sternheim, 97 Fed. 625, 38 C. C. A. 345; Western Electric Mfg. Co. v. Odell (D. C.) 18 Fed. 321.

But the patent appears to have been granted upon the theory that there is "some degree of novelty and invention" in the combination of the bell-shaped tip with the square form of the candle; that is, in the setting back of the base of the bell shaped cap from the square edges of the square column having flat sides. That was certainly the theory upon which the validity of the patent was sustained in the court below and the theory upon which the patent was granted in the Patent Office. In the court below the District Judge said:

"While, in view of the prior art, it may be doubted whether there is patentable invention in this combination containing this feature, I am inclined to hold the patent valid as the presumption is in its favor."

[4] The grant of the patent by the Patent Office makes out a prima facie case for the successful applicant, and one who attacks it has the burden of showing that the Patent Office reached a wrong conclusion concerning it. And in our opinion in this case the burden of proof has been sustained by the defendant.

[5] It must be conceded that, if there is any possibility of inventive genius being present in this design patent, it can only be found in the peculiar form of the tip. What Knapp has done was to place a small coach candle tip in the center of a square column. To do this did not

show patentable novelty or involve inventive genius. The patent in suit was, as we have seen, granted in August, 1913. But in 1906 there was published Lamborn's American Soaps, Candles and Glycerine. That work, on page 526, contains the following statement:

"Candles are molded in a great variety of shapes; the most common shape being that of a plain cylinder of varying diameter and length. A great variety of ornamental forms for religious and decorative purposes are molded in numerous prismatic cross-sections, as squares, triangular, octagonal, etc. They may also be molded longitudinally or spirally fluted."

And on page 530 there is the following statement:

"Candles may be made with tapering butts, to enable them to fit any holder either by use of the tapering machine shown in Fig. 201, or by the use of additional molds inserted in the fluted or regular candle mold. A type of candle of this description is shown in Fig. 197. The first self-fitting end candle is attributed to Field, who in 1861 patented his device for giving candles a conical end or butt by molding."

Knapp's own testimony admits that the base of his candle was not new. This is his admission:

"Q. Was it also ancient to make candles with this particular kind of a base on them? A. That was made a good many years ago, I believe; back 20 years, that I know of."

The following is an illuminating excerpt from his testimony:

"Q. Now take Plaintiff's Exhibit 4 and tell us of record. Show his honor exactly how you made that particular candle. In the first place, you started with what sort of a candle? A. A round candle.

"Q. Probably such as his honor referred to yesterday? A. I should imagine it was. After the round candle was casted, it was drawn through a hot die, and that die was square; the result is, it made that candle.

"Q. It transformed tuat from a round candle into a square candle? A. Into a square candle.

"Q. Where did you learn that sort of thing? A. The die for drawing candles?

"Q. Yes. A. Oh, about 25 years ago.

"Q. When you were with the Will & Baumer people, or associated with them? A. Yes.

"Q. That was a common practice, was it not? A. Oh, yes, that was sort of an ancient practice, I guess. The idea is to smooth the candle.

"Q. To form the candle? A. To form the candle.

"Q. And were those dies always round, through which the candle was drawn? A. Some of the dies are round.

"Q. What other shapes were there? A. We only had round and square dies at my plant. And we have had a die that was corrugated.

"Q. Now, we have got the shank of the candle formed. Now, please form the lower end of it, which we term the base. How do you do that? A. The candle is put into warm water, the lower end of it; when the candle gets pliable, it is placed into a die, and it forms that corrugated base.

"Q. And where and when did you first learn about that operation, of taking the ends of a candle—warming the end and forming it? A. At the Mosbroder plant, 25 years ago, when I went there.

"Q. Was that connected in any way with Will & Baumer? A. It was not. They were not organized in those days.

"Q. But later, before you manufactured your square candles, the Will & Baumer Company to your knowledge did form the end of the candles in that same way, did they not? A. Oh, yes.

"Q. And that end is the same as formed on the round candles? A. Certainly.

"Q. Previous to that time you made round candles with that particular end, did you not? A. Yes.

"Q. And that has been an old practice for many years? A. Yes.
"Q. What is the purpose of it? In candle language, it is called self-fitting. A. That is the usual term.
"Q. And it is usually at its upper part larger diameter than at the other end? A. Certainly.
"Q. Sometimes candles are made with that end, and sometimes without? A. Yes.
"Q. And to your knowledge thousands have been made that way many years before your application was filed? A. Certainly.
"Q. Now, take the other end, Mr. Knapp; when was the upper end on that candle formed? A. The bell shape?
"Q. The bell-shaped end; the upper end. A. That round shape was a very old pattern; I should imagine it was.
"Q. When did you first see candles with a small bell-shaped end on a larger upper portion of the candle? A. Oh, well, I guess ever since I have been in the candle business. It is originally what they called a coach candle.
"Q. That is the candle term a coach candle? A. Yes."

Knapp's own testimony as to the designing of his patented candle convinces us that the square candle of his patent involved no inventive thought or practice. He followed precisely the teachings of the art as set forth by Lamborn. What he did was to take a coach candle of ordinary type as shown by Lamborn and draw it through a square mold, a thoroughly familiar process, and then equip it with a self-fitting base as directed by Lamborn. The effect of these several steps is disclosed in the following cuts:

ORDINARY COACH CANDLE

ONE SQUARED AS DESCRIBED BY LAMBORN

ONE PROVIDED WITH SELF-FITTING BASE AS DESCRIBED BY LAMBORN.

What Knapp did involved no inventive act. He took an ordinary coach candle, with its bell shaped tip, and simply changed the column from a round one into a square one, leaving the bell-shaped tip the

same as before. In converting a round column into a square one, he followed precisely the teachings of the art as previously set forth by Lamborn. He did what any ordinary workmen would have done—drew a round candle through a square mold in accordance with a common practice. Then he provided it with a self-fitting base in accordance with the teachings of the art since 1861.

[6] It is true that invention may reside in a new combination of old elements. Every new combination of old elements, however, is not patentable. But as this court said in Steffens v. Steiner, 232 Fed. 862, 147 C. C. A. 56:

"The question in the case at bar is not whether a design patent can be sustained, although each separate element in the design may be old, but it is whether what has been done in assembling the old elements in the new designs rose in these particular cases to the level of invention."

And in Strause Gas Iron Co. v. William M. Crane Co., 235 Fed. 126, 148 C. C. A. 620, this court again said:

"The test for invention is to be considered the same for designs as for mechanical patents; i. e., was the new combination within the range of the ordinary routine designer?"

In both of those cases this court held design patents void for want of invention. In what was held in those cases we were simply applying the doctrine which was announced in Smith v. Whitman Saddle Co., 148 U. S. 675, 13 Sup. Ct. 768, 37 L. Ed. 606, in which case the court approved the following statement:

"To entitle a party to the benefit of the act, in either case, there must be originality, and the exercise of the inventive faculty. In the one, there must be novelty and utility; in the other, originality and beauty. Mere mechanical skill is insufficient. There must be something akin to genius—an effort of the brain as well as the hand. The adaption of old devices or forms to new purposes, however convenient, useful, or beautiful they may be in their new rôle, is not invention."

We are quite at a loss to find in the patent in suit anything "akin to genius" in what the patentee did. We find nothing beyond the ability of the ordinary routine candle maker. What was done did not rise to the level of invention.

As the patent in suit is not valid, it is not necessary to inquire whether it has been infringed.

The decree must be reversed, and the bill dismissed. It is so ordered.

FLYNN et al. v. CHRISTENSON et al.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1921.)

No. 3542.

1. Courts ⇐375—State limitation statute held not applicable to libel in admiralty.

Code Civ. Proc. Cal., § 340, limiting actions for libel, slander, or for injury to or for the death of one caused by the wrongful act or neglect of another, does not apply to a libel filed in an admiralty court for the recovery of civil damages for the death of a stevedore, since the applica-

tion of the state statutes of limitation would destroy the uniformity of admiralty law, and since section 337, giving the right of action for death by wrongful act or neglect of another, prescribed no time limit for the commencement of such action.

2. Shipping ⊜86(2)—**Evidence held to sustain finding of ship's negligence.**
On libel for the death of a stevedore, evidence that rope furnished by schooner for a sling to be used in unloading lumber was too short for a double turn around the lumber, so that a single turn was used, which proved to be insufficient, *held* to sustain the court's finding that the schooner was negligent.

3. Shipping ⊜86(2)—**Evidence held not to show contributory negligence of stevedore.**
Evidence that a stevedore was killed while he was preparing another load of lumber for the sling, when the previous load, after being swung over the side of the vessel, struck a string piece, as a result of which some of the lumber was knocked from the sling, and one piece swung aboard and struck the stevedore, *held* not to show contributory negligence by the stevedore, since it is unreasonable to require the men engaged in unloading the vessel to suspend their work until each load has been safely landed, in order to protect themselves against the charge of contributory negligence.

4. Death ⊂⊃99(4)—**Award of $13,000 for father's death sustained.**
On a libel for damages resulting from the death of the husband and father of libelants, who was killed while working as a stevedore on a vessel, an award of $13,000, after an original award of $20,000 was reduced by the trial court, will not be disturbed.

5. Shipping ⊜207—**Liability for death of stevedore, caused by negligence, can be limited.**
The liability of owners of a schooner for the death of a stevedore, resulting from the negligence of the vessel, can be limited to the respective interests of the owners in the schooner.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Frank S. Dietrich, Judge.

Libel by David James Flynn and others, by their guardian and next friend, Honora Della Flynn, against E. A. Christenson and others, as joint owners of the schooner Sophie Christenson, to recover damages caused by the death of David James Flynn while employed as a stevedore in unloading the schooner. From a decree dividing the damages, libelants appeal. Decree modified, to allow full damages, and, as modified, affirmed.

The appellants are the widow and children of one David James Flynn, and were libelants in the court below against the appellees, as joint owners of the schooner Sophie Christenson, to recover damages growing out of his death. He was killed while employed as stevedore and engaged in helping to unload lumber from the schooner at San Pedro, Los Angeles county, Cal., in the year 1903. The cause was not brought to trial in the court below until about a year ago. Why it is unnecessary now to inquire.

The amended libel alleged that the defendants thereto are and at all times therein mentioned were joint owners of the schooner in certain specified proportions, and further alleged, among other things, that while the vessel was lying in the harbor of San Pedro and moored to the wharf there, the deceased was, with others, employed to remove the cargo of lumber from the vessel to the wharf, and while working in such employment in a proper way one of the sling loads of lumber was hoisted from the hold of the vessel under the direction of the defendants and its officers in a grossly negligent manner, and

while being so hoisted was so insufficiently secured by the sling rope that it resulted in some of the pieces of lumber slipping from the sling, one of which pieces struck the head of the said Flynn while he was working on the deck of the vessel, resulting in his death August 3, 1903; that the accident occurred without any negligence or want of care on the part of the deceased, but by reason of the negligence of the defendants, both in the handling of the sling load and also by reason of the fact that the rope was weak and inadequate, and of improper material for the purpose for which it was being used, and was insufficient in size, as well as too short to admit of the same being properly adjusted and fastened, so as to secure the sling load of lumber; that the widow and the minor children, of whom she alleged she was the duly appointed guardian, thereby suffered damages in the sum of $20,000, for which they prayed judgment.

The defendants, in answer to the amended libel, while making various denials, admitted the hoisting from the hold of the vessel of the lumber with which she was loaded "in lots, parcels, or sling loads made up of heavy planks and timbers bound together with rope slings," but denied that any of the sling loads were so hoisted or handled in a negligent manner, or were insufficiently secured, or that the sling was too short to admit of the same being properly adjusted or fastened to secure the lumber, or was insufficient in size or otherwise, and, while admitting that "some pieces of lumber fell and struck a man working on board said ship," denied "that the same was without any want of care or without negligence on the part of the man so hurt; on the contrary, these respondents on their information and belief allege that the said accident to the said man was due solely and entirely to his own negligence."

Andros & Hengstler and Louis T. Hengstler, all of San Francisco, Cal., for appellants.

Nathan H. Frank and Irving H. Frank, both of San Francisco, Cal., for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). [1] As appears from the amended libel, the death of Flynn occurred August 3, 1903, and the record shows that the libel was not filed until August 12, 1904, a little more than one year thereafter. Wherefore it is contended on the part of the appellees that it was barred by the third subdivision of section 340 of the Code of Civil Procedure of California, which reads:

"3. An action for libel, slander, assault, battery, false imprisonment, seduction or for injury to or for the death of one caused by the wrongful act or neglect of another or by a depositor against a bank for the payment of a forged or raised check."

We think it obvious that the foregoing provision has no application to a libel filed in an admiralty court, containing the plaintiff's allegations as a basis for the recovery of civil damages, in so far as the word "libel" therein mentioned is concerned, but to libels based upon defamatory remarks or acts intended or which tend to bring one into disrepute. It is a part of the provisions commencing with section 335 of the Code of Civil Procedure of California prescribing the "Time of Commencing Actions Other Than for Recovery of Real Property," and has, in our opinion, no more application to a libel in admiralty than has the provision of the California statute of frauds to an agree-

ment between the parties to a libel in an admiralty court. See Union Fish Co. v. Erickson, 248 U. S. 308, 39 Sup. Ct. 112, 63 L. Ed. 261, Western Fuel Co. v. Garcia, 255 Fed. 817, 167 C. C. A. 145. Otherwise one admiralty court might be required to grant relief upon one such cause of action, and another such court deny it in a precisely similar cause, depending upon different and conflicting provisions of the state statutes upon the subject of limitations, thereby destroying the uniformity of rules governing admiralty courts. The provision of the California statute—section 377, C. C. P.—giving a right of action to the heirs or personal representatives of a person, not a minor, whose death is caused by the wrongful act or neglect of another, prescribing no time limit for the commencement of such action, a court of admiralty will enforce it in accordance with the recognized principles of maritime law. Authorities supra.

[2] The court below found that the alleged negligence was proved, and we are satisfied from an attentive examination of the evidence that it was properly so held. It shows that the rope provided by the schooner and used as a sling was not long enough for a double turn around the lumber. The single turn used, and which proved in the instant case insufficient, was, as the court found, extrahazardous, although sometimes used, and that to secure such bundles of lumber in the unloading of vessels the sling loads should be secured by a double turn of the rope around them, which was the usual and safer way.

The contention made on the part of the appellees that there was also wire rope on the schooner, which could have been selected by the deceased, is not supported by the record, which shows only, according to some of the testimony, that in loading the vessel at the mill wire rope was used. Whether such rope was furnished by the mill or was part of the equipment of the schooner was not shown.

[3] The court below, however, found that the deceased was guilty of contributory negligence, and accordingly divided the damages found by it to have been caused by the death of the deceased, allowing the libelants one-half thereof. We are of the opinion that the conclusion reached by the trial court regarding the alleged contributory negligence of the deceased is not justified by the record. It appears that two of the schooner's men, Ehlert and Kenyon by name, made up the load in question on the starboard side of the vessel, and when it was ready for hoisting the mate was notified, and it was started by means of a donkey engine on its way to the wharf—the vessel having a slight list to the wharf to facilitate unloading. The mate was not called as a witness, but the master of the schooner was by the respondents, and he gave this account of the accident—the pertinent portions only being here given:

"I came along from aft and was going forward. * * * When I came forward, they were leaving a load up out of the hold, and the load started to slip; there were a couple of planks slipped out of the load. It was a single load, 12 by 12's, and I suppose 20 pieces in it. I seen the pieces start in to slip out, and I said to everybody, 'Get out of the way! get out of the way!' And everybody was out of the way, all walked away, and the load swung in to the wharf. When it came in to the wharf the donkeyman didn't let it go;

he could have let it go, but he kind of held on, and the load swung back, and one plank slipped out again, and it stood on end. Mr. Flynn, the man that got hurt, had gone back; he was warned to get away, and he was away; he was between the poop and the mizzenmast, but he went back again; nobody told him to go back; he went back on his own account, and this plank fell out and hit him on top of the head."

Being asked the question, "You stated, did you not, that it came back from the wharf?" The witness answered:

"Yes; it swung off the wharf, and a piece fell out; it stood on end this way, and the other end hit Mr. Flynn right in the head."

The donkey engine man—Nilsson—testified that at the time of the accident Flynn was working with another man on the deck abreast of the mizzenmast making up a sling load of the lumber, there being two other men similarly engaged on the other side of the deck. As the latter were on the starboard side Flynn was on the port side of the boat. In describing how the accident happened, Nilsson said, among other things:

"I was heaving up a load of lumber, and when I got the load up high enough, the gaff was hanging out a little, so she came over the wharf like; * * * hanging over the rail like. * * * And then a few pieces—I don't know how many—six or seven of those short planks fell out, and they fell right between, into the water. Well, the mate was singing out for those people on deck to stand clear. Q. Did you holler out, too? A. Not that time; I don't think I did. I might have, but I am not quite sure. Just after a little while those planks that were left, they fell off the sling and fell in the same direction that man was at work. If the three of them, the planks, fell, that is more than I remember, because I got kind of excited when I saw the man get hurt. So I don't remember whether those two planks fell down or not, or whether one plank struck him; I can't say anything about that. Q. How did they strike him? A. The man was standing with his back to the load, and the plank just hit him in the back of the head, with the end of the plank. Q. Do you know whether or not the man had stood clear when the mate called out, and went back again to his work? A. I don't know that. Q. You do not know? A. I don't know that. Q. Were you inside of the donkey house? A. If that man was away and came back again, that is more than I can tell, because I had my eyes on that load then. So I can't say anything about that, whether he was away or not."

Ehlert, one of the men who made up the load that collapsed, being asked whether he heard any one call out to stand clear when that load went up, answered:

"Yes, sir; not when the load went up, but when the load fell. That is the time they sang out to stand clear, but it was too late then. Q. It was too late then? A. Yes, sir. Q. You are sure no one said to stand clear until the load fell? A. That is right."

Having testified that he witnessed the accident, and being asked to describe it as well as he could, the witness answered:

"Well, the load went up—I hooked it on this—the load went up, and the mate always gives the order. The mate said, 'Go ahead.' He gives one whistle, which means 'Go ahead.' When he thinks it is high enough, he gives another whistle to stop. Then he sings out 'Come back.' When the load swings towards the wharf, he sings out 'Come back.' Q. Go on and tell us how it happened with this particular load. A. The mate sang out 'Go ahead.' He sang out 'Hi.' He sang out 'Come back.' When the load came back, it hit the stringer on the wharf, because the ship was lower than the stringer, about 2

feet lower than the stringer, and it shook it, and half of it fell out between the ship's side. There were three planks left, and the gaff swung inside because there was nothing to hold it on the wharf. The gaff swung in, and the planks, what was left, fell between the ship's side and the wharf; three planks were left, and they swung in and killed him."

The other seaman who helped make up the sling load in question, and who gives the name of his companion worker as "Elliott," after describing the manner of making up that sling load and the order of the mate to go ahead, being asked to describe the rest of the operation, answered:

"We were all told to get out of the way, of course, when the lumber was going to swing right across the ship. Q. Go right ahead and tell us what happened after that. A. The lumber was still going up, and shaking back and forth, as they do; no guide at all attached to it; going up, it was high enough, and came back, and the mate sang out to come back. Q. What was done then? A. It struck the stringer of the wharf. Q. What does 'come back' mean in that case? A. 'Come back' is to lower away. Q. After the load struck the stringer of the wharf, what happened then? A. It shook the load, and some pieces fell down between the ship and the wharf, and the remaining three pieces swung aboard, and one piece struck this man Flynn. Q. Where did it strike him? A. Right on the head, sir. Q. Did you see the plank strike him? A. Yes, sir. Q. What was Mr. Flynn's position at the time, and what was he doing when the plank struck him? A. He was just lifting a big piece of timber, so as for another man to put the block under the piece of timber, so as to allow the sling to go underneath. Q. He was making up a new sling load, was he? A. Yes, sir. Q. Whereabouts on the deck was he at that time? A. Well, he was more near to the mizzenmast. Q. Near to the mizzenmast, and between what masts? A. The main and the mizzen. Q. If I understand you, the gaff was swung between the main and mizzen masts, was it? A. Yes, sir. Q. The loose end toward the mizzen? A. Towards aft—the mizzen."

The latter witness also testified in substance that there was no machinery on the schooner for the purpose of making the lumber swing off towards the wharf, but a slight list of the vessel that way, the effect of which was to further the delivery of the lumber, and that the wharf was higher than the deck of the vessel, the port side of which was next the wharf. That witness was also questioned, and answered, as follows:

"Q. Now, as I understand you, this had passed clear over the vessel, and over to the wharf, and then struck the wharf, and most of the load fell in between the wharf and the vessel into the water? A. Most of the load fell between the wharf and the vessel's side. Q. When this was swung over, what were you doing? A. I was looking at it. We generally look to see that it goes clear of the ship. We don't like to see pieces falling out there every time. Q. Did you keep your eye on that sling load? A. We generally keep an eye on it all the time, on every sling we send up. Q. What I want to know is, did you watch that sling load till it struck the wharf and dropped—did you keep your eye on it all the time? A. I kept my eye on it all the time."

We think it clear that, after the load had swung from the vessel to the wharf, it could not be reasonably expected by Flynn that it would or might swing back to the vessel, but, on the contrary, that it was his duty, after it left the vessel, to proceed with his work, as the evidence shows without conflict he did. The opposite view would not only justify, but require, the men engaged in unloading the vessel to suspend

their work until each load, not only left the boat, but was safely landed, in order to protect themselves against the charge of contributory negligence—a very costly and, in our opinion, a highly unreasonable rule to adopt.

[4, 5] The court below first fixed the amount of damages occasioned the plaintiffs by the death of the deceased at $20,000, but upon subsequent consideration reduced the amount to $13,000, dividing the damages between plaintiffs and respondents. With the modified amount of damages so fixed we see no valid ground to interfere, nor do we think the court committed any error in holding the respondents' liability limited to their respective interests in the schooner. Its ruling in that regard is, we think, well supported by the decision of the Supreme Court in Richardson v. Harmon, 222 U. S. 96, 32 Sup. Ct. 27, 56 L. Ed. 110. The libel as amended proceeded upon such limited liability, and we see nothing in the evidence to justify a departure therefrom.

Accordingly, the decree must be so modified as to run against each appellee for his proportionate share of $13,000, and for his proportionate share of the costs in both courts, and, as so modified, it will stand affirmed.

KIRBY et al. v. UNITED STATES, for and on Behalf of CROW TRIBE OF INDIANS.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1921.)

No. 3607.

1. **Indians ⇐16(7)—Grazing lease construed as to excess in number of cattle grazed.**
   Grazing lease for a two-year term, at an annual rental, under Act Feb. 28, 1891, and Act Aug. 15, 1894 (U. S. Comp. St. §§ 4218, 4219), limiting the cattle to be grazed "to an average of 9,000 head, the maximum number at any one time not to exceed 11,500 head, and that any excess over and above such maximum number shall be paid for at the rate of $4.50 per head * * * in addition to the rental herein named," *held* to mean that for the specified annual rental lessees could graze any number up to the equivalent of 9,000 head throughout each year taken separately, and for any excess of that number the lessees should pay $4.50 per head grazed during the equivalent of a year; the excess being computed from 9,000 as the maximum for the year as a whole, and not from the 11,500 provided as a maximum at any time.
2. **Evidence ⇐461(1)—Written offer preceding contract may be looked to in construing ambiguous contract.**
   Where a contract was ambiguous, the intention of the parties could be made clear by referring to the written offer which one party submitted preliminary to the contract.
3. **Damages ⇐78(6)—Provision in grazing lease for excess pasturage held not a penalty.**
   Grazing lease for a two-year term, at an annual rental, under Act Feb. 28, 1891, and Act Aug. 15, 1894 (U. S. Comp. St. §§ 4218, 4219), limiting the cattle to be grazed "to an average of 9,000 head, the maximum number at any one time not to exceed 11,500 head, and that any excess over and above such maximum number shall be paid for at the rate of $4.50 per

head * * * in addition to the rental herein named," *held* not invalid as to the provision for payment of $4.50 per head, on the ground that it was intended as a penalty or liquidated damages, violating Rev. Codes Mont. §§ 5054, 5055, for such provision was merely a stipulated sum to be paid for a specified privilege, namely, to graze cattle in excess of 9,000 up to the limit of 11,500, and such excess grazing did not constitute a breach of the contract.

4. **Indians ⇐16(7)—Grazing lease construed as to averaging excess grazing.**
Grazing lease for a two-year term, at an annual rental, under Act Feb. 28, 1891, and Act Aug. 15, 1894 (U. S. Comp. St. §§ 4218, 4219), limiting the cattle to be grazed "to an average of 9,000 head, the maximum number at any one time not to exceed 11,500 head, and that any excess over and above such maximum number shall be paid for at the rate of $4.50 per head * * * in addition to the rental herein named," *held* to authorize the averaging of the cattle, to determine extra payment for excess grazing, for each year separately, instead of for a two-year period, as the contract was divisible into two periods of a year each.

5. **Indians ⇐16(7)—Grazing lease provision for payment for excess grazing held not invalid as payment for illegal act.**
In action by the government in behalf of the Crow Tribe to recover from lessees under a grazing lease under Act Feb. 28, 1891, and Act Aug. 15, 1894 (U. S. Comp. St. §§ 4218, 4219), for excess grazing as provided for in the lease, the contention that the agreement to pay for excess grazing was invalid as an agreement to pay for violating Rev. St. § 2117 (Comp. St. § 4107), by placing cattle on the reservation without the consent of the tribe, could not be sustained, where the complaint alleged and the answer admitted that the lease was made in pursuance of a resolution of the Crow Tribal Council, and was approved by the Secretary of the Interior, and the lease recited that it was made on behalf of the Crow Tribe under and pursuant to the action of the council of the tribe.

6. **Indians ⇐16(5)—Ouster of one grazing lessee by another does not affect joint liability.**
Ouster of one lessee by another would not affect their joint liability under a lease made pursuant to Act Feb. 28, 1891, and Act Aug. 15, 1894 (U. S. Comp. St. §§ 4218, 4219).

7. **Costs ⇐185—Mileage taxable only for distance that could be reached by subpœna.**
Mileage is taxable in the federal court only for the distance that could be reached by a subpœna, namely, from any point within the district, and for a distance of 100 miles, if the witness came from a point at a greater distance and without the district.

8. **Costs ⇐176, 184(3), 185—Mileage and fees of witnesses not testifying, subpœnaed in good faith, and subpœna fees and expenses held properly taxed.**
Where witnesses were subpœnaed in good faith and their testimony was deemed material to the issues involved, although they did not in fact testify, it was not an abuse of discretion to tax as costs their mileage and fees and the fees and expenses of the marshal in serving subpœnas upon them.

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

Action by the United States, for and on behalf of the Crow Tribe of Indians, against George B. Kirby and others. Judgment for the United States, and defendants bring error. Remanded, with instructions to retax costs; otherwise affirmed.

On December 17, 1915, in accordance with the provisions of section 3 of the Act of Congress of February 28, 1891 (26 Stat. 794 [U. S. Comp. St. § 4218]), as amended by the Act of August 15, 1894 (28 Stat. 305 [U. S. Comp. St. § 4219]), and in pursuance of the resolution of the Crow Tribal Council of July 29, 1915, a grazing lease of tribal lands was entered into between the plaintiffs in error and the defendant in error, which lease was approved by the Secretary of the Interior on January 11, 1916. The lease was for a term of two years, and it provided for an annual rent of $31,950, payable in equal semiannual installments. It contained the following provision: "It is further agreed that the number of cattle to be grazed on the territory described above shall be limited to an average of nine thousand (9,000) head, the maximum number at any one time not to exceed eleven thousand, five hundred (11,500) head, and that any excess over and above such maximum number shall be paid for at the rate of $4.50 per head for each and every head of such excess number, in addition to the rental herein named." The complaint of the defendant in error, hereinafter called the plaintiff, alleged the defendants had kept cattle on the lands largely in excess of the number specified in the lease, setting forth the number thereof, and judgment was demanded for $141,049, with interest. The cause was tried before the court without a jury, and the court found that there was no excess grazing during the first year, but that during the second year there were excess cattle of 6,968 head, and that the sum due therefor to the plaintiff was $31,356. Judgment was entered accordingly for that sum, with interest at 8 per cent. per annum from and after February 1, 1918, and costs.

Grimstad & Brown, of Billings, Mont., and Gunn, Rasch & Hall and Hugh Thomas Carter, all of Helena, Mont., for plaintiffs in error.

George F. Shelton, U. S. Atty., of Butte, Mont., for defendant in error.

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

GILBERT, Circuit Judge (after stating the facts as above). [1] The merits of the controversy depend upon the construction of the clause of the contract which is quoted above. The court below construed it to mean that for the rental of $31,950 per annum the defendants could graze any number of cattle up to the equivalent of 9,000 head throughout each year taken separately, and that for any excess of that number the defendants were to pay $4.50 per head grazed during the equivalent of a year. Said the court:

"The language of the lease, that this $4.50 per head is payable for 'any excess over and above such maximum number,' does not necessarily import only cattle over and above 11,500 head, the last antecedent and maximum eo nomine, but consistent with the writing and construction can be and is taken to import cattle over and above 9,000 head, the first antecedent and also a maximum, although not in terms so characterized. Nine thousand head are the maximum for the year as a whole, the principal thing, and the 11,500 are the maximum at any time (and for such time as will serve to accomplish the 9,000 maximum), an incidental thing."

We agree with that construction of the contract. It is obvious that there was error in one phrase of the instrument, but, notwithstanding the error, the true intention of the contracting parties is not difficult to ascertain. It was clearly not their intention that there should be any free grazing, and the construction contended for by the defendants

would result in free grazing for all cattle in excess of 9,000 and under 11,500.

[2] The intention of the contracting parties is made clear by referring to the written offer which the defendants submitted preliminary to the contract, and which may be properly taken into consideration in construing the instrument. United States v. Bethlehem Steel Co., 205 U. S. 105, 118, 27 Sup. Ct. 450, 51 L. Ed. 731; Northwestern Terra Cotta Co. v. Caldwell, 234 Fed. 491, 499. 148 C. C. A. 257. In that proposal the defendants wrote:

"The minimum amount to be paid per annum, in semiannual payments in advance, $31,950. * * * The number of cattle to be grazed on this district to be 9,000 head, at the rate of $3.55 per head per annum, and that any cattle grazed on this district in excess of 9,000 head shall be paid for at the same rates per head per annum."

[3] The defendants contend that the provision for the payment of $4.50 per head was intended either as a penalty or as liquidated damages for violation of the contract in grazing an excess number of cattle on the leased premises, that in providing for such payment no provision is made about the average number of cattle, and that the true construction is that for all cattle placed on the leased land in excess of the maximum number the lessee should pay $4.50 per head, even if the cattle were on the land but for a single day, a rate so disproportionate to the value of the grazing privilege that it must be considered as a penalty, and it is argued that it is immaterial whether the $4.50 rate be regarded as a penalty or as liquidated damages, in view of sections 5054 and 5055 of the Revised Codes of Montana of 1907. The contention cannot be sustained. The provision for the payment of $4.50 per head is neither in the nature of a penalty nor liquidated damages. It is a stipulated sum to be paid for a specified privilege.

The contract does not bind the defendants to pasture no more cattle per annum than the lowest number therein specified. The plaintiff does not sue for breach of a contract. There is no allegation in the complaint upon which either a penalty or liquidated damages can be predicated. There was in fact no breach of contract. The agreement left the defendants at liberty to pasture as many cattle on the lands as they might see fit to place thereon, up to the limit of 11,500, but it provided that for cattle in excess of 9,000 and for the exercise of such privilege they should pay an increased rate of pasturage per head. The rate was increased doubtless on the theory that the presence of such excess cattle would result in some injury to the pasture, but that does not mean that the rate so fixed is compensation for damage. It was but payment for that which the plaintiff parted with and the defendants received.

[4] In view of the construction which we have given to the contract, it becomes unnecessary to discuss the assignment that the court erred in holding that the Surety Company was liable on the bond for the excess number of cattle grazed. Nor do we find that the court below erred in construing the contract to authorize the averaging of the cattle for each year separately, instead of for a two-year period. The con-

tract was clearly divisible into two year periods. The rent was apportioned to each year, and was payable for each year, and the conclusion is reasonable that the provision in regard to extra payment for excess cattle applied to each year.

[5] It is contended that, as the contract expressly limits the number of cattle which may be grazed on the leased premises, the grazing thereon of any excess number was without the consent of the Crow Tribe of Indians, and in violation of section 2117 of the Revised Statutes (Comp. St. § 4107), and that the agreement to pay for the excess cattle could impose no liability; it being an agreement to pay for violating the statute by placing cattle on the reservation without the consent of the tribe. But it does not appear from the record that any provision of the lease was inserted therein without authority from the Crow Indians. The complaint alleges and the answer admits that the lease was made in pursuance of a resolution of the Crow Tribal Council, and that the same was approved by the Secretary of the Interior. The lease itself recites that it was made on behalf of the Crow Tribe of Indians, under and pursuant to the action of the council of the tribe. The leased lands were subject to lease, under section 3 of the Act of February 28, 1891, 26 Stat. 795 (Comp. St. § 4218). The lands had been "bought and paid for" within the meaning of that statute. Strawberry Valley Cattle Co. v. Chipman, 13 Utah, 454, 45 Pac. 348. In Maricopa & Phœnix Railroad v. Arizona, 156 U. S. 347, 15 Sup. Ct. 391, 39 L. Ed. 447, the court, answering the contention that it did not appear by the record that the consent of the Indians had been given to a grant of a right of way over their land, said:

"In the first place, as the company has taken the rights granted by the statute, the legal presumption of duty performed (omnia rite, etc.) requires us to assume that the consent was given in accordance with law. And again, the company, having assumed and exercised rights which it could possess only by virtue of such consent, cannot be permitted to aver its own wrongdoing, trespassing, and violation of the statute in order to escape its just share of the burden of taxation."

In Cincinnati & Tex. Pac. Ry. v. Rankin, 241 U. S. 319, 327, 36 Sup. Ct. 555, 558 (60 L. Ed. 1022, L. R. A. 1917A, 265), the court said:

"The law 'presumes that every man, in his private and official character, does his duty, until the contrary is proved. It will presume that all things are rightly done, unless the circumstances of the case overturn this presumption.'"

[6] It is contended that it was error to hold the defendant Kirby liable for cattle belonging to certain cattle companies which were grazed on the leased premises by permission of McDaniels, and without Kirby's knowledge or consent. The evidence leads clearly to the inference that, notwithstanding that in the spring of 1916 Kirby may have been ignorant of the arrangement made by McDaniels to pasture the cattle of others on the leased lands, he acquired such knowledge before the end of that year, and that he was aware of McDaniels' acts in so pasturing other cattle during the second year of the lease, the year in which the court below found liability to have been incurred to pay the rental of $4.50 per head. There is no evidence of ouster of Kirby by

McDaniels, and, even if there were, their joint liability under the lease would not be affected thereby. Kendall v. Carland, 5 Cush. (Mass.) 74; Goshorn v. Steward, 15 W. Va. 657; Glenn v. Dungey, 4 Exch. 61.

[7] Error is assigned to the ruling of the court below in allowing as costs the mileage of witnesses who attended the trial from without the state, and from points more than 100 miles from where the court was held. The question of practice raised by the assignment is one upon which the courts have differed. In the First circuit it is held that a witness is entitled to the whole mileage without limit to the 100 miles, whether or not he resides within the jurisdiction. United States v. Sanborn (C. C.) 28 Fed. 302; The City of Augusta, 80 Fed. 297, 25 C. C. A. 430; The Governor Ames, 187 Fed. 40, 109 C. C. A. 94; Eastern S. S. Corp. v. Great Lakes Dredge & D. Co., 256 Fed. 497, 168 C. C. A. 3. The rule is to the contrary in the Second circuit. Buffalo Ins. Co. v. Providence & S. S. S. Co. (C. C.) 29 Fed. 237; The Syracuse (C. C.) 36 Fed. 830. Also in the Third circuit. The Progresso (D. C.) 48 Fed. 239. And in the Fourth circuit. Sloss Iron & Steel Co. v. South Carolina & G. R. Co. (C. C.) 75 Fed. 106. Also in the Sixth circuit. The Vernon (D. C.) 36 Fed. 113; Burrow v. Kansas City, etc., R. Co. (C. C.) 54 Fed. 278. Also in the Seventh circuit. Eastman v. Sherry (C. C.) 37 Fed. 844. Also in the Eighth circuit. Pinson v. Railroad Co. (C. C.) 54 Fed. 464; Griggsby Const. Co. v. Louisiana & N. W. R. Co. (C. C.) 123 Fed. 751; United States v. Green (D. C.) 196 Fed. 255. In the Ninth circuit, in Hunter v. Russell (C. C.) 59 Fed. 964, Judge Knowles followed the rule of the First circuit, but in Hanchett v. Humphrey (C. C.) 93 Fed. 895, Judge Hawley ruled otherwise, and held that mileage is taxable for a witness from any point within the district and for a distance of 100 miles, if the witness came from a point at a greater distance, and without the district. In United States v. Southern Pac. Co. (C. C.) 172 Fed. 909, Judge Bean followed the ruling in Hanchett v. Humphrey. In United States v. Southern Pac. Co. (D. C.) 230 Fed. 270, Judge Trippet held likewise. In neither of the last two cases was mention made of the decision of this court in Jesse D. Carr Land & Live Stock Co. v. United States, 118 Fed. 821, 55 C. C. A. 433, in which Judge De Haven, speaking for the court said:

"The appellant's motion to strike from the bill of costs the amount claimed by the appellee for mileage and fees of certain witnesses, who came from without the state and more than 100 miles from the place of trial, was properly denied"—citing United States v. Sanborn (C. C.) 28 Fed. 299.

Upon that decision the plaintiff in the present suit relies. We are of the opinion that the remarks of the court in that case should not be held decisive of the question here involved. The ruling was made, not on a motion to retax the costs, but on a motion to strike out the costs taxed as mileage and for expenses of witnesses. It does not appear that the question whether or not the witnesses were entitled to mileage for more than 100 miles was presented or discussed. Judge Hawley participated in the decision, notwithstanding his prior ruling in Hanchett

v. Humphrey. We think it should not stand in the way of adopting the rule which is sustained by the weight of authority, as well as by the weight of reason, that mileage is taxable in the federal court only for the distance that could be reached by a subpœna, and we so hold.

[8] But we think there was no abuse of discretion in taxing as costs the mileage and fees of witnesses who did not in fact testify, and in taxing as costs the fees and expenses of the marshal in serving subpœnas upon them. It is shown by the bill of exceptions that the witnesses were subpœnaed in good faith, and that their testimony was deemed material to the issues involved. Clark v. American Dock & Imp. Co. (C. C.) 25 Fed. 641; Burrow v. Kansas City, Ft. S. & M. R. Co. (C. C.) 54 Fed. 278.

The cause is remanded to the court below, with instructions to retax the costs of the mileage of witnesses in accordance with the foregoing opinion. In other respects the judgment is affirmed.

DAVIS v. WILLEY.

In re WILLEY.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1921.)

No. 3584.

1. **Limitation of actions ⟸100(3)—Creditor held to have had knowledge of fraud.**
   A creditor, who was present in court in an action to determine the title to an automobile which he had seized in execution when testimony was given that his debtor had transferred an account in the bank to another, has knowledge of facts sufficient to put him on inquiry which would have informed him that the account was fraudulently transferred, so that his right to have the transfer set aside is barred three years thereafter, under Code Civ. Proc. Cal. § 338, subd. 4.

2. **Limitation of actions ⟸37(4)—Bankruptcy trustee's suit to set aside fraudulent transfer is barred by state statute.**
   The right of the trustee in bankruptcy under Bankruptcy Act, § 70e (Comp. St. § 9654), to maintain an action to set aside a fraudulent transfer, is merely the right to assert a creditor's remedy not a new right, and is barred under the state statute of limitations (Code Civ. Proc. Cal. § 338, subd. 4) three years after the creditor had knowledge of the fraud, not being governed by Bankruptcy Act, § 11d (Comp. St. § 9595), forbidding suits by or against a trustee two years after the estate is closed, which is confined to suits founded strictly upon the Bankruptcy Act.

In Error to District Court of the United States for the Second Division of the Northern District of California; William C. Van Fleet, Judge.

Action by John C. Davis, as trustee in bankruptcy of the estate of Charles F. Willey, against E. T. Willey. Judgment for defendant (263 Fed. 588), and plaintiff brings error. Affirmed.

This action, brought under section 70e of the Bankruptcy Act (Comp. St. § 9654), was instituted in March, 1918, by Davis, trustee of the estate of C. F. Willey, bankrupt, against E. T. Willey, to recover certain sums transferred

to E. T. Willey in 1912 by the bankrupt, C. F. Willey, and alleged to have been transferred in fraud of his creditors. The defendant denied the material allegations of the complaint and pleaded that the cause of action was barred by a judgment rendered in an action in equity in the District Court of the United States for the Northern District of California, in which Davis, trustee of the estate of C. F. Willey, bankrupt, was plaintiff, and E. T. Willey and Mrs. C. F. Willey were defendants, and respecting the same alleged transfer that is the subject of the present action at law. In the present case the court made findings in effect as follows:

That C. F. Willey was adjudged a bankrupt on June 26, 1914; that in January, 1912, C. F. Willey was indebted to E. McGinn, and an action was pending in the superior court of the state of California wherein McGinn sued Willey to recover the debt; that the action was tried and submitted for decision about February 8, 1912, and pending decision and judgment C. F. Willey transferred to his brother, E. T. Willey, $3,387, money of the said C. F. Willey; that the transfer was made for the purpose of defrauding McGinn, and was made with the knowledge and consent of E. T. Willey; that in May, 1912, in the action in the state court, McGinn recovered judgment against C. F. Willey, and that upon appeal the judgment against C. F. Willey was affirmed on April 8, 1914, which was little more than two months before C. F. Willey filed petition for voluntary bankruptcy; that execution out of the state court upon the judgment against the property of C. F. Willey was partly satisfied, but that there still remains unpaid on the judgment more than $1,000, of the principal sum, besides the interest; that in proceeding under the execution in the state court the sheriff levied upon an automobile as belonging to C. F. Willey; that thereafter E. T. Willey brought an action in the state court against the sheriff for the conversion of the property so seized, and recovered judgment against the sheriff for the value of the property; that the action was tried in March, 1914, and that on the trial of the action in the state court testimony was given in the presence of the counsel for McGinn and of McGinn himself by an officer of the First National Bank at Sonora, Cal., to the effect that in 1912 a transfer had been made upon the books of the bank by C. F. Willey to E. T. Willey of certain funds; that the evidence of this transfer at the time of the trial in the state court was sufficient to put McGinn and the present plaintiff in error, Davis, as trustee, upon inquiry as to fraud in the transfer, and to disclose that, if an investigation had been made, it would have exposed to McGinn and his counsel the entire transaction set forth in the complaint in the present action, but that no investigation was made before April, 1915; that heretofore, in March, 1917, the present plaintiff, Davis, as trustee, brought suit in equity in the District Court of the United States for the Northern District of California against E. T. Willey and Mrs. Charles F. Willey the wife of the bankrupt, to obtain a decree requiring them to pay over to the trustee the same moneys sued for in the present action, the complaint setting up the same fraudulent transfer by C. F. Willey as is alleged in the present complaint; that upon the trial in the United States court it was decreed that Mrs. C. F. Willey had received certain of the said moneys as a fraudulent transferee of C. F. Willey, and that she pay over the sum of $1,565 to the trustee, but that the suit as to the defendant E. T. Willey was ordered dismissed, and a decree to that effect was duly entered, and that no appeal was taken by the plaintiff as trustee to the Circuit Court of Appeals. It is of record, also, that in the equity suit in the federal court E. T. Willey set up that the money transferred to him was in payment of a debt due him by C. F. Willey and that plaintiff's remedy was at law.

As a conclusion of law the court held that the present action is barred by the provisions of subdivisions 4, section 338, of the California Code of Civil Procedure, and by the order dismissing the suit in equity as against the defendant E. T. Willey. Section 338 of the California Code provides that an action for relief on the ground of fraud or mistake shall be brought within three years. The cause of action, however, is not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

Judgment was entered on the findings and writ of error taken to this court.

J. C. Webster, of Sonora, Cal., and William H. Bryan, of San Francisco, Cal., for plaintiff in error.

William E. Billings, of San Francisco, Cal., for defendant in error.

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

HUNT, Circuit Judge (after stating the facts as above). The more important assignment of error presents the question whether the court erred in holding that the action was barred by the provisions of section 338 of the California Code of Civil Procedure heretofore quoted.

[1] Upon reading the record, there can be no substantial doubt of the accuracy of the finding of the District Court that McGinn and the counsel who represented him at the trial, which concerned ownership of an automobile claimed by E. T. Willey on the ground that it had been purchased with funds that belonged to C. F. Willey, in the state court in 1914, learned as a fact that the records of the First National Bank at Sonora showed that in 1912 a special account of $1,787.37 was created by transfer to the name of C. A. Belli from the funds of C. F. Willey, bankrupt herein, and that in June, 1912, a check for $794 was drawn on the special account. Having such knowledge of the facts relating to the transfer of the $1,787.37 fund, we think McGinn must be held to have had the means of knowledge of ascertaining all the facts of the fraud alleged. The circumstances were such that they put him upon inquiry as to the fact that there was a further considerable sum of money belonging to C. F. Willey which had been transferred to the brother of E. T. Willey. The most reasonable diligence would have quickly led to the discovery of the extent of the transfers and for the lack of such reasonable diligence there are no facts shown by way of fair excuse.

It is not to be disputed that E. T. Willey has put himself in an unusual position. By separate answer in the equity suit brought by the trustee against him as a party in the federal court, he set up a legal defense that in 1912 he had paid back certain money to C. F. Willey, now bankrupt, but that none of the money so paid were moneys which had been received by C. F. Willey for a sixth interest in a mining claim owned by McGinn and which had been sold and over which there had been the litigation referred to in the findings of the court. The court held that this defense was well founded and dismissed as to him. Now, after the trustee brought the action at law against him and pleaded the same facts and none other, he has set up the decree in the equity suit as a defense to the law action.

As pointed out by the counsel for the plaintiff in error it may therefore result that, if the defense is good, Willey will avoid liability upon the ground that he could not be held in equity because any remedy against him was at law, and he cannot be held at law, because the action is barred by statute of limitations. This argument, however, is not of sufficient force to justify the court in declining to apply the thoroughly well-settled principle of law that in an action for relief on the ground of fraud, unless the case can be brought within an excep-

tion of the statute of limitations, the action is barred. In Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. 807, the court said:

"The plaintiff was supine. If underlying fraud existed * * * he did nothing to unearth it. * * * Whatever is notice enough to excite attention, put the party on his guard and call for inquiry, is notice of everything to which said inquiry, might have led." Archer v. Freeman, 124 Cal. 528, 57 Pac. 474; Truett v. Onderdonk, 120 Cal. 581, 53 Pac. 26.

It is said that decree of dismissal in the equity suit was not on the merits, and that action at law upon the same cause of action is not barred. But under the statute of limitation of California no action at law can be maintained by the plaintiff. The nature of the dismissal in the equity suit is not of special importance.

[2] This brings us to the question whether the action is subject to the provision of limitation of the Code of Civil Procedure of California, or to such period of limitation as may be found in the Bankruptcy Act. By the Bankruptcy Act the trustee is given title to money fraudulently transferred, and he has a right to sue to recover it.

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred," etc. Section 70e.

Section 11d of the Bankruptcy Act of 1898 (Comp. St. § 9595) provides that—

"Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed."

The section last quoted seems to be confined to suits founded strictly upon the Bankruptcy Act. For instance, a case within section 60b of the act (Comp. St. § 9644) may be governed by it. The distinction between actions founded upon the Bankruptcy Act and those founded upon rights existing under the common or state laws is clearly recognized in Arnold Co. v. Shackelford, 140 Ga. 585, 79 S. E. 470, a case cited by plaintiff in error. But under section 70e heretofore quoted, the trustee may void any transfer which any creditor might have voided. This right is conferred upon the trustee to put him in a position to assert the right which the creditor might have possessed in suing to set aside a transfer. The trustee is really subrogated. No new rights, no additional remedies, are created for the benefit of the creditor, other than such as the creditor would have had had it not been for the bankruptcy. In Holbrook v. International Trust Co., 220 Mass. 150, 107 N. E. 665, the court said:

"All that section 70e of the Bankruptcy Act does is to give authority to the trustee in bankruptcy to enforce the rights of creditors to avoid fraudulent transfers of property made by the bankrupt if such fraudulent transfers have been made. That is to say whether a particular transfer was or was not fraudulent as to creditors under section 70e does not depend upon the United States Bankruptcy Act, but upon the laws of the state which govern the transfer of the property in question."

To the same effect is the able opinion by Judge Lowell in In re Mullen (D. C.) 101 Fed. 413; Manning v. Evans (D. C.) 156 Fed. 106.

Having sued herein under section 70e, the suit is based on the state

law, and therefore the controlling point is whether McGinn could have maintained the action, under the law of the state. To this there is but the one plain answer. The action, if brought in the state court, would be barred, and therefore the state statute has been correctly applied in the federal court, and, as plaintiff in error, McGinn, failed to assert any rights he may have had within the prescribed time, his action must now be held to be barred.

The judgment is affirmed.

THE PORTLAND.

NATIONAL SURETY CO. et al. v. UNION OIL CO. OF CALIFORNIA.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1921.)

No. 3608.

1. **Maritime liens ⟸17—Statute of 1910 was intended to remove confusion.**
The purpose of Act June 23, 1910, c. 373 (Comp. St. §§ 7783–7787), relating to liens on vessels for repairs, supplies, or other necessaries, was to give certainty, where uncertainty and conflict of decision had arisen as to the liability of a ship for services and supplies.

2. **Statutes ⟸209—"Order" and "procure," in different sections of Lien Act have same meaning.**
The fact that in Act June 23, 1910, c. 373, §§ 1, 3 (Comp. St. §§ 7783, 7785), the word "order," or "ordering," is used with reference to the supplies for which a maritime lien is given, while in section 2 (Comp. St. § 7784), specifying the persons presumed to have authority from the owner to bind the vessel, the word "procure" is used, does not indicate an intention to give different significance in those sections.

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

3. **Maritime liens ⟸21—Requirement that charterer shall pay for fuel does not deprive master of authority to bind vessel.**
The requirement in a charter party that the charterer shall furnish and pay for the fuel regulates the rights between the owner and charterer, but does not affect the rights of third persons and does not deprive the master of the authority he is presumed to have under Act June 23, 1910, c. 373, § 2 (Comp. St. § 7784), to bind the vessel for fuel, so that a lien may be asserted for the fuel notwithstanding section 3 (Comp. St. § 7785), denying a lien if the furnisher knows that because of the terms of the charter party the master was without authority to bind the vessel for the fuel.

4. **Maritime liens ⟸28—Charter provision giving lien for advances does not deny authority of master to bind vessel for supplies.**
A provision in a charter party giving the charterer a lien on the vessel for advances made, but not determined, does not impliedly deny the authority of the master to bind the vessel for fuel furnished to it, since it refers to a lien given by the owner to the charterer, and not one given by the charterer to third persons.

5. **Stipulations ⟸14(10)—Stipulation held to show fuel was supplied vessel on order of master and not under contract with charterer.**
On a libel to enforce a lien for fuel against a vessel while she was under charter, a stipulation that the libelant furnished fuel oil on orders from

the master shows that it was procured by the master, who had authority to bind the vessel, and not furnished under an existing written contract between the charterers and the fuel company.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Libel by the Union Oil Company of California against the steamship Portland and another to enforce the maritime lien. Decree in favor of libelant, and claimant appeals. Affirmed.

Libel in rem to recover the value of fuel oil furnished by Union Oil Company to the steamship Portland on different occasions between July 5 and November 27, 1912. About April 18, 1911, the California-Atlantic Steamship Company contracted with the Union Oil Company of California that the Steamship Company would use oil in the steamers which the company might charter or operate in its California-Atlantic service and to purchase from libelant all oil required in the operation of any steamers chartered subsequent to April 18, 1911, not specifically mentioned in the contract. The Oil Company agreed to sell and deliver the oil. On August 28, 1911, the Steamship Company chartered the Portland, the charterers to pay for all fuel, except as specifically provided for. It is stipulated that libelant notified a representative of the Steamship Company that it would be necessary to charge any oil and dunnage furnished to the ships mentioned in the contract to the vessels, and that to this the representative of the Steamship Company consented. Bills for oil furnished between August 28, 1911, and July 5, 1912, were rendered to the Steamship Company, charging oil to the ship and to the charterer Oil Company, and such bills were paid by the California-Atlantic Steamship Company. But for five deliveries between July 5, 1912, and November 12, 1912, no payment was made, and libelant filed the present libel. From a decree in favor of libelant claimant appealed.

The claimant's position is that libelant has no lien upon the steamer, and that neither the steamer nor her owners are liable for the oil furnished; while libelant asserts that it has a lien under the provisions of the Act of Congress of June 23, 1910, c. 373 (36 U. S. St. L. 604 [Comp. St. §§ 7783–7787]), "relating to liens on vessels for repairs, supplies, or other necessaries." The act provides "that any person furnishing repairs, supplies, or other necessaries * * * to a vessel * * * upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien upon the vessel which may be enforced by a proceeding in rem, and it shall not be necessary to allege or prove that credit was given to the vessel." Section 2 provides that among the persons who shall "be presumed to have authority from the owner or owners to procure repairs, supplies and other necessaries for the vessel," shall be "the managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is entrusted." Section 3 is as follows: "That the officers and agents of a vessel specified in section 2 shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel, but nothing in this act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of the charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor."

Andros & Hengstler and Louis T. Hengstler, all of San Francisco, Cal., for appellants.

Farnham P. Griffiths and McCutchen, Willard, Mannon & Greene, all of San Francisco, Cal., for appellee.

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

HUNT, Circuit Judge (after stating the facts as above). [1] The purpose of the act of 1910 was to give certainty where uncertainty and conflict of decision had arisen upon the question of the liability of a ship for materials and service. In The Yankee, 233 Fed. 919, 147 C. C. A. 593, the Court of Appeals for the Third Circuit summarizes the contrariety of views and refers to the learned opinion of Judge Lowell in The Underwriter (D. C.) 119 Fed. 713, as demonstrating the confusion which through centuries has obscured the subject. This court, too, considered the state of the law in The South Coast, 247 Fed. 84, 159 C. C. A. 302.

The cases cited show how the courts differed in their construction, depending upon whether supplies were furnished in a foreign or domestic port, or were furnished upon the credit of the representative of the ship, or upon the credit of the ship, and whether they were furnished upon the order of the owner or the master. We shall not take up the discussion further than to say that Congress, presumably knowing of the confusion, endeavored by the act of 1910 to make the law more certain by providing in effect that proof that credit was given the ship is dispensed with in the first instance, in that a presumption shall obtain that certain persons have authority to procure supplies and that the ship's husband or master is one of the persons. No lien accrues if such persons did not have authority to bind the ship, and such lack of authority was known, or ought to have been known, to the furnisher of supplies. To apply the law to the circumstances of the present case is quite simple. The supplies were furnished at San Francisco, Oleum, and Balboa, upon the order of the master of the Portland. This being the case, the libelant established a prima facie right to a lien to be upheld, unless the claimant showed facts which withdrew the case from the general provisions by proving that the furnisher knew or by the exercise of reasonable diligence could have ascertained that because of the terms of the charter party, or for any other reason, the master was without authority to bind the ship.

[2] Appellant puts special stress upon the fact that there was a general contract between libelant and the charterer to buy fuel oil used by the charterer in operating its ships, and that the charterer therein agreed to provide and pay for the fuel oil used by the ship, and says that the oil was in fact "procured" by the charterer under a personal contract obligating libelant to furnish the same. It is to be noted that section 1 of the act uses the words "upon the order" of the owner, while section 2 declares what persons shall be presumed to have authority from the owner "to procure" supplies, and in section 3 we find the words "person ordering the repairs," etc. We cannot perceive, however, that the words "order" and "procure" were used with different significance. Fuel furnished by a person upon the order of the master is equivalent to fuel which the master has authority to procure. The first section confers the right of lien where the furnishing is done on

order; the second defines those who are presumed to have authority to obtain the fuel.

[3] It is said that the charter party gave the charterer no right to impose a lien on the vessel for fuel to be furnished for two reasons: One, because the charter obligation to provide fuel was on the charterer; another, because the only lien upon the ship given to the charterer by the charter party was a lien for moneys advanced and not earned. But an examination of the charter party fails to disclose that the master or charterer had not authority to bind the vessel for supplies of fuel at distant ports. There are no words prohibiting persons enumerated in section 2 of the act of Congress from binding the vessel for necessary things. We think that a charter party with a provision that charterer shall provide and pay for fuel oil does not take away from the master the authority conferred by the act upon the master to bind the ship. It regulates the rights as between owner and charterer; but as to third persons the right of lien is not affected. In The South Coast (D. C.) 233 Fed. 327, Judge Dooling very clearly enunciated that in a charter party requiring charterer to pay expenses incurred in operating as well as for supplies furnished the vessel, it is an essential precaution for the owners to provide by the terms of the charter that the charterer or the master appointed by him, should be without authority to bind the vessel therefor. This court affirmed that view in The South Coast, 247 Fed. 84, 159 C. C. A. 302, and the ruling was affirmed by the Supreme Court in The South Coast, 251 U. S. 519, 40 Sup. Ct. 233, 64 L. Ed. 386.

[4] Distinction between that case and this is said to exist because in The South Coast the charter party recognized that liens might be imposed by the charterer, whereas here there is no such recognition, but, on the contrary, there are provisions which negative the right of the charterer to impose a lien "for the purpose of procuring" fuel oil. Among the provisions of the charter party under consideration are: That charterer shall provide and pay for fuel; that charterer shall pay for use of vessel regardless of whether she moves or not or whether she is supplied with fuel or not; that charterer shall have a lien "on the ship for all moneys paid in advance and not earned." But the charter party in The South Coast required charterer to provide and pay for supplies as well as operating expenses of the vessel. Nor does the provision giving a lien on the ship for all moneys paid in advance and not earned affect the similarity of the cases, as the lien referred to in the case before us is one given by the owners to the charterers, not one given by the charterers to third persons.

The real ground for the ruling in The South Coast was that the supplies were furnished on orders from the master, and the master had the power to impose a lien unless the charter party excluded the possession of such power. Some of the cases cited by the appellant are to the effect that one knowing that he is dealing with a charterer is put on inquiry as to the terms of the charter party. The Oceana (D. C.) 233 Fed. 139; Id., 244 Fed. 80, 156 C. C. A. 508; The Castor, 267 Fed. 608. That rule can be accepted without disturbance of the authority of The

South Coast for holding that, libelant having delivered supplies upon the master's orders, and the master having been authorized to order supplies for the vessel, and there being no clause in the charter which in any way prohibited the master from exercising such authority, it has a lien which has not been defeated. In the case of The Millinocket (D. C.) 266 Fed. 392, cited by appellant, it is doubtful at least whether the coal was ordered by one presumed under the statute to have authority to bind the vessel. We gather that a subcharterer was the person who tried to pledge the ship, and it was properly held that no lien was presumed in favor of the libelant without proof of authority. In Curacao T. Co. v. Bjorge (C. C. A.) 263 Fed. 693, it was held the master did not order the coal, but acted for the charterers, and therefore there was no presumption of a lien.

[5] Claimant says that the stipulated facts are that the fuel oil was furnished at the prices and under the conditions specified in the oil contract, and that therefore the oil was furnished upon orders from the master, and that the master had nothing to do with getting it, except under charterer's direction, of which libelant knew. The position is not tenable. In the pleadings libelant alleged "that the fuel oil was furnished by order of the master and charterer of the vessel and was charged to said vessel by libelant." The answer denied that the fuel oil "was furnished by order of the master and charterer or by the master of said vessel." The stipulation is that from time to time "libelant furnished to the steamer Portland fuel oil in the amounts as follows upon orders from the master," etc. We gather neither directly nor by implication a meaning whereby the master became merely a person for the transmission of the order.

The decree is affirmed.

LAWRENCE v. WARDELL, Collector of Internal Revenue.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1921.)

No. 3615.

1. Taxation ⟸16—Power of Congress to levy taxes not restricted, as in states.

The power of Congress in the imposition of taxes in the Philippine Islands is derived from Const. art. 4, § 3, cl. 2, authorizing it to make rules and regulations respecting the territory of the United States, and is not restricted by Const. art. 1, § 8, limiting its general power of taxation as to uniformity and apportionment.

2. Internal revenue ⟸7—Citizen residing in Philippines liable to taxation under Revenue Act of 1918.

The income tax levied by Revenue Act 1916, as amended by Revenue Act 1917, in the Philippine Islands, which, under section 23 of the former act (Comp. St. § 6336v) is to be paid to the insular treasury, and which was not repealed by Revenue Act 1918, § 1400a (Comp. St. Ann. Supp. 1919, § 6371¾a), does not prevent the levy of the income tax under sections 210, 211 (sections 6336⅛e, 6336⅛ee), on every individual in lieu of the taxes levied by the acts of 1916 and 1917; the latter provision not limiting the persons taxable to those who were taxed under the preceding

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

act, especially in view of section 260 of the act of 1918 (section 6336⅛yy), limiting the tax on citizens of possessions, but not otherwise citizens of the United States, to the income derived from sources within the United States.

3. Internal revenue ⟸7—Saving of 1916 act in Philippines does not prevent collection of tax under act of 1918.

The provision of Revenue Act 1918, § 1400a (Comp. St. Ann. Supp. 1919, § 6371¾a), that Revenue Act 1916, as amended by Revenue Act 1917, should remain in force for the collection of the income tax of the Philippine Islands, except as may be otherwise provided by their Legislature, does not prevent the collection of the income tax under the act of 1918 from a citizen of the United States residing in the Philippines.

4. Internal revenue ⟸7—Citizen residing in Philippines liable for difference between local income tax and tax of 1918.

Under Revenue Act 1918, § 222a (Comp. St. Ann. Supp. 1919, § 6336⅛k), allowing credit on the income tax for taxes paid to any possession of the United States, a citizen of the United States residing in the Philippine Islands, who had paid into the treasury of the Islands there the income tax levied as local revenue under the Revenue Acts of 1916 and 1917, is liable to the United States treasury for the difference between the amounts paid under those acts and the amount of the income tax computed under Revenue Act 1918, §§ 210, 211 (sections 6336⅛e, 6336⅛ee).

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

Action by W. H. Lawrence against Justus S. Wardell, Collector of Internal Revenue for the First District of California. Judgment for defendant, after general demurrer to the complaint was sustained (270 Fed. 682), and plaintiff brings error. Affirmed.

In an action by plaintiff, Lawrence, to recover certain sums paid under protest to the defendant, collector of internal revenue, the District Court sustained a general demurrer to the complaint and entered judgment of dismissal. Writ of error was taken out, in order to present the question whether sections 210 and 211 of the Revenue Act of 1918 (Comp. St. Ann. Supp. 1919, §§ 6336⅛e, 6336⅛ee) apply to the 1918 income of a citizen of the United States residing in the Philippine Islands. The facts are these:

Plaintiff, a citizen of the United States, was a resident of the Philippine Islands in 1918, and until March, 1919. In January, 1919, in the Philippines, plaintiff paid an income tax representing the full amount of tax upon his 1918 income, computed in accordance with the Revenue Act of 1916 (39 Stat. 756), as amended by the Revenue Act of 1917 (40 Stat. 300). In March, 1919, plaintiff became a resident of California, and in July, 1919, was required by the defendant collector to pay income tax upon his 1918 income, computed in accordance with the Revenue Act of 1918, with credit for the amount paid in the Philippines. Defendant paid under protest, and his claim for refund was denied. The position of the plaintiff is that by section 1400 of the Revenue Act of 1918 (Comp. St. Ann. Supp. 1919, § 6371¾a) title I of the Revenue Act of 1916, as amended by the Revenue Act of 1917, is still in force as to 1918 income of residents of the Philippine Islands; that by section 261 of the Revenue Act of 1918 (section 6336⅛z) plaintiff was required to pay in the Philippines the income tax as provided by the Revenue Act of 1916 on his whole income of 1918; that sections 210 and 211 of the Revenue Act of 1918 imposed an income tax only in lieu of the corresponding taxes of the Revenue Acts of 1916 and 1917, and are not applicable where the earlier acts stand unrepealed; that the Legislature of the Philippine Islands has not amended or modified or repealed the income tax provisions of the Revenue Acts of 1916 and 1917 as to the income of the year 1918. On the other hand, it

is contended that the act of 1916, as amended by the act of 1917, was, so far as it affected the Philippine Islands, enacted by Congress in its capacity of a local Legislature for the Philippine Islands, and that the Revenue Act of 1918 imposes a tax equally upon all citizens of the United States, without regard to the place of residence. Summarizing the pertinent statutes, they are as follows:

By the Revenue Act of 1916, title I, part 1, it is provided in section 1 (a)—Comp. St. § 6336a—that taxes should be levied and collected annually upon the entire net income received in the preceding calendar year by every individual, a citizen or resident of the United States. Section 23 (section 6336v) made the provisions of the title extend to Porto Rico and the Philippine Islands, provided that the administration of the law and the collection of taxes imposed in Porto Rico and the Philippine Islands should be by internal revenue officers of the government of those islands, and that all revenue collected in those islands under the act "shall accrue intact to the general governments thereof." By the Revenue Act of 1917, approved October 3, 1917 (Comp. St. 1918, § 6336aa), it is provided (section 1):

"That in addition to the normal tax imposed by the subdivision (a) of section one of the act entitled 'An act to increase the revenue, and for other purposes,' approved September 8, 1916, there shall be levied, assessed, collected, and paid a like normal tax of two per centum upon the income of every individual, a citizen or resident of the United States, received in the calendar year 1917 and every calendar year thereafter."

The provisions did not extend to the Philippines, and the local Legislature was given power to amend or repeal income taxes in force. The Revenue Act of 1918, approved February 24, 1919 (title II, part 2), provides:

"Sec. 210. That, in lieu of the taxes imposed by subdivision (a) of section 1 of the Revenue Act of 1916 and by section 1 of the Revenue Act of 1917, there shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax at the following rates. * * *" Comp. St. Ann. Supp. 1919, § 6336⅛e.

"Sec. 211. (a) That, in lieu of the taxes imposed by subdivision (b) of section 1 of the Revenue Act of 1916 and by section 2 of the Revenue Act of 1917, but in addition to the normal tax imposed by section 210 of this Act, there shall be levied, collected, and paid for each taxable year upon the net income of every individual, a surtax equal to the sum of the following. * * *" Section 6336⅛ee.

"Sec. 222. (a) That the tax computed under part II of this title shall be credited with:

"(1) In the case of a citizen of the United States, the amount of any income, war-profits and excess-profits taxes paid during the taxable year to any foreign country, upon income derived from sources therein, or to any possession of the United States; and * * *." Section 6336⅛k.

"Sec. 260. That any individual who is a citizen of any possession of the United States (but not otherwise a citizen of the United States) and who is not a resident of the United States, shall be subject to taxation under this title only as to income derived from sources within the United States, and in such case the tax shall be computed and paid in the same manner and subject to the same conditions as in the case of other persons who are taxable only as to income derived from such sources." Section 6336⅛yy.

"Sec. 261. That in Porto Rico and the Philippine Islands the income tax shall be levied, assessed, collected, and paid in accordance with the provisions of the Revenue Act of 1916 as amended.

"Returns shall be made and taxes shall be paid under Title I of such act in Porto Rico or the Philippine Islands, as the case may be, by (1) every individual who is a citizen or resident of Porto Rico or the Philippine Islands or derives income from sources therein. * * * An individual who is neither a citizen nor a resident of Porto Rico or the Philippine Islands but derives income from sources therein, shall be taxed in Porto Rico or the Philippine Islands as a non-resident alien individual. * * *" Section 6336⅛z.

The local Legislature has power to amend or repeal the income tax laws in force in the Islands.

Section 1400 (a) of the Revenue Act of 1918 provided:

"That the following parts of acts are hereby repealed, subject to the limitations provided in subdivision (b) 1: The following titles of the Revenue Act of 1916: Title I (called 'Income Tax') * * * (3) The following titles of the Revenue Act of 1917: Title I (called 'War Income Tax'); * * * Title XII (called 'Income-Tax Amendments'). * * * (b) * * * Title I of the Revenue Act of 1916 as amended by the Revenue Act of 1917 shall remain in force for the assessment and collection of the income tax of Porto Rico and the Philippine Islands, except as may be otherwise provided by their respective legislatures." Section 6371¾a.

W. H. Lawrence and Burt F. Lum, both of San Francisco, Cal., for plaintiff in error.

Frank M. Silva, U. S. Atty., and E. M. Leonard, Asst. U. S. Atty., both of San Francisco, Cal., for defendant in error.

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

HUNT, Circuit Judge (after stating the facts as above). By the statutes above cited Congress extended the provisions of the Revenue Law of 1916 to the Philippine Islands, and authorized the assessment and levies to be made by the administrative internal revenue officers of the Philippine government, but, instead of requiring the taxes when collected to be paid into the treasury of the general government of the United States, directed that they should accrue to the general government of the Philippine Islands. A like policy obtained and still obtains as to Porto Rico. The purpose of such legislation was to enable the governments of those islands, respectively, to have sufficient revenue to meet their needs and to receive the money through the most direct channels, and not have to await appropriation by Congress. The policy was not new. For example, in the island of Porto Rico, ever since the institution of civil government in May, 1900, customs duties collected have been turned over to the insular treasury by the collector of customs for the island, to be expended as required by law for the government and benefit of the island, "instead of being paid into the treasury of the United States." Act of Congress April 12, 1900, § 4, Supplement R. S. U. S. vol. 2, p. 1128 (U. S. Comp. St. § 3752).

[1] The power of Congress, in the imposition of taxes and providing for the collection thereof in the possessions of the United States, is not restricted by constitutional provision (section 8, article 1), which may limit its general power of taxation as to uniformity and apportionment when legislating for the mainland or United States proper, for it acts in the premises under the authority of clause 2, section 3, article 4, of the Constitution, which clothes Congress with power to make all needful rules and regulations respecting the territory or other property belonging to the United States. Binns v. United States, 194 U. S. 486, 24 Sup. Ct. 816, 48 L. Ed. 1087; Downes v. Bidwell, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088.

When Congress enacted the Revenue Law of October 3, 1917, by section 5 (Comp. St. 1918, § 6336vv) it saw fit to provide expressly that

the provisions of the title should *not* extend to the Philippines or Porto Rico, and the local Legislatures were given power to amend, alter, modify, or repeal the income tax laws in force in the islands, respectively. The result was that under the act of 1916 the entire net income of every individual, a citizen or resident of the United States, resident in the Philippines, became taxable thereunder, but subject to the jurisdiction of the Philippines in respect to tax matters. But Congress, acting doubtless under the after-war needs, by the Revenue Act of 1918, changed the situation and made the net income of every individual citizen of the United States taxable, no matter where he resides. In the place of the taxes imposed by the act of 1916 (subdivision [a] section 1), and by the act of 1917 (section 1) the net income of "every individual" was subject to the rate prescribed (section 210); and in place of taxes imposed by subdivision (b), section 1, of the act of 1916, and section 2 of the act of 1917 (Comp. St. 1918, § 6336aaa), but in addition to the normal tax imposed by section 210 of the act the surtaxes prescribed should be collected.

[2] The comprehensiveness of the 1918 act is as great as language could make it, for it applied to the income of every individual, changing the rates, and obviously imposing taxes at the new rates, where no tax could have been imposed prior to the 1918 act. We are unable to infer that, by using the words "in lieu of," Congress meant to tax only those incomes of individuals who had been subject to taxation under the two prior acts. It is more reasonable to hold that, where the individual was liable under the prior act of 1916, the new act of 1918 became the controlling standard. Where, by the act of 1917, he was relieved of the increased rates of that act, but had been subject to the 1916 act, he was covered by the provisions of the 1918 act, and in the event he was never before included he became liable under the very broad terms of the act of 1918. Section 260, supra, of the act of 1918, also leads to the conclusions indicated. The language there used discriminates, by making individuals who are citizens of a possession of the United States, yet not otherwise citizens of the United States, and who are not residents of the United States, subject to be taxed only as to income derived from sources within the United States. Unless such a person has income so derived, he is not subject to the act.

[3] In the repealing clauses of the act of 1918, as quoted in the statement of the case, the act of 1916, as amended by the act of 1917, in force in the Philippines, was continued in force, except as might be otherwise provided by the local Legislature. As a general statute of the United States there was clear repeal, but as to the Philippines the act of 1916 was kept alive, as direct legislation by Congress with respect to the local affairs of the island, and not as a general statute of the United States.

A citizen of the United States residing in the Philippines becomes subject to the Income Tax Law under the act of 1918. By section 261, supra, of that act, the tax shall be levied, collected, and paid in accordance with the act of 1916, as amended, returns to be made and taxes to be paid under title I of the act by "every individual who is a citizen

or resident" of the island; the local Legislature having power as already defined. The citizen of the United States residing in the island is in much the same position as is a citizen of a state, where there is a state income tax. The fact of residence in the Philippines avails him no more than would the fact of residence in a state.

[4] Section 222 of the act of 1918, in providing for credits for taxes, makes the taxes computed under part II of the title subject to a credit (1) in the case of a citizen of the United States the amount of any income taxes paid during the taxable year to any foreign country upon income derived from sources therein, "or to any possession of the United States." It is argued that a citizen of the United States, resident of the islands, is not subject to taxation under the 1918 act, because the return to the "possession" is not a return under the act of 1916, though it is a return under a local act. Section 222 allows to one residing in the Philippines a credit upon the tax computed under part II of the 1918 act, but there is nothing to indicate that there is exemption to the citizen residing in the islands. He may have paid to the island treasury such amounts as are due, but still be liable to the United States for a sum in excess of that paid in the islands.

The regulations of the Treasury Department (regulation 45, articles 1131, 1132) have been framed upon the construction which we have adopted; and, as credit appears to have been given to plaintiff for the amount of taxes which he had already paid in the Philippines, we think he cannot complain of the judgment rendered against him.

The judgment is affirmed.

McKELVEY et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1921.)

No. 3622.

1. Public lands ⇐21—Preventing person from crossing unoccupied lands by use of firearms prohibited by statute.

Act Feb. 25, 1885, § 3 (Comp. St. § 4999), providing that no person by force, threats, intimidation, or by fencing or inclosing, etc., shall prevent or obstruct any person from entering upon and establishing a settlement on public lands subject to settlement, or prevent or obstruct free passage or transit over public lands, is not limited to acts amounting to an occupancy of the lands or to the obstruction of intended settlers, but applies to the obstruction of free passage to persons driving a band of sheep, by using firearms to intimidate them from crossing unoccupied lands.

2. Public lands ⇐21—Penalty for obstructing passage not limited to owners or agents.

Act Feb. 25, 1885, § 4 (Comp. St. § 5000), providing that any person violating the provisions of that act (relating to the obstruction of free passage over unoccupied public lands), whether as owner, part owner, or agent, or who shall aid, abet, etc., any violation, shall be guilty of a misdemeanor, is not limited to owners, part owners, or agents, but applies to one who with no pretended claim of right or ownership, by threats and intimidation, prevents another from driving stock across public lands.

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3. **Criminal law ⟸437—Township plats held admissible on trial for obstructing passage across public lands.**
On a trial for preventing and obstructing free passage across public lands by force and intimidation, official plats of townships in which the lands in question were situated were competent to prove the lands were public lands, though a part of such townships were privately owned.

4. **Public lands ⟸21—Evidence sufficient to support conviction for preventing and obstructing passage.**
On a trial for preventing and obstructing free passage over unoccupied public lands by force, threats, and intimidation, evidence *held* sufficient to sustain a verdict as against all the defendants convicted.

5. **Public lands ⟸6—Statute prohibiting prevention of free passage held valid.**
Act Feb. 25, 1885, § 3 (Comp. St. § 4999), so far as it prohibits the prevention and obstruction of free passage over unoccupied public lands, is valid, under Const. art. 4, § 3, authorizing Congress to make all needful rules and regulations respecting the territory or property belonging to the United States.

6. **Indictment and information ⟸111(3)—In indictment for obstructing passage over public lands, proviso need not be negatived.**
Under Act Feb. 25, 1885, § 3 (Comp. St. § 4999), providing that no person by force, etc., shall prevent or obstruct free passage over public lands, provided that this shall not affect the right or title of persons improving or occupying such lands and claiming title thereto in good faith, the proviso is not a component part of the definition of the offense, and need not be negatived in an indictment.

In Error to the District Court of the United States for the Eastern Division of the District of Idaho; Frank S. Dietrich, Judge.

Charles McKelvey and others were convicted of preventing and obstructing free passage over unoccupied public lands, and they bring error. Affirmed.

Chase A. Clark and Solon B. Clark, both of Mackay, Idaho, for plaintiffs in error.

J. L. McClear, U. S. Atty., and J. R. Smead, Asst. U. S. Atty., both of Boise, Idaho.

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

HUNT, Circuit Judge. Defendants below brought writ of error to review their conviction of having prevented and obstructed free passage over and through certain described public unoccupied lands of the United States; the obstruction being accomplished by force, threats, and intimidation. The indictment charged that the defendants did—

"willfully and unlawfully, by means of force, threats, and intimidation and other unlawful means, prevent and obstruct certain persons * * * from having and enjoying free passage over and through certain public unoccupied land of the United States of America, to wit: * * * That they * * * did then and there forcibly and unlawfully make an assault with firearms * * * upon the said * * * who were then and there attempting peaceably to pass over and through said aforesaid public lands of the United States, and did then and there threaten to injure the said * * * if they should not then and there desist in passing and attempting to pass over and through said public land, * * * or should endeavor again to go upon said public lands, all of which things were done * * * for the purpose of prevent-

ing and obstructing the said * * * from passing over and through the said public lands, and by means of which said forcible assaults and threats the said * * * did then and there intimidate the said * * * and did then and there force them to desist from passing on, over, and through said public land," etc.

There was evidence that about August 25th certain men in charge of some bands of sheep were driving them down on the left side of Big Lost river toward Mackay, Idaho; that some of the defendants, Lehman and Warren, told the man in charge of the sheep that they would have to move, as it was a cattle range; that the sheep men told the defendants that they would have to get orders from the owners of the sheep; that later that day defendant Bates told the sheep men to move right away, and with others who were armed made threats and demonstrations of force. On the morning of the 26th defendant Bates went to the sheep camp and asked the man in charge of the sheep if they were going to move. The sheep man replied that they were going on the side of the river they were on toward the trail they always used between the ranches and the forest reserve, whereupon defendant Bates said they could not go through there. Thereupon Bates told the sheep man something would happen to him. Later Tom Donahue (who was discharged on motion of the United States attorney), McKelvey, Warren, and one other, met the sheep men, and E. Donahue, T. Donahue, McKelvey, and another scared the horses of the sheep men, rode into camp, and told the sheep men to hold up their hands. The men obeyed. The visiting party commenced to shoot, and wounded one of the sheep men. Further threats were then made by Emmet Donahue and Bates and Lehman. Some of the defendants then ordered the sheep men to pack the horses and move everything, sheep and men. The sheep men then drove the sheep down across the river.

According to the plats of the land office, and as testified to by the register of the United States Land Office at Haley, Idaho, the land where the trouble occurred was public land not entered, and the land over which the sheep men proposed to drive the sheep was vacant and unentered public land, lying between a forest reserve and certain occupied lands in the river valley.

[1] The question of the sufficiency of the indictment is presented by a contention that the act charged does not come within the scope and meaning of section 3 of the Act of Congress of February 25, 1885, entitled "An act to prevent unlawful occupancy of the public lands" (23 Stat. 321 [Comp. St. § 4999]), and that the indictment does not negative the proviso contained in section 3 of the act of Congress referred to. By section 1 of the act (Comp. St. § 4997) it is provided:

"All inclosures of any public lands * * * heretofore or to be hereafter made * * * by any person, * * * to any of which land included within the inclosure the person * * * making or controlling the inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto, by or under claim, made in good faith with a view to entry thereof at the proper land office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited; and the assertion of

a right to the exclusive use and occupancy of any part of the public lands, without claim, color of title, or asserted right as above specified as to inclosure is likewise declared unlawful, and hereby prohibited."

Section 2 (Comp. St. § 4998) makes it the duty of the district attorney to proceed in the cases where it is brought to his attention that section 1 of the act is being violated. Section 3, under which the indictment is drawn, provides:

"No person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peacefully entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands: Provided, this section shall not be held to affect the right or title of persons, who have gone upon, improved or occupied said lands under the land laws of the United States, claiming title thereto, in good faith." 23 Stat. 322.

Section 4 (Comp. St. § 5000) provides that "any person violating" the provisions of the act, "whether as owner, part owner, agent, or who shall aid, abet, counsel, advise, or assist in any violation * * * shall be deemed guilty of a misdemeanor," etc.

It is argued that the only acts prohibited by the act are those of occupancy of the public lands "which amount in fact to an inclosure," and that the acts condemned must in effect amount to a public nuisance, as distinguished from a private nuisance, except that under section 3 it is unlawful for any person to prevent or obstruct any other person from going upon the public land to establish a residence or settlement under the land laws.

Our opinion is that the act under which the conviction was had is broader in its purpose than plaintiffs in error regard it. The clauses of section 1 are limited to inclosures, or to what are in effect inclosures; but section 3 lays down a rule of conduct that no person, by himself or in combination with others, shall prevent or obstruct any person not only from peaceably entering upon any tract of public land, but that no person shall prevent or obstruct free passage or transit over or through the public lands, except as provided, where entry has been made under the land laws in good faith.

It is proper to recall that at the time the act was passed the general policy of Congress was in recognition of an implied license that, until the government might object, the public lands adapted to live stock growing and not held under claim of title should be free for all persons to pass over and through. Buford v. Houtz, 133 U. S. 320, 10 Sup. Ct. 305, 33 L. Ed. 618. The act may therefore be regarded as expressive of the determination of Congress to preserve that policy by making (section 1) the physical thing, an inclosure of the public lands, unlawful; by prohibiting the maintenance, erection, construction, or control of such inclosure; by prohibiting the assertion of right to the exclusive use and occupancy of any part of the public land without claim or color of title as to the inclosure; by prohibiting (section 3) any person by force, threats, or intimidation, or by fencing or in-

closing, from preventing or obstructing any one from peaceably going upon the public lands or settling thereon under the land laws; by prohibiting any person from preventing or obstructing free passage or transit over the public lands.

It seems clear that if one not himself in good faith claiming a right under the land laws, or not in lawful authority, by the use of firearms intimidates a person and orders him not to cross over the unoccupied public lands, he obstructs free passage over such lands, and so violates the provisions of section 3 of the law, and is liable to any punishment, if any has been provided by the penalty provision, which is section 4.

[2] Section 4 should not be construed too narrowly or in a way to nullify the words which make the section applicable to any person who violates the provisions of the act or who aids and abets in any violation thereof. In providing that "any person" who violates any provision of the act, "whether as owner, part owner or agent," is to be deemed guilty, the legislative body did not intend to restrain the applicability of the generality of the words "any person" to such only as are specifically enumerated, as would have been the case if the clause contained the videlicet which is used to limit or qualify the generality of the preceding term. Voegthy v. School Directors, 1 Pa. 330. As the evident intent of the whole act was to protect the public lands, in order that persons might lawfully occupy or pass over them, it is not to be supposed that one who has no pretended claim of right or ownership or agency can by threats and intimidation prevent one from driving stock across the public lands, and yet escape liability upon the ground that he is excluded as not within the enumerated classes, although he comes within the general category of any persons violating the act. The Supreme Court in Ash Sheep Co. v. United States, 252 U. S. 159, 40 Sup. Ct. 241, 64 L. Ed. 507, has recently said:

> "The admitted rule that penal statutes are to be strictly construed is not violated by allowing their words to have full meaning, or even the more extended of two meanings, where such construction best harmonizes with the context, and most fully promotes the policy and objects of the Legislature."

In Omaechevarria v. Idaho, 246 U. S. 343, 38 Sup. Ct. 323, 62 L. Ed. 763, cited by plaintiffs in error, no decision was had upon a statute preventing passage over the public lands; nor did the Supreme Court analyze section 3 of the act here involved. The opinion emphasizes the fact that the Idaho statute there discussed makes no attempt to grant a right to use public lands, "but merely excludes sheep from certain ranges under certain circumstances," and was a valid exercise of police power by the state. If the case has any relevancy to the present controversy, it is in the fact that the court regarded the entire act as showing that part of section 1 sought to prohibit the assertion of an exclusive right of way or occupation by force or intimidation or by what would be equivalent in effect to an inclosure. From such a standpoint, the opinion by Justice Brandeis might be cited in support of an argument that, even under a very restricted construction, one who without claim of right and with arms intimidates another who is driving stock across the public lands, and compels him to seek another route,

is in effect asserting a right of control or of qualified ownership of right to use part of the public lands.

[3] The register of the United States Land Office testified concerning certain official plats of townships in which the public lands in question were situated. We think they were competent as tending to prove whether the particular lands described in the indictment were public lands of the United States or had been entered and were private. The fact that a part of two townships shown upon the plats was owned privately did not affect the competency of the testimony with respect to the lands described in the indictment and related to the case on trial.

[4] Nor is there substantial ground for the contention that the evidence failed to show that the defendants, nor any of them, were connected with the offense charged. The evidence amply sustains the verdict as against all who were convicted.

[5] The constitutionality of that portion of section 3 of the act under which the indictment was found is questioned upon the ground that it not only covers cases which it is within the power of Congress to act upon, but also cases in which Congress has not the power to act upon. But the question presented by the record pertains to the power of Congress to pass the statute which prohibits the doing of the things charged against plaintiff in error. To that there can be but one answer. That Congress can exercise control over the public lands is thoroughly well established. Section 3, art. 4, Constitution. And surely Congress may exercise power necessary for the protection of the public lands, including as an incident the prosecution and punishment of persons who obstruct passage or transit over the public lands. Light v. United States, 220 U. S. 535, 31 Sup. Ct. 485, 55 L. Ed. 570.

[6] Plaintiffs in error assail the indictment as fatally defective, because it did not negative the proviso contained in section 3 of the act. The proviso, however, is not a component part of the definition of the offense; hence it was not necessary to negative the proviso. United States v. Cook, 84 U. S. (17 Wall.) 168, 21 L. Ed. 538; Ledbetter v. United States, 170 U. S. 606, 18 Sup. Ct. 774, 42 L. Ed. 1162; Robertson v. United States (C. C. A.) 262 Fed. 948; Stetson v. United States, 257 Fed. 689, 168 C. C. A. 639; Jelke v. United States, 255 Fed. 264, 166 C. C. A. 434; Grand Trunk R. Co. v. United States, 229 Fed. 116, 143 C. C. A. 392, Ann. Cas. 1917B, 1094.

We find no error in the record, and affirm the judgment.

PHELPS DODGE CORPORATION v. GUERRERO.

(Circuit Court of Appeals, Ninth Circuit. May 9, 1921.)

No. 3591.

1. Witnesses ⇐219(5)—Testimony plaintiff visited physician, who treated his eye, does not waive privilege to exclude physician's testimony.

Under Civ. Code Ariz. 1913, par. 1677, forbidding testimony by a physician, without consent of his patient, as to any communication made by the patient or any knowledge obtained by personal examination, but

providing that, if the patient voluntarily testified with reference to such communication, he thereby consents to the examination of the physician, testimony by plaintiff that he visited a physician, who examined his eyes and put some drops in them, does not waive the privilege, since it is not testimony to any communication made to the physician.

2. **Witnesses ⟸222, 223—Whether testimony is privileged is question for trial court, and evidence relating thereto may be received.**
The question whether the testimony of a physician was privileged is a question for the trial court, on which it was proper for that court to hear testimony preliminary to determining it.

3. **Witnesses ⟸222—Party claiming privilege has burden of proving it.**
As a general rule, the burden of proof to establish the existence of a privileged communication rests on him who claims it.

4. **Witnesses ⟸222—Presumption that person visiting physician did so to receive treatment.**
In an action for personal injuries to an employee, where defendant's manager testified plaintiff voluntarily visited a physician to be examined, for the information of the company as to the extent of his injury, while plaintiff testified his visit was for treatment, the exclusion by the trial court of the physician's testimony as privileged was not erroneous, though the burden was on the plaintiff to establish the privilege, and the trial court stated the evidence was evenly balanced, since there is a presumption that a person who visited a physician did so for the purpose of receiving treatment.

5. **Witnesses ⟸210—Accidental injury to eye is "disease," as to which testimony is privileged.**
An accidental injury to the eye of an employee, for treatment for which the employee consulted a physician, is a "disease," within Civ. Code Ariz. 1913, par. 1677, subd. 6, making privileged information obtained by a physician of a patient suffering from any disease.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Disease.]

Hunt, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Arizona, William H. Sawtelle, Judge.

Action by Epifanio Guerrero against the Phelps Dodge Corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

Everett E. Ellinwood, John Mason Ross, James S. Casey, and John E. Sanders, all of Bisbee, Ariz., for plaintiff in error.

L. Kearney, of Clifton, Ariz., and James R. Dunseath, of Tucson, Ariz., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff in error brings under review certain rulings of the court below in excluding testimony offered by it in its defense to an action brought by the defendant in error under the Employers' Liability Law of Arizona (Civ. Code Ariz. 1913, pars. 3153–3162), for personal injuries sustained while he was in the service of the plaintiff in error. The rulings to which error is assigned were based upon paragraph 1677, Revised Statutes of Arizona, Civil Code 1913, which is as follows:

"(6) A physician or surgeon cannot be examined, without the consent of his patient, as to any communication made by his patient with reference to

any physical or supposed physical disease or any knowledge obtained by personal examination of such patient; provided, that if a person offer himself as a witness and voluntarily testified with reference to such communications, that is to be deemed a consent to the examination of such physician or attorney."

The injury complained of in the action was injury to the eyes of the plaintiff. His eyes were examined and treated by various physicians, who were employed by the defendant, and under the evidence disclosed in the case the court below was called upon to rule on the question whether or not the relation of patient and physician existed between the doctors and the plaintiff. The court ruled in each instance that such relation did exist, and excluded the proffered testimony. The defendant assigns error to the rulings, and contends that the court should have submitted to the jury the question whether or not such relation existed.

[1] The plaintiff testified that a doctor in Morenci treated him; that he put "some kind of water, that was too strong, in my eye." Again he said:

"I used to go over to the doctor at Morenci, and he put some drops in my eye, and that was all he did."

From this and similar statements it is argued that the plaintiff waived the privilege of the statute and that on cross-examination he might be compelled to testify, and that the doctors were at liberty to testify as to the privileged matter. In 40 Cyc. 2399, it is said:

"There must be a distinct and unequivocal waiver, in order to authorize the disclosure of privileged communications."

The Arizona statute provides that there is waiver if the patient offer himself as a witness and voluntarily testify with reference to such communications. But here the plaintiff had given no such testimony. To testify that a doctor treated him and put drops in his eye was not to testify concerning communications made by him to the doctor, and it did not amount to waiver of the privilege conferred by the statute. Testimony that "does not recite the communication works no waiver." Union Pacific v. Thomas, 152 Fed. 365, 368, 81 C. C. A. 491; Burgess v. Sims Drug Co., 114 Iowa, 275, 86 N. W. 307, 54 L. R. A. 364, 89 Am. St. Rep. 359.

The Arizona statute has been under consideration in the following cases: In Arizona & N. M. Ry. Co. v. Clark, 207 Fed. 817, 125 C. C. A. 305, this court held that the statute was designed to protect the patient, and should be liberally construed to that end. That case was taken to the Supreme Court (Arizona & New Mexico Ry. Co. v. Clark, 235 U. S. 669, 35 Sup. Ct. 210, 59 L. Ed. 415, L. R. A. 1915C, 834), and it was therefore held that the privilege is waived only in the event that the patient offers himself as a witness and voluntarily testifies with reference to such communications. The court said that the statute—

"contemplates that the patient may testify with reference to what is communicated by him to the physician, and in that event only it permits the physician to testify without the patient's consent. * * * The act gives him the option of excluding the physician's evidence entirely by himself refraining

from testifying voluntarily as to that respecting which alone their knowledge is equal, namely, what the patient told the physician with reference to the ailment."

In Arizona Eastern R. Co. v. Matthews, 20 Ariz. 282, 180 Pac. 159, 7 A. L. R. 1149, the Supreme Court of Arizona held that a patient may object to a physician testifying as to what he may have learned in his professional capacity, unless the patient has himself testified to the communication which he made to the physician.

The manager of the defendant testified that, by agreement and with the consent of the plaintiff, the latter was sent to a physician for examination, so that the physician might inform the defendant of the nature of the plaintiff's injury. It is contended that, when the patient consents to an examination by a physician for the purpose of informing a third party of his injury, the relation of physician and patient is not established, and that it was error to exclude the testimony of the physician. The plaintiff, however, testified that he did not go to the physician for the purpose indicated by the defendant's witness, that he had no such agreement or understanding with the defendant's manager, and that he went to the physician with the understanding that he was to be treated for the benefit of his eye. The trial court observed that the evidence was evenly balanced and sustained the objection.

[2] The question whether the testimony was privileged was a question for the trial court, and it was proper for that court to hear testimony preliminary to determining it. 40 Cyc. 2396; Hughes v. Boone, 102 N. C. 137, 9 S. E. 286; Hull v. Lyon, 27 Mo. 576; Bacon v. Frisbie, 80 N. Y. 394, 36 Am. Rep. 627; Stewart v. Douglass, 9 Cal. App. 712, 100 Pac. 711. And it has been held that, upon a conflict of evidence, the decision of the trial court upon the question of the existence of the privilege must be deemed conclusive, and that the discretion exercised by that court is not the subject of exception. State v. Louanis, 79 Vt. 463, 65 Atl. 532, 9 Ann. Cas. 194; Childs v. Merrill, 66 Vt. 302, 29 Atl. 532; Harris v. Daugherty, 74 Tex. 1, 11 S. W. 921, 15 Am. St. Rep. 812.

[3, 4] It is true that the general rule is that the burden of proof to establish the existence of the privilege rests on him who claims it. We are not convinced, however, that the court below was unmindful of the rule, or that the judgment should be reversed because of the fact that he remarked that the evidence was evenly balanced. The defendant's counsel made no objection to the ruling on the ground that the plaintiff had not sustained the burden of proof. In Munz v. Salt Lake City Ry. Co., 25 Utah, 220, 70 Pac. 852, it was held that, where a physician is sent to make an examination of an injured person, it will be presumed that the relation of physician and patient exists with regard to the examination, and that the information obtained was for the purpose of enabling the physician to prescribe and act for the patient. That there is such a presumption was also held in Hager v. Shindler, 29 Cal. 47; Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131; Moore v. Bray, 10 Pa. 519, and McIntosh v. Moore, 22 Tex. Civ. App. 22, 53 S. W. 611.

[5] We find no merit in the contention that the plaintiff's case is

without the statute, for the reason that the injury which he sustained was not a "disease," and did not create a disease. The plaintiff not only had a disease, within the definition of that term as found in the dictionaries, but in the case of Arizona & New Mexico Ry. v. Clark, supra, the Supreme Court applied the statute to the case of an accidental injury to the eye.

The judgment is affirmed.

HUNT, Circuit Judge (dissenting). There is evidence tending to show that plaintiff below, after talking about a settlement for his injuries with the representative of the corporation voluntarily agreed to go and did go to El Paso to have his eye examined by a specialist, who was specially employed by the company to make such examination. It may be doubted, I think, whether under such circumstances the plaintiff was in the relation of patient of the examining specialist as contemplated by the statute; but, assuming that the plaintiff was the patient, it seems to me that by submitting to the examination he waived the privilege of barring the testimony of the physician. When the court found an even balance of the evidence upon the point of the existence of the privilege, decision should have been against the plaintiff's objection to the testimony of the physician.

BECKER v. GENERAL CHAIN CO.

(Circuit Court of Appeals, First Circuit. May 12, 1921.)

No. 1497.

1. **Patents ⇐95, 114—Assignee can prosecute application in Patent Office and bring suit to compel issuance of patent.**
   Under Rev. St. § 4895 (Comp. St. § 9439), which permits a patent to be granted to an assignee, and requires that in all cases of an application by an assignee the application shall be made and the specifications sworn to by the inventor, when construed in the light of the enactments from which it was taken, an assignee can prosecute an application in the Patent Office as expressly permitted by the Patent Office rules, and therefore can bring in his own name the suit to compel the issuance of a patent authorized by section 4915 (section 9460), which suit is in reality a continuation of the prosecution of the original application.

2. **Statutes ⇐225¾—Re-enactment after construction is strong indication of intent to adopt construction.**
   Where Congress re-enacted a statute some years after it had been construed, and such construction was unquestioned for more than 40 years after re-enactment, those facts are a strong, if not conclusive, indication of the intent of Congress in the re-enactment of the law to adopt the construction.

3. **Patents ⇐95—Assignee of full interest obtains full title, regardless of how patent was issued.**
   An assignee of the entire interest in an invention and right to a patent obtains full title when the patent is issued, whether the patent is issued to him on request made in the assignment or issued to the inventor, in the absence of such request in the assignment.

4. Patents ⇐114—After time for filing bill court can permit original inventor to be joined as plaintiff in assignee's bill.

Where an assignee of an invention had filed his bill, under Rev. St. § 4915 (Comp. St. § 9460), to compel the issuance of a patent to him, within the time prescribed by section 4894 (section 9438), the court could thereafter in its discretion authorize the original inventor to be joined as a party plaintiff without affecting the right to maintain the suit, though the suit could not be maintained under those circumstances if the inventor was a necessary party to the original bill.

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

Suit by Charles A. Becker against the General Chain Company to secure the issuance of a patent. From a decree dismissing the bill, plaintiff appeals. Reversed and remanded.

Edwin J. Prindle, of New York City (Clarence O. McKay, of New York City, Russell M. Everett, of Newark, N. J., and Francis J. V. Dakin, of Boston, Mass., on the brief), for appellant.

A. D. Salinger, of Boston, Mass., for appellee.

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

BINGHAM, Circuit Judge. This is an appeal from a decree of the District Court for Massachusetts dismissing a bill in equity brought under section 4915, R. S. (Comp. St. § 9460), by Becker, assignee through mesne assignments, dated January 26, 1916, and April 7, 1917, of the entire interest in the invention and application of Robert Hauschild, serial No. 654,658, for letters patent filed October 14, 1911. The defendant is the General Chain Company, assignee of the invention and application, serial No. 679,428, of Eugene Speidel. This assignment was made March 6, 1919, after a decision by the Court of Appeals of the District of Columbia (March 3, 1919) in favor of the Speidel application in an interference proceeding between the two applications. 48 App. D. C. 419. The Hauschild assignment was made pending the prosecution of his application in the Patent Office. This bill was filed March 2, 1920.

In the court below the defendant moved to dismiss upon the ground that the bill was brought by the assignee, instead of the inventor, Hauschild. The plaintiff filed a motion to amend by making Hauschild a party plaintiff. The latter motion was not made until after the expiration of one year from the last action of the Patent Office on the Hauschild application. The court denied the plaintiff's motion to amend and granted the defendant's motion to dismiss the bill.

It does not appear from the record whether the assignment executed by Hauschild contained a request to the Commissioner of Patents to issue the patent to the assignee. But it does appear that the assignments were duly recorded in the records of the Patent Office and that the plaintiff, after obtaining his assignment, prosecuted the application by taking an appeal from the decision of the Examiners in Chief to the

Commissioner of Patents, and from his decision to the Court of Appeals of the District of Columbia.

It is contended on behalf of the defendant that the bill was properly dismissed for the reason that an assignee of an application for a patent, which has been denied by the Patent Office, is not a proper party to a bill under section 4915, as he is not an applicant within the meaning of that terms as employed in the act; that, while proceedings under section 4915 are not appeals, but independent suits in equity (Greenwood v. Dover, 194 Fed. 91, 114 C. C. A. 169), they are, nevertheless, a part of the application for a patent (Gandy v. Marble, 122 U. S. 432, 7 Sup. Ct. 1290, 30 L. Ed. 1223), and in essence a continuation of the proceedings on the application in the Patent Office; that the provisions of law contained in section 4895, R. S. (Comp. St. § 9439), and other sections preceding and following it relating to applications for patents, require that the application for the issue of a patent shall be made by the inventor or discoverer, if he is alive; that an assignee cannot make such an application; and that, if he does not come within the meaning of the provisions of law regulating an application in the Patent Office, he is not an applicant within the meaning of that term as employed in section 4915. In other words, its position is that the inventor, if living, is an indispensable party plaintiff in a bill in equity under section 4915.

Section 4915, Rev. St. (Comp. St. § 9460) reads as follows:

"Sec. 4915. Whenever a patent on application is refused, either by the Commissioner of Patents or by the Supreme Court of the District of Columbia upon appeal from the Commissioner, the *applicant* may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that *such applicant* is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. * * *"

Section 4895, Rev. St. (Comp. St. § 9439) is as follows:

"Sec. 4895. Patents may be granted and issued or reissued to the assignee of the inventor or discoverer; but the assignment must first be entered of record in the Patent Office. And in all cases of *an application by an assignee for the issue of a patent*, the application shall be made and the specification sworn to by the inventor or discoverer; and in all cases of an application for a reissue of any patent, the application must be made and corrected specification signed by the inventor or discoverer, if he is living. * * *"

The subject-matter contained in section 4915 first appeared in section 16 of the Act of July 4, 1836 (5 Stat. at Large, 123). Section 16 was amended by section 10 of the Act of March 3, 1839 (5 Stat. at Large, 354), but not in a manner affecting the question here involved. It was re-enacted in section 52 of the Act of July 8, 1870 (16 Stat. at Large, 205), in the language now found in section 4915.

The subject-matter of section 4895 was first dealt with by Congress in section 6 of the Act of March 3, 1837 (5 Stat. at Large, 193). It then read:

"Sec. 6. *And be it further enacted*, that any patent hereafter to be issued, may be made and issued to the assignee or assignees of the inventor or discoverer, *the assignment thereof being first entered* of record, and *the application* therefor being *duly made*, and the *specification duly sworn to by the inventor.* * * *"

In section 33 of the Act of July 8, 1870 (16 Stat. at Large, 202), section 6 of the Act of 1837 was amended to read as follows:

"Sec. 33. *And be it further enacted*, that patents may be granted and issued or reissued to the assignee of the inventor or discoverer, the assignment thereof being first entered of record in the Patent Office; but in such case the application for the patent shall be made and the specification sworn to by the inventor or discoverer; and also, if he be living, in case of an *application* for reissue."

[1] Under either section 6 or section 33 an inventor could assign his right to obtain a patent, prior to filing an application and specification verified by his oath. Section 33 was amended in the Revised Statutes of 1878, and as now found in section 4895 authorizes an assignee to make application for the issue of a patent, and provides how he shall do it. In such case it requires that the application or petition shall be made—that is, signed—and the specification sworn to by the inventor or discoverer, if he is living. And the further provisions of the section recognize that if he is not living or is insane, the assignee must have the application or petition signed and the specification sworn to by the executor or guardian of the inventor (section 4896 [Comp. St. § 9440]). This not only plainly appears from section 4895, but is evidently the meaning placed upon it by the Patent Office, for, in this very proceeding, the plaintiff, after obtaining his assignment, was permitted to prosecute the application in the Patent Office, and did so during the greater portion of the proceedings in that office. See Rev. St. §§ 4909, 4910, 4911, Act Feb. 9, 1893, 27 Stat. at Large, c. 74, § 9 (Comp. St. §§ 9454–9456).

Then again rule 17 of the Patent Office provides that "an applicant or an *assignee of the entire interest* may prosecute his own case," and rule 5 that "the assignee of the entire interest of an invention is entitled to hold correspondence with the office to the exclusion of the inventor." Under the latter rule it is held that upon the request of such an assignee the inventor shall be excluded from participation in the proceedings. See Stoddard's Annotated Patent Office Rules, pp. 10, 11.

Instead, therefore, of an assignee being unable to prosecute an application in the Patent Office under section 4895, as the defendant contends, the contrary is true, for the law authorizes and the practice and rules of the Patent Office permit it; and, as a proceeding under section 4915 is in reality a continuation of the prosecution of the original application, there would seem to be no reason why the assignee of the entire right to a patent, who is permitted to prosecute an application in the Patent Office under section 4895, should not be allowed to do so in this court under section 4915.

It is also to be noted that in 1849, Mr. Justice Nelson of the Supreme Court, sitting as Circuit Justice in the Circuit Court for the Southern District of New York, in the case of Gay v. Cornell, 10 Fed. Cas. 110, Case No. 5,280, had under consideration the right of an assignee to prosecute a bill in equity under section 16 of the Act of July 4, 1836, as amended by the tenth section of the Act of March 3, 1839, the predecessor of section 4915, and that, at the time the case then under consideration arose, the sixth section of the Act of March 3, 1837, the

predecessor of section 4895, was in existence. And it was held that the assignment was valid and the bill properly brought in the name of the assignee. The decision reads:

"Nelson, Circuit Justice. The sixteenth section of the Act of July 4, 1836, speaks of the party making the application for the patent, as the proper person to file a bill in case of a refusal by the Board of Examiners to grant the patent [the Chief Justice of the District of Columbia was afterwards substituted in their place], and, doubtless, referred to the inventor, as no provision then existed authorizing him to assign his interest before the issuing of the patent. But, the sixth section of the Act of March 3, 1837 (5 Stat. 193), provides, that any patent thereafter to be issued, may be issued to the assignee of the inventor, the assignment being first entered of record; the application still to be made in the name of the inventor, and the specification to be sworn to by him. After the assignment of the invention, under this section, by which the inventor divests himself of all interest therein, and transfers it to the assignee, although the application for the patent must be made in his name, in conformity with the statute, still, for all substanial purposes, and in judgment of law, the assignee is the party making the application, and, we think, comes, if not within the letter, at least within the spirit of the provisions of the sixteenth section of the Act of 1836, and of the tenth section of the Act of March 3, 1839. He would, no doubt, be held liable as such for the expenses mentioned in the latter part of the sixteenth section, and for any other to which the applicant might become subject. * * *

"Upon the whole, we think the assignment is valid, and the bill properly filed in the name of the assignee, he being the only real party in interest, and that the averments and facts set forth therein show a sufficient title prima facie in him to the patent, on the ground that Perry was the first and original inventor.

"Demurrer overruled.

[2] It is not to be forgotten that, after the lapse of 20 years from the decision of Mr. Justice Nelson interpreting the meaning of the words "applicant" and "application" in section 16 of the Act of July 4, 1836, construed in the light of the sixth section of the Act of March 3, 1837, Congress, in 1870, re-enacted section 16, using the same language, so far as the question here is concerned, and no doubt did so with full knowledge of the meaning which the court had put upon the words 20 years before, and that that construction, so far as we can ascertain, has not been questioned down to the present time. This is a strong, if not conclusive, indication of the intent of Congress in the re-enactment of the law. It is also made evident that Congress had in mind the decision of Mr. Justice Nelson when, in the Revised Statutes in 1878, it enacted section 4895, amending section 33, and expressly provided for "an application by an assignee," making the letter of the law comply with its spirit.

[3] It has been held time and again that an assignee of the entire interest in an invention and right to a patent obtains full title, when the patent is issued, and that this is so whether the patent is issued directly to him, a request to that effect having been made in the assignment, or whether it is issued to the inventor, no such request having been made in the assignment. Gayler v. Wilder, 10 How. 476, 491–494, 13 L. Ed. 504; Railroad v. Trimble, 10 Wall. 367, 19 L. Ed. 948; Wende v. Horine (C. C.) 191 Fed. 620; Individual Drinking Cup Co. v. Osmun-Cook Co. (D. C.) 220 Fed. 335; Colman et al. v. American Warp

Drawing Machine Co. (D. C.) 235 Fed. 531; Thoma v. Perri (D. C.) 205 Fed. 632.

As the assignee of the entire interest in an invention is the only party directly interested in the prosecution of an application for a patent, there can be no doubt of his right to institute proceedings under section 4915. The court below erred in dismissing the bill.

[4] The bill having been properly brought by the assignee within the time allowed by law, it was within the discretion of the court to permit the inventor, Hauschild, to be joined as a party plaintiff. If the assignee had not the right to institute the suit, it may be doubtful whether such an amendment could be allowed after the expiration of the time prescribed by section 4894, R. S. (Comp. St. § 9438), in the absence of proof disclosing that the delay was unavoidable. But, as we have no such question here, we refrain from deciding it.

If in Wende v. Horine (C. C.) 191 Fed. 620, the inventor was rightly allowed to prosecute a bill under section 4915, it would seem that it must have been upon the ground that he was technically an applicant within the meaning of that section and was under some duty to prosecute the same to protect the interest of the assignee. Apparently the court in that case overlooked certain language contained in section 4895 and reached a conclusion different from what it otherwise might, for in quoting from that section it omitted the clause—"And in all cases of an *application by an assignee* for the issue of a patent"—recognizing the right of an assignee to make an application, and only quoted the portion which states that "the application shall be made and the specification sworn to by the inventor or discoverer," which, as previously pointed out, simply shows how "an application by an assignee" shall be made—that is, that the application or petition shall be signed and the specification sworn to by the inventor or discoverer.

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.

TOMPKINS-HAWLEY-FULLER CO. v. HOLDEN.

(Circuit Court of Appeals, Second Circuit. April 6, 1921.)

No. 28.

1. Patents ⇐328—Reissue patent, No. 13,749, for paper-making machine, held valid.

The Fuller reissue patent, No. 13,749, for improvements in paper-making machines, consisting of the addition to standard machines of means for conveying the moist paper from the press rolls to the driers, preventing breakage and increasing the daily production, *held* to disclose invention, and not anticipated.

2. Patents ⇐35—Utility and extensive use evidence of patentability.

The evident utility of a patented device, the absence of other competing devices, and its extensive use is strong evidence of patentable merit.

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

3. Patents ⟸157(1)—"Drier," in application for patent on paper-making machine, held to mean only hot drum.

The claims for a paper-making machine, consisting of the combination of press rolls, a drier, etc., *held* to use the word "drier" as meaning only a hot drum, and not a cold drum, which is not, properly speaking, a drier at all.

4. Patents ⟸157(1)—Subject to general rules for construction of contracts.

A patent is a contract made by the government's acceptance of the inventor's proposition contained in his application, and is subject to the same general rules of construction that apply to other contracts.

5. Patents ⟸157(2)—Liberally construed in favor of inventor.

Patents are liberally construed, so as to secure to the inventor the real invention which he intends to secure by his patent.

6. Patents ⟸26(1)—Combination of known devices not patentable, if obvious, but otherwise may be.

The aggregation of old and well-known devices is not patentable, if the combination claimed is an obvious one for attaining the advantages proposed, which would occur to any mechanic skilled in the art; but, if otherwise, it may be patentable.

7. Patents ⟸26(2)—New results may be patentable, though successive steps not patentable.

The product of a new result, which meets a recognized need and goes immediately into general use, may disclose invention, though there would be no invention in the adoption of any one of the successive steps by which the result was obtained.

8. Patents ⟸16—Essential elements stated.

The validity of a patent depends on novelty, utility, and invention.

9. Patents ⟸328—Reissue patent, No. 13,749, for paper-making machine, held infringed.

Infringement of the Fuller patent, No. 13,749, for improvements in paper-making machines, consisting of means for conveying the moist paper from the press rolls to the driers, *held* not avoided by disconnecting the steam pipes from the first of the series of driers and running it cold; it appearing that it was the practice in the trade to run the first drier either hot or cold, as the operator preferred.

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

Suit by the Tompkins-Hawley-Fuller Company against Amos F. Holden, trading as the Little Falls Paper Company. From a decree dismissing the bill, plaintiff appeals. Reversed and remanded, with directions.

The plaintiff is a corporation organized under the laws of the state of Oregon, of which state it is a citizen. The defendant is a citizen of the state of New York, and has a regular and established place of business within the Southern district of New York. The suit is in equity for infringement of United States letters patent to Frederick H. Fuller, assignor by direct and mesne assignments to the Tompkins-Hawley-Fuller Company, a corporation. The patent is reissue No. 13,749, reissued June 16, 1914, and is for a paper-making machine. The original was No. 1,013,288, dated January 2, 1912, and application for reissue was filed August 21, 1913.

The complaint alleges that defendant has been and is infringing the reissued letters patent by manufacturing, using, and selling, or causing to be manufactured, used, and sold, certain new and useful improvements in paper-making machines, each of which contains and embodies the inventions described and claimed in the reissued letters patent. The complaint prays that defendant may be compelled to account for and pay over to plaintiff all the

profits made by him by reason of his unlawful acts and the damages which the plaintiff has sustained thereby, and that the actual damage assessed be increased to a sum equal to three times the amount of such assessment under the circumstances of the willful and unjust infringement by him.

The answer alleges that the plaintiff's patent is void, in that prior to Fuller's supposed invention, or more than two years prior to his application for his original patent, the alleged inventions or improvements referred to in the bill of complaint and in the reissued patent had been patented or described in certain specified United States letters patent, French letters patent, and German letters patent, and in other printed publications.

The learned District Judge thought the validity of the patent was open to question, but did not decide it, simply holding that there was lack of infringement. The bill was accordingly dismissed.

Edwin J. Prindle, of New York City (Warren H. Small, of New York City, of counsel), for appellant.

Walter D. Edmonds, of New York City (Philip C. Peck, of New York City, of counsel), for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The patent in suit is for certain new and useful improvements in paper-making machines. The invention relates especially to machines for handling tissue or other thin papers, and is particularly applicable to what is known as the Harper-Fourdrinier type of machine, although also applicable to other paper machines, as, for example, to those of the cylinder type. The object of the invention is to prevent the pulp from sticking to the upper metal press roll of the paper-making machine and to cause it to be carried unbroken to the "driers."

[1] A paper-making machine consists of means for forming a sheet of paper from properly prepared pulp, or paper stock, extracting the water from the stock, pressing it, drying and smoothing the paper, and preparing the finished product for market sizes and requirements. Machines used for this purpose are tremendous pieces of mechanism, averaging 100 feet in length and 25 feet in width, and being 10 to 12 feet high. They weigh from 100 to 200 tons, and run at a speed of from 200 to 450 feet a minute. The pressure roller *22* of the patent in suit, which appears in the drawing in a subsequent part of this opinion and which looks so small itself, weighs approximately one ton.

The manufacture of paper appears to be an extremely difficult art. Those engaged in it describe it as such, and say that it required a great deal of skill, experience, and knowledge. The art of paper-making involves: (1) The shaping of the saturated pulp into a continuous sheet. (2) The drying of the sheet.

The ultimate stage of the shaping has long been accomplished by the aid of a coacting pair of rollers, known in the art as "press rolls," between whose compressive "bite" the pulpy sheet is pressed into its final thickness, and most of its water squeezed out; its cohesion and strength being thereby augmented. The sheet as it emerges from the press rolls is still so wet that it is fragile and industrially useless. The next step is to dry it, and this is done by bringing the sheet into progressive contact with one or more internally heated rotary cylinder drums, to which the sheet is transferred as directly as possible on its

emergence from the "press rolls," and thus brought into progressive contact with the hot peripheries of the cylinders or drums until it is sufficiently dehydrated or dried.

Standard paper-making machines comprise three main elements: (1) A forming wire or screen, on which the wet pulp is deposited. (2) Press rolls, to squeeze water from the wet pulp and compress or mat the fibers to form a web. (3) A series of drums, called driers, to complete the paper.

The patent in suit adds to these three standard parts an attachment for conveying the moist web from the press rolls to the driers. Heavy papers have sufficient strength to pass from the press rolls to the driers without difficulty. But light-weight paper, such as very thin tissue paper, does not have sufficient strength for that purpose. Prior to the invention in suit the web of wet paper had to be carried over by hand from the press rolls to the driers. This was a difficult thing to do, and to do it required skill and training. To accomplish it one had to move his hands at the same speed the machinery was going. In the process the paper was constantly breaking. The problem which the inventor had to solve was so to equip a paper-making machine that the web of thin tissue paper could be taken from the couch roll through the press rolls and onto the first of a series of driers automatically and without breaking the paper. This it is claimed Fuller succeeded in doing.

Claims 1 and 2 of the patent are illustrative and read as follows:

"1. In a paper-making machine, the combination of press rolls, a drier, a bottom felt, and a top felt, the bottom felt passing between the press rolls, the top felt passing from the upper press roll to and into contact with the drier, and another roll for pressing the top felt against the drier at or above the level of the axis of the drier.

"2. In a paper-making machine, the combination of a couch roll, press rolls, a drier, a bottom felt, and a top felt, the bottom felt passing around the couch roll and between the press rolls, the top felt passing from the upper press roll to and into contact with the drier, and another roll for pressing the top felt against the drier at or above the level of the axis of the drier."

The plaintiff offered in evidence a certified copy of the patent in suit, marked Exhibit 5, Figure 1 of which is here reproduced:

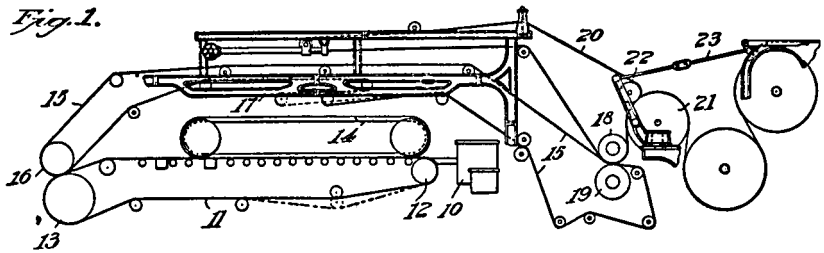

Figure 1 represents the Harper-Fourdrinier machine, with Fuller's attachment, which is the patent herein involved; and Fuller's testimony concerning it was as follows:

"Q. Did that machine have the felt *20* thereon when it first was set up on the floor and when you tried unsuccessfully to take a web of paper over it without breaking it? A. It did not.

"Q. Did it have the roller *22* thereon? A. It did not.

"Q. Did it have the hand lever *23* thereon? A. It did not.

"Q. Did it have all the other parts shown in this drawing? A. It had all the parts, except the support for the top felt *20* and these parts that you just specified, roll *22* and rod *23*.

"Q. Now, by reference to this same Figure 1 of the drawing and using the reference characters thereon, will you please explain just what you did to that machine so that it operated successfully without breaks? A. I took the gear off the drier *21*, put a drive pulley on the back end of bottom press *19* to drive this drier *21*, put a frame on top of frame *17* to carry felt *20*, which I put around top press *18* and around roll *22*, and put on a tension rod *23* for pressing this roll *22* against the overhang drier of a series of driers.

"Q. How did you connect the drive pulleys on drier *21* and press *19*? A. With a belt.

"Q. Did you add the roller *22*, or was that on the machine as it was delivered? A. I added it.

"Q. Was there any reason for having the roller *22* press against the drier *21*? A. To make the paper leave the felt and go onto the drier roll.

"Q. What do you mean by the drier roll? A. The overhanging drier of a series of driers.

"Q. What is the reference character attached to the drier to which you refer? A. Reference character *21*.

"Q. Is there any significance in the location of the roller *22* with reference to the axis of drier *21*? A. I don't understand your question.

"Q. The roller *22* is shown above the axis of drier *21*. Could roller *22* have been placed below the axis of drier *21* with equally satisfactory results? A. It could be placed anywhere on the drier above the center. I found it worked better right where I had it.

"Q. Was there any advantage in placing it above the center? A. It was more inclined to follow the drier than if it was down lower on the drier. Gravity helped along with the pressure.

"Q. Did the machine on which you placed your attachment in the summer of 1909 operate successfully thereafter? A. It did.

"Q. For how long? A. Still in operation."

Fuller further testified as follows:

"Q. Please state the advantages which your invention has which apply to a paper-making machine. A. The greatest advantage is that you can run a thin sheet of paper and not have it break. Another advantage is that this increases the speed of the machine; you can use a poorer grade of stock.

"Q. What do you mean by stating that it increases the speed of the machine? Please explain a little more fully. A. You can run the machine at a faster speed. I have known machines before this attachment was put on make paper at the rate of 200 feet a minute. I know machines now that are running 450 feet with this attachment, and it would not be possible to do it without this attachment on.

"Q. Why is this so? A. Because the paper would break on the press; there is nothing to automatically carry it on to the first drier. In the other styles of machines it had to be carried from this press to drier over by hand. This was a very difficult job and the paper would break in two. With this attachment it is delivered automatically from the press to the first drier of a series of driers.

"Q. What ordinarily limits the speed of a paper-making machine of the kind to which you have referred? A. The ability to keep the paper over the machine.

"Q. By keeping the paper over the machine you mean running the paper without breaks. Is that correct? A. Yes."

The explanation given of the exhibit illustrating the Harper-Fourdrinier standard type of machine follows:

The wet pulp is contained in a head box *10* (near the center of the drawing at the bottom), from which it is spread on the straight top of an endless forming wire *11* (at the left of the drawing), from which it is taken off by an endless belt or felt called a lower felt *15* and conveyed to the press rolls *18*, *19* (near the right of the drawing). A couch roll *16* keeps the felt in contact with the forming wire *11*. All this is old and standard practice, as well as the series of driers *21*, to which the pulp sheet passes from the press rolls *18*, *19*. It was the practice before the present invention to have the upper press roll *18* bare and convey the paper by hand (when starting the machine) from the press rolls *18*, *19*, to the first of the series of driers *21*. This is still standard practice for heavy papers, which have sufficient body and tensile strength to permit their being scraped from the upper roll *18* by a doctor knife, and then pass the gap to the first of the series of driers without danger of breaking. With very light tissue paper, however, the wet pulp sheet is so tender that it does not scrape readily from upper press roll *18* and breaks continually between press roll *18* and the first of the series of driers *21*. When the paper breaks at this point it is necessary to stop the machine and carry the paper on to the drier by hand or by a sheet of cardboard. This lowers the quality of the product, and also diminishes the output, as the machines must be run at a comparatively low speed, so that in case of a break the amount of paper wasted before the machine can be stopped will not be too great. Notwithstanding these disadvantages, this practice was common in the manufacture of tissue paper until the attachment of the patent in suit was placed on the market, although many attempts were made to overcome the difficulty. The practical attempts to overcome the difficulty consisted of various devices and modifications to upper press roll *18* to prevent the wet pulp sheet from sticking thereto.

The attachment of the patent in suit cured the difficulty by running an upper continuous band called an upper felt *20* between the press rolls and onto the first drier *21*, against which the felt was pressed directly by a pressure roller *22*. Pressure at this point by the roller is essential to make the paper leave the felt and stick to the first drier and the pressure of pressure roller *22* on the first drier *21* was made adjustable so that the pressure could be varied to suit varying conditions. The exact position of pressure roller *22* on first drier *21* is not essential, so long as the pressure roll *22* is above the center of first drier *21*. Its position is changed according to the particular work in hand. Some mills run first drier *21* hot and other mills run it unheated. It is obvious that with an unheated first drier the arc of contact which felt *20* makes with first drier *21* may be greater than if the drier is hot, as the heat bakes the felt and destroys its life. In case the machine is stopped, moreover, a hot first drier would injure the felt, which is prevented by having the first drier unheated.

Among the advantages of having pressure roller *22* above the center of first drier *21* is the aid afforded by gravity in causing the sheet of wet pulp to leave the felt and adhere to the drier and the benefit derived from having the pressure roller (which is more than 10 feet in length and weighs approximately a ton) supported throughout its length instead of by its ends only. When a roller of this size is supported only by its ends it tends to sag and tremble at high speeds and spring out of line, thus drawing the paper unevenly. Although the invention of the patent in suit added to a standard type of machine only the upper felt *20* and the pressure roller *22*, some of the claims cover these parts in combination with the parts with which they coact including the lower felt *15* and the couch roll *16* around which the lower felt runs, as the entire machine is made automatic thereby. The machine is so completely automatic with the attachment that in case a break does occur it is not necessary to stop the machine, as the broken end, no matter where it occurs, is carried over by the felt onto the first of the series of driers.

The invention has been a commercial success. The principal tissue mills of the country use it, paying royalties to the plaintiff therefor. The largest mill machinery builders in the world are licensees under the patent in suit. A number of the oldest, most experienced, and most

successful paper manufacturers in the country testified that the plaintiff's device is standard practice in paper mills making light-weight tissue paper, and that they did not know of any other device which was satisfactory. Their testimony shows that the device enables the machines to be operated at an increased speed of from 20 to 50 per cent., and that it accomplishes automatically a particular part of the work which previously had to be done by hand. A paper manufacturer of 40 years' experience, the president of the Victoria Paper Mills Company, which operates its plant night and day 6 days in the week, testified that all the machines in his plant had been equipped with the plaintiff's device, which he began to use 4 years before, and that he did not know of any device which would work as satisfactorily as the device of the patent. He was asked whether it was standard practice, and answered: "Yes; I do not know of anything else." He was corroborated by other witnesses of almost as wide an experience. There is no testimony in the record which contradicts them. There can be no doubt as to the utility of the device.

[2] The courts hold that it is not essential to patentability that an invention should be the best of its kind. Lamb Knit Goods Co. v. Lamb Glove, etc., Co., 120 Fed. 267, 56 C. C. A. 547; Crown Cork & Seal Co. v. Aluminum Stopper Co., 108 Fed. 845, 48 C. C. A. 72; Wheeler v. Clipper Mower, etc., Co., 10 Blatchf. 181, Fed. Cas. No. 17,493. But the record in this case makes it evident that prior to this device there was no way of running a thin sheet of paper through the machines without having it break at the press rolls, and it had to be carried over by hand. This device obviated both difficulties. The paper did not break, the device operated automatically, and the speed of the machines was increased from 20 to 50 per cent. Its evident utility, its absence of other competing devices, and its extensive use strongly attest its patentable merit. Lorillard v. McDowell, 15 Fed. Cas. 893, No. 8,510.

[3] The court below held that the plaintiff failed on the issue of infringement for two reasons: (1) Because he thought that Fuller probably meant by "drier" only a hot drum. (2) Because, if Fuller meant to include a cold drum, his patent would have been invalid. We have no way of judging Fuller's intentions, except by what he said. In an application for a patent, and basing it upon a specification which the applicant declares to be "a full, clear, and exact description of the invention," we think that the inventor has clearly indicated his intention by the language he has used, and that no reason really exists for speculating as to what he meant by what he said.

[4, 5] A patent is subject to the same general rules of construction that apply to other contracts; for a patent is a contract made by the acceptance by the government of the proposition made by the inventor in his application. O. H. Jewell Filter Co. v. Jackson, 140 Fed. 340, 72 C. C. A. 304. Patents are to be liberally construed, so as to secure to an inventor the real invention which he intends to secure by his patent. There are cases in which an element described in the specification of a combination or device claimed has been read into the claim from the specification. This court has held that the specification may be

referred to for the purpose of limiting, though not of expanding, a claim. Fowler & Wolfe Mfg. Co. v. McCrum-Howell Co., 215 Fed. 905, 132 C. C. A. 143. And in a number of cases the Supreme Court has sustained the validity of a patent which otherwise might have been invalid by importing into the claim the particulars of the specification. See Seymour v. Osborne, 11 Wall. 516, 547, 20 L. Ed. 33; Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 538, 18 Sup. Ct. 707, 42 L. Ed. 1136; Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 432, 22 Sup. Ct. 698, 46 L. Ed. 968. But neither in the specification nor in any one of the claims is anything said which indicates that the applicant meant by "drier" something which was not a drier, but a cold drum. A drier is defined in the Century Dictionary as:

"A machine or mechanical contrivance or apparatus used in removing moisture from some substance."

The following is an excerpt from the testimony:

"Q. What is the term 'drier' in paper-making machines? A. The term 'drier,' as used by paper makers, has always signified a drying cylinder with steam connections in the inside and a web of paper passing around the circumference of the drier, which is dried by coming in connection with the hot cylinder."

In view of this testimony we think it sufficiently appears that a cold drum is not a "drier," and that the drum to be a drier must be hot. Fuller not only "probably meant by drier only a hot drum," but he could not have meant anything else than a hot drum, as a cold drum is not, properly speaking, a drier at all. In a subsequent part of his specification Fuller uses the following language:

"In addition to the marked advantages of preventing the paper from sticking to the upper press roll and carrying it on the under side of the top felt immediately to the first drier, I secure also the advantage of using a common and familiar equipment, while at the same time obtaining the full benefit of the first drier by carrying the paper in contact with a large part of its area. In fact, the paper as it passes up from the press rolls hugs the adjacent portion of the circumference of the first drying cylinder, before it passes over the upper and outer part of the circumference, or, in other words, first contacts with the drier and leaves it at substantially diametrically opposite points, or at points below the line of a horizontal diameter of the drier."

The "full benefit of the first drier" must mean the exposure of the web to a large area of hot surface of the "drying cylinder," as there could be no benefit in its exposure to a cold surface of the cylinder. The Fuller attachment includes a series of driers, and some manufacturers at times run the first of the series cold with certain kinds of paper. But when it is run cold it is not acting as a drier, and is not rendering the service for which driers are devised.

The prior art patent mainly relied upon to defeat the validity of the patent in suit, and the only one which needs to be considered in this connection, is that issued to Tompkins & Barnes, No. 668,068, dated February 12, 1901. The object of that invention, as stated in the specification, was to provide certain improvements in paper machines—

"whereby the same may be rendered more efficient and capable of doing better work and with less manual labor or attendance."

The Tompkins & Barnes patent was acquired by the plaintiff in November, 1912, upon its organization. The plaintiff's articles of incorporation were filed in the office of the secretary of state of Oregon on November 23, 1912. Its articles state that—

"The object, business, enterprise and pursuit of this corporation shall be the acquisition and ownership of the Tompkins-Barnes patent, No. 668,068, patented February 12, 1901, and the Fuller-Hawley patent, No. 1,013,288, patented January 2, 1912, and to combine the above-named patents, together with any other improvements upon the invention represented by said patents pertaining to the automatic handling or treatment of sheet-paper on paper-making machines, and generally to engage in the manufacture, lease, and sale of paper-making machinery and devices pertaining to the manufacture of paper."

This Tompkins-Barnes patent expired on February 12, 1918. The bill of complaint was filed and the present suit commenced on June 29, 1918. The defendant intimates that the suit is an attempt unwarrantably to extend the monopoly possessed by the plaintiff under this Tompkins-Barnes patent. Whether the attempt is or is not unwarrantable must depend on whether the first patent was an anticipation of the second. The fact that the plaintiff owned both patents is altogether irrelevant. Neither does it illuminate the matter any to be informed that, as the life of the first patent has expired, the plaintiff seeks to prolong his monopoly through the second patent. This, of course, the plaintiff has a perfect right to do, if its patent is valid.

Prior to the Tompkins-Barnes patent there had been a number of attempts to remedy and prevent the breakage to which the web of pulp was liable in its passage between the press rolls. The Bingham patent, No. 58,051, dated September 18, 1866, stated that as the object of the invention of that patent, and it consisted "in a novel arrangement of two felts and four press rolls with doctors inside of the felts." Hoeborn, who had taken out his patent in 1887 in Germany, and later in England, in France, and in Belgium, and who filed his application in 1889 in the United States Patent Office, had the same object in mind, and claimed that his machine made it possible to manufacture paper of all kinds of materials and of any desired thickness, varying from the thickest cardboard to the thinnest tissue paper. He used a second felt, brought directly to the drier by a roll. So did La Croix and Paquet, under German patents, and Du Pont, under French patents.

In the Tompkins-Barnes patent and in the Fuller patent there are two felts in both, and the paper is between these two felts in both, and passes between the two press rolls, the same in each, and the paper sticks to the upper felt. In these respects there is no difference between the two patents. But there is a difference as regards the separation of the paper from the upper felt when the time comes to separate it. Separation in the Tompkins-Barnes patent takes place on a lower roll in a different way from that in the Fuller patent. In the Tompkins patent the point of contact is more acute and the paper more often breaks, whereas in the Fuller patent the contact is more obtuse and is easier on a tender, wet sheet, and so can be used with a different degree of safety to the sheet. The inventor, Mr. Tompkins, was asked as follows:

"Q. Mr. Tompkins, will you please explain to the court what is the difference, if any, between this patent of yours, No. 668,068, and the Fuller patent in suit now, as regards the protection of the paper as it passes between the press rolls as against breakage or otherwise? In what respect does your own patent and this device for that differ from the Fuller patent in suit? A. The two felts run between the two press rolls, and the paper always sticks to the upper felt. That it does in both instances.

"Q. There are two felts in both cases, and the paper is between those two felts in both cases, and passes between the two press rolls the same in each, does it not? A. Yes.

"Q. And that is a good arrangement for protecting the paper from any injury from the upper press roll, is it? A. Yes.

"Q. Now, further comparing the two patents mentioned in my last question, what difference is there between their respective devices as regards the separation of the paper from the upper felt when the time comes to separate it? A. Separation takes place on a lower roll in a different way from the Fuller roll, for the reason that it was harder on the small circumference, the point of contact was more acute and it would sometimes break; whereas the Fuller contact is more obtuse and it is easier on a tender, wet sheet, and it can be used with a different degree of safety to the sheet."

In applying his invention to an existing machine Mr. Tompkins added two rolls, and Mr. Fuller in his attachment only one. The lower of the Tompkins rolls, being supported on the extreme ends of the bearings, did not always run true and without sag. The Fuller attachment obviated that difficulty. Mr. Tompkins was asked:

"Q. Does the Fuller attachment of the patent in suit obviate that difficulty? A. It does.

"Q. How? A. By having a greater diameter, and the roller lays on a smoother surface on a drier 4 feet in diameter or more; the entire length has a bearing. It has the support of the drier itself, so that there is no chance of sagging.

"Q. That is, in your attachment the bottom roller is supported only at the ends? A. That is all.

"Q. While in the Fuller attachment the roller is supported throughout its length? A. Yes; it has a smoother, more uniform bearing for the entire length.

"Q. And the result of the uniform bearing is what? A. The uniform bearing gives the result that the sheet is turned out without injury and without drawing any part of it. It has a uniform bearing and a uniform pressure."

The following is a further excerpt from the testimony of Tompkins, the patentee, concerning his patent:

"Q. Will you please state whether you made any attempt to introduce this device into use in the mills? A. We took a great deal of pains to show it to visitors that came to us, and we had some correspondence about it. We tried to introduce it, and continued to do that from the time the device was put on in 1897, in August, in Mr. Barnes' mill, and in September, in my mill, until 1901, when the patent was issued. We did not succeed in interesting the first mill to put on the attachment.

"Q. Did you advertise it? A. It was noted in the paper trade journals. * * *

"Q. Do you know of any mill which ever adopted or used this invention? A. I never heard of but one, and that was mentioned in the record by the defendant, and was noted in an article in a paper trade journal by some one in Ohio. That was the only one I ever heard. I bought Mr. Barnes' interest in the patent in 1901 and owned it thereafter myself, and I endeavored to put it on the market at that time; but I never could succeed in getting a man to put it on the machines.

"By the Court: Q. What was the trouble with it, Mr. Tompkins? A. Well, it worked nicely in a way. The introduction of a false doctor was necessary. It was not automatic, only to the doctor on the lower roll, and there the attendant would draw back the false doctor and let it drop onto the drier.

"Q. You mean the doctor lying on the drier? A. From the bottom of the lower press roll. That needs the attention of an attendant, and there was more or less water dripping from the lower roll, it being an iron roll, and that sometimes would drop on the sheet and blotch the sheet, so that Mr. Barnes, when he first started it, while the sheet would run perfectly, it would run as though it had smallpox, just the little drips of water dropping here and there all over the sheet. Commercially it spoiled the sheet, until we put on the false doctor.

"Q. The element *T*? A. To catch the drippings from the doctor itself, which caused defects, and ward it off and drop it on the floor, and these little defects did not appeal to the public.

"Q. When you put on the element *T*, which you called the false doctor, it obviated the dripping? A. Yes, sir.

"Q. I do not quite get the function of the doctor and how it works here. As I understand, it is to scrape the condensed water or the carried water from the paper rolls, so that as the roll goes up to engage the new webbing it shall be dry, relatively; is that right? A. In a sense. The doctor was to prevent this winding also on the lower roll.

"Q. Prevent what? A. To prevent the sheet, the web of paper, winding on the lower roll. It had to be there to prevent that.

"Q. It would not do that unless it broke? A. It would not do that unless it broke, and in taking the end when starting the machine. When you first took the end over it would, and then it was put off by hand onto the lower drier, and it might be in a crippled condition, which caused it to be crinkly, and the speed of the lower drier was faster than the upper roll, in order to take up the stretch at that point. After a time it would straighten out and run smooth.

"Q. Before you put on the false doctor, as I understand, it worked in this way, when the sheet was in a broken condition the real doctor *U* would be in contact with the lower roll and the doctor would therefore keep scraping off the moisture which gathered on the lower roll, and that moisture would fall down onto the web? A. Onto the back side of the web. It would be dirty water.

"Q. You put on the element *T*, which you call a false doctor, which bore off that water to the rear of the machine, and that obviated the difficulty? A. That is just right.

"Q. After you had done that, did it work well after that? A. It worked fine. It worked all right.

"By Mr. Small: Q. Was it automatic? A. It was not automatic in taking it to the drier, only to the bottom of the lower roll."

This excerpt tells the story and makes extended criticism unnecessary. The Tompkins patent is not automatic and has not been used by the trade. It did not anticipate the patent in suit, the device of which works automatically. There is no other device than the patent in suit which satisfactorily accomplishes the result.

The purpose of both the Tompkins and Fuller devices was to prevent the breaks in the web of tissue paper at the press roll. Tompkins failed to accomplish that result, and besides his machine was not automatic. Fuller accomplished the result, and did it in a manner entirely satisfactory to the trade, and with a machine which is automatic. We are at a loss, therefore, to see how it can be said that the Barnes or Tompkins device anticipated the Fuller device.

[6] A mere aggregation of old and well-known devices may or may not be patentable, depending upon the circumstances of the particular

case. If the combination claimed is an obvious one for attaining the advantages proposed, and one which would occur to any mechanic skilled in the art, it would not be patentable; and, if otherwise, it may be. In the leading case of Loom Co. v. Higgins, 105 U. S. 580, 591 (26 L. Ed. 1177), the law is stated as follows in respect to a mere aggregation of old devices:

"* * * This argument would be sound if the combination claimed by Webster was an obvious one for attaining the advantages proposed, one which would occur to any mechanic skilled in the art. But it is plain from the evidence, and from the very fact that it was not sooner adopted and used, that it did not, for years, occur in this light to even the most skillful persons. It may have been under their very eyes; they may almost be said to have stumbled over it; but they certainly failed to see it, to estimate its value, and to bring it into notice. Who was the first to see it, to understand its value, to give it shape and form, to bring it into notice and urge its adoption, is a question to which we shall shortly give our attention. At this point we are constrained to say that we cannot yield our assent to the argument that the combination of the different parts or elements for attaining the object in view was so obvious as to merit no title to invention. Now that it has succeeded, it may seem very plain to any one that he could have done it as well. This is often the case with inventions of the greatest merit. It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention. It was certainly a new and useful result to make a loom produce 50 yards a day when it never before had produced more than 40; and we think that the combination of elements by which this was effected, even if those elements were separately known before, was invention sufficient to form the basis of a patent."

[7] And the production of a new result which meets a recognized need and goes immediately into general use is held to disclose invention, though there would be no invention in the adoption of any one of the successive steps by which the result was attained. American Steel Foundries v. Damascus Brake Beam Co., 267 Fed. 574.

There is no device of the prior art which is precisely similar. Patentable novelty may reside in the particular means used for accomplishing an old result. It may also lie in the use of old means in a new relation to produce a new result. The essence of the Fuller invention is the repositioning of the Tompkins roll. The patent in suit used old means in a new relation to produce a new result. The fact proves that the claims cover a "novel" structure. The evidence is uncontradicted that the attachment of the patent has become standard practice. It is shown to be "in fact the only attachment or device on the market for the purpose for which it is used." The fact proves that the claims cover a "useful" structure.

The evidence clearly establishes the fact that results are obtained under the structure of the patent which were never obtained before under any structure of the prior art. It dispensed with "an endless amount of breaks at the press rolls, which occasioned loss of production." It caused "fully 20 per cent. increase" in the daily production of the machine on tissue paper, and increased the speed of the machine from 20 per cent. to 50 per cent. To accomplish this result, even by a combination or rearrangement of old elements, affords sufficient evidence of "invention" to form the basis of a patent.

[8] The validity of a patent depends upon novelty, utility, and invention, and in the opinion of the majority of the court the patent in suit shows novelty, utility, and invention, and is therefore valid.

[9] This brings us to the question of infringement. We discover no real difference between the defendant's machine No. 3 and that of the patent in suit. In the defendant's machine the press rolls are coupled directly to the first of a series of standard driers in the same manner as in the Fuller device, but it is sought to avoid infringement because defendant disconnects his steam pipes from the first of the series of driers. The argument is that, when the steam is disconnected, the first drum is not the first of a series of driers. The practice of the trade shows that it is quite usual among those who use the Fuller attachment to run the first of the series of "driers" cold. They run the first cylinder without steam, in order to improve the paper and protect the felt, as the less pressure and heat one has on the driers the better the strength of the paper. As the first drier is run either hot or cold, as the operator prefers, one cannot avoid infringement by merely disconnecting the steam pipes from the first drier and running it cold. A valuable contribution to an art is not to be destroyed by mere artifice and evident evasion.

The decree of the District Court is reversed, and the cause remanded, with directions to reinstate the bill and take such further action as may be necessary, not contrary to this opinion.

THE NEWBURGH. THE ROBERT J. McGUIRL. Petition of SHAMROCK TOWING CO.

(Circuit Court of Appeals, Second Circuit. April 6, 1921.)

No. 136.

1. **Collision ⟸95(2)—Evidence held to show vessels were crossing at small angle and that one substantially kept her course and speed.**
   Evidence *held* to show that a steamer going up the North River and a tug towing a barge from a point on the Jersey shore to a pier further down the river on the Manhattan side were crossing at a very small angle, and that the tug did little or nothing, but substantially kept her course and speed, after assenting to the steamer's signal for a starboard to starboard passing.

2. **Collision ⟸95(4)—Steamer signaling for starboard passing with crossing vessel held at fault in not stopping or in making close shave.**
   A steamer going up the Hudson river, and colliding with a tug crossing her course at a narrow angle, *held* at fault in not stopping and backing when the tug's answer to her signal for a starboard to starboard passing was too long delayed, or in making too close a shave in her own navigation after the signal was assented to.

3. **Collision ⟸93—Burdened vessel, agreeing to proposal of privileged vessel, escapes risk.**
   When a privileged vessel proposes that the burdened vessel cross her bows, and gets an assent to such proposal, she assumes the risk of the proposal.

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4. Collision ⇐93—Duty of burdened vessel, assenting to proposal of privileged vessel that she cross her bows, stated.
When a privileged vessel proposes that the burdened vessel cross her bows, and gets an assent to such proposal, the case is one of special circumstances, and the burdened vessel is not rigidly bound to keep her course and speed.

5. Collision ⇐106—When burdened vessel agrees to cross bows, situation is one of special circumstances.
Where vessels are crossing at a small angle, and the burdened vessel agrees to cross the bows of the privileged vessel, a position of special circumstances is created, no matter from which vessel the proposal emanates, and the burdened vessel is not absolved from her original duty to keep out of the way, nor rigidly bound to hold her course and speed.

6. Collision ⇐95(2)—Crossing vessel, assenting to signal for starboard passing and doing little to avoid collision, held at fault.
Where a steamer going up the Hudson river and a tug towing a barge were meeting at a small angle, and the steamer, the privileged vessel, signaled for a starboard to starboard passing, to which the tug assented, the tug *held* at fault in holding her course and speed, and doing little or nothing to prevent a collision.

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

Two libels—one by Owen J. McWilliams and others against the Cornell Steamboat Company, which brought in the steamer Newburgh, her engines, etc., claimed by the Central Hudson Steamboat Company; and the others by the Archibald McNeil & Sons Company against the steamer Newburgh, her engines, etc., claimed by the Central Hudson Steamboat Company—with petition by the Shamrock Towing Company, owner of the steam tug Robert J. McGuirl, for limitation of liability. From a final decree, holding the Newburgh and the Robert J. McGuirl jointly at fault for a collision, the Central Hudson Steamboat Company and the Shamrock Towing Company appeal. Affirmed.

This is an appeal from a final decree of the District Court for the Southern District of New York, holding the steamer Newburgh and the tug Robert J. McGuirl jointly at fault for a collision between the barge Blue Star and the Newburgh in the North River on March 25, 1917. On that day the barge Blue Star, lying at Guttenburg, on the Jersey shore of the North River, about opposite Seventy-Ninth street, was taken in tow on the starboard hand of the tug Robert J. McGuirl. She was to be towed to the Forty-Eighth street pier of the Pennsylvania Railroad on the Manhattan side in time to join the tow leaving there for South Amboy at 5 p. m. The McGuirl set out at about the slack of the ebb, shortly before 5 o'clock, and started across and downstream at a rate of about 3 or 4 miles an hour. One of the issues in the case was whether, at the time of the subsequent collision, she was straight down the river or quartering across. Meanwhile the steamer Newburgh had left her pier in Manhattan bound up the North River at a speed of about 14 miles an hour. It is agreed that at all times the Newburgh had the McGuirl on her port bow, and that the Newburgh blew two whistles, to which the McGuirl answered with two.

The McGuirl says that she had turned in the stream above the place of collision, and was headed downstream at a sufficient distance to make a safe port to port passing, that she starboarded after the exchange of whistles, and that the collision occurred through the failure of the Newburgh to do her share towards a starboard to starboard passing. The Newburgh's version is that the McGuirl was still quartering across the river at the exchange, so as to make it a starboard hand case; that the McGuirl, having assented, did not

do her share to co-operate in crossing the Newburgh's bow, porting at the last minute into the Newburgh after an initial starboarding. It is further agreed that the collision occurred by a head-on meeting between the barge and the steamer. At this time the steamer had backed and a large part of her way was off, but she had still enough to plow into the barge, inflicting such injuries that she sank before she could be beached.

There were certain subsidiary proceedings on limitation, responsibility over, and the like, which it is not necessary to set forth, in view of the fact that both vessels have been held at fault.

Herbert Green, of New York City, for the Blue Star.

Duncan & Mount, of New York City (S. C. Fordham, O. D. Duncan, and H. W. Dieck, Jr., all of New York City, of counsel), for the Newburgh.

Alexander & Ash, of New York City (Peter Alexander, of New York City, of counsel), for The Robert J. McGuirl.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City (Robert S. Erskine, of New York City, of counsel), for Cornell Steamboat Co.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass. (Edward E. Blodgett and Albert T. Gould, both of Boston, Mass., of counsel), for certain owners of the barge's cargo.

Before ROGERS and MANTON, Circuit Judges, and LEARNED HAND, District Judge.

LEARNED HAND, District Judge (after stating the facts as above). [1] We think that this was a crossing, not a passing, case. We must choose between the story of the Newburgh, backed up by Eldridge, and the supposition that each vessel was passing the other port to port on directly opposite courses 300 feet apart. If so, it seems to us highly improbable that the Newburgh should ever have sought a starboard to starboard passing, even though we should agree that, had she done so, the McGuirl would have assented. The suggestion that the Newburgh meant to avoid the New York shore further up because of possible shipping appears fantastic. On the other hand, it seems hard to accept Eldridge's story that the McGuirl was heading only two points downstream, because not only does it contradict the story of the McGuirl, but there was no conceivable reason for her still so doing half a mile below Guttenburg. Munson says that the McGuirl was headed "about the same" as he, which is consistent with a slight heading on the New York shore. Furthermore, there is no improbability that the McGuirl had already begun to head in towards her slip a mile below; the tide had not yet become a serious factor. Finally, there is every indication that the Newburgh, taken unawares, was presented with a sudden situation which in her judgment demanded some action on her part. The only relative position of the vessels, consistent with that fact, is a crossing case, though at a very small angle, probably about one point.

The learned trial judge believed that the "McGuirl starboarded after accepting the Newburgh's proposal to cross her (the Newburgh's) bows," and in this he is supported by the apparently disinterested tes-

timony of Eldridge. Yet Eldridge heard no signals from the McGuirl, and swore that she starboarded five points at the last moment, which is certainly impossible. His observation must therefore have been faulty. Moreover, we regard it as most unlikely that a burdened vessel, having agreed to cross another's bows, and having started to do so, should in the middle of that movement change and do the exact opposite for no ascertainable reason. We think it much more likely that she relied upon the superior speed and turning power of the Newburgh, and either ported slowly or did nothing at all. It is, of course, possible that her master, after starting to cross, supposed the Newburgh would not follow her signal, and in haste attempted to starboard, yet that presupposes an emergency in his judgment, and such an emergency would ordinarily have called for an alarm on his part. As we are forced to choose between the supposition that she substantially kept her course, or first ported and then starboarded, we accept the former.

[2] These facts being established, it seems to us clear that the Newburgh made too close a shave, or, having a faulty lookout, was taken by surprise, as is made plausible by the short interval between her signals and the little distance left her after the McGuirl's assent. If we were to assume that she did not shave too close, but merely found herself at too close quarters, it would still follow that she had allowed the McGuirl to get too close for safe navigation after she got her assent. Either she ought to have stopped and backed at once, when the answer was too long delayed or without making any such proposal, or she had distance enough to execute her proposal after getting the McGuirl's assent, and failed in her own navigation. In any event, she is in a dilemma which puts her in fault.

[3-5] We have decided that the McGuirl did little or nothing after assenting to the Newburgh's two whistles, but substantially kept her course and speed. Her navigation in this view raises a question upon which we have found very little in the books. It is good law that, when the burdened vessel decides to "keep out of the way" by crossing the bows of the privileged vessel, though she gets an assent to such a proposal, she assumes the risks involved in choosing that method. The Nereus (D. C.) 23 Fed. 448, 455, 456; The Greenpoint (D. C.) 31 Fed. 231. The duty of the privileged vessel in such cases is to co-operate, and she need not keep her course. The Sammie (C. C.) 37 Fed. 907; The M. Vandercook (D. C.) 88 Fed. 559, affirmed 105 Fed. 1004, 45 C. C. A. 183. The situation, at least in this circuit, after the agreement, is one of special circumstances. The George S. Shultz, 84 Fed. 508, 510, 28 C. C. A. 476 (semble). But such an agreement, initiated by the privileged and assented to by the burdened vessel, might be regarded as creating other duties. It could be considered as a proposal that the duties of the vessels should be reversed, and that the burdened (now the privileged) vessel hold her course and speed, so that the privileged (now the burdened) vessel might be able to forecast her positions at future moments, precisely as the rule requires when no agreement has been made.

We have been unable to find much in the books which touches on the precise point. In The Susquehanna (D. C.) 35 Fed. 320, 322, the bur-

dened vessel was exonerated because she did not "thwart" the proposal, having apparently kept her course. On the other hand, in The Columbia (D. C.) 29 Fed. 716, 720, Judge Brown thought it a matter of indifference which vessel proposed the change; the burden always remaining upon the vessel originally burdened. In Stetson v. The Gladiator (D. C.) 41 Fed. 927, Judge Nelson said that the exchange justified the burdened vessel in keeping her course.

In none of these cases was the originally burdened vessel held to any duty to keep her course. On the whole, we are disposed to think that any agreement to change the usual rules should be treated as creating thereafter a position of special circumstances. If so, we think that, although the proposal emanates from the privileged vessel, and should be taken as meaning that she will undertake actively to keep out of the way, it need not absolve the burdened vessel from her similar and original duty also to keep out of the way, nor will it impose on her a rigid duty to hold her course and speed. It is true that that duty is imposed by the rules generally as a correlative to the duty to keep out of the way, but only in cases where no agreement has been reached. Some convention is essential when neither knows the other's purposes, but when both have agreed upon a maneuver by an exchange of signals, their accord should be left for execution by movements adapted to the circumstances. For example, if the angle of crossing is wide, it will usually be best for the originally burdened vessel to hold her course and speed; but, if it be narrow, it is safest for both to starboard and pass at a greater distance. No doubt the proposal involves the proposer in a duty to give a wide enough margin for safety, even though the assenting vessel do not starboard.

[6] In the case at bar the McGuirl, having assented, did nothing, or at most very little, as the position at collision proves. The crossing was at a narrow angle, and the assent involved for safety some active co-operation on her part under those special circumstances. Each was under a duty to keep out of the way of the other, and to this extent the original duty of the McGuirl remained. Her co-operation included more than the mere absence of anything which might "thwart" the Newburgh. Had the angle been wide, her best co-operation might well have been to hold her course and speed. In this respect her fault may have been less than the Newburgh's, who had suggested the change; but upon that we do not feel disposed to speculate. It is enough that the agreement in fact created a situation not much removed from a starboard to starboard passing, in which both vessels have an active duty.

While, therefore, we cannot agree in imputing to the McGuirl the final porting, which the learned trial judge accepted, the result is the same, and both vessels were at fault.

The decree is affirmed, with costs.

GARDINER et al. v. EQUITABLE OFFICE BLDG. CORPORATION.

(Circuit Court of Appeals, Second Circuit. April 6, 1921.)

No. 63.

1. **Corporations ⟸448(2)—Accept benefit of contract made by promoters cum onere.**
   There is no implied liability on the part of a corporation to its promoters for their services and expenses, and it is not liable therefor, in the absence of an express promise made after its organization, unless the liability is imposed by its charter or by the general law; but, where the corporation accepts the benefits of a contract made by the promoters, it is subject to the burdens of the contract of which it had knowledge.
2. **Corporations ⟸428(5)—Knowledge of director chargeable to corporation only when he acts for it in the transaction.**
   Knowledge of a director is not imputable to the corporation, in a transaction between them in which he acts for himself, and not for the corporation, nor is knowledge obtained by a director before he became such, unless it is present in his mind when acting for the corporation in a transaction to which it is material.
3. **Corporations ⟸448(2)—May expressly or impliedly adopt contract made for it by promoters.**
   Under the American authorities, a contract made by promoters in behalf of a corporation projected, but not yet formed, may be adopted by the corporation and become binding on it, if it expressly or impliedly adopts the contract after its organization.
4. **Corporations ⟸448(2)—Held to have assumed a liability contracted for in its behalf by promoter.**
   The promoter of a scheme to build a large office building in New York City employed plaintiffs' testator to render services in connection with securing the desired site. After that had been arranged for he turned the project over to another, who agreed, on behalf of the corporation to be organized to carry on the enterprise, to pay a stated sum for such services in cash and stock of the corporation. He organized defendant corporation, of which he became a director, and which accepted his offer to turn over his contracts and property acquired by him "in consideration and on condition" of the doing of certain things by defendant, among others that it would "assume and discharge and reimburse me for all my expenses in connection with" securing the property and preparing for building "and all other expenses of every kind, either incurred or which may be incurred by me in bringing about such arrangements." *Held*, that such acceptance bound defendant to fulfill the promoter's agreement to pay for the services of plaintiffs' testator as expenses of the enterprise, though no services were rendered directly for such promoter or defendant.
5. **Corporations ⟸501—Complaint to charge corporation on contract made by promoter held to state cause of action in equity.**
   Complaint in an action to charge a corporation with liability on a contract made in its behalf by a promoter before its organization *held* to state a cause of action in equity.

Hough, Circuit Judge, dissenting.

Appeal from and in Error to the District Court of the United States for the Southern District of New York.

Action by Bentley Gardiner and Mary Elsie Gardiner, executors of the will of George N. Gardiner, deceased, against the Equitable Office Building Corporation. Complaint dismissed, and plaintiffs bring error and appeal. Reversed.

The plaintiffs are citizens of the state of New Jersey and the defendant is a corporation organized under the laws of the state of New York. The action is brought for breach of contract, and damages in the sum of $200,000 are asked, together with interest thereon from April 24, 1913. The complaint alleges the death of George N. Gardiner on July 17, 1914, and that the plaintiffs are the sole acting executors of his will. It sets out two causes of action.

For the first cause of action it is alleged that one Frank M. Andrews arranged with George N. Gardiner, the plaintiffs' testator, that the latter should ascertain from the officers of the Equitable Life Assurance Society whether or not a proposition would be entertained for the purchase of the site on which what was known as the "Equitable Building" stood, in the city of New York, and the erection thereon of a modern office building by an outside company, provided the society could be assured of the good faith and financial ability of the persons interested to carry out the enterprise. It is alleged that Gardiner was personally acquainted with the officers of the society, and that he was to secure information in regard to the attitude of the officers towards such a proposition, and the terms on which they would be willing to entertain the same. It is alleged that Gardiner did procure such information, and that it was valuable to Andrews, and enabled him to prepare a plan for organizing and financing the project; that thereafter Andrews and T. Coleman Du Pont entered into arrangements whereby Andrews turned over the enterprise to Du Pont, and the latter promised to provide for and pay out of funds to come into the treasury of a company to be organized to carry out the project the obligations and expenses incurred in the formation thereof, including the sum of $200,000 to be paid to Gardiner, the payments to be contingent upon the closing of the deal with the Equitable Life Assurance Society, which deal was then in progress for the purchase of the Equitable site and the erection of a building thereon; that $100,000 was to be paid in cash, and $100,000 in par value of the common stock of the said company; that the cash commission was to be paid out of the first moneys available from the sale of the preferred stock and second mortgage bonds of the company.

Then it is alleged that thereafter an agreement was entered into between the society and Du Pont, wherein it was agreed that the former would sell the site hereinbefore referred to, and the latter agreed that the corporation to be organized by him would erect upon the premises a 36-story fireproof office building according to plans to be approved by the society. It is further alleged that Du Pont caused the defendant corporation to be organized and incorporated, and that he became a director thereof; that Du Pont then made a certain offer to the defendant concerning the plan and enterprise hereinbefore referred to, which offer was accepted by the defendant; that the defendant, in accepting Du Pont's offer, "agreed to assume and discharge and reimburse said Du Pont for all of his expenses in connection with negotiating for and securing the delivery of the various instruments and agreements in connection therewith, and in connection with the work done and materials supplied for the construction of the building in anticipation of the arrangement between him and the defendant, and of all other expenses of every kind, either incurred or which might be incurred by him in bringing about such arrangements, including the claim of the plaintiffs' testator." There are other allegations in connection with the first cause of action, but which it is not necessary in this connection to set forth.

For the second cause of action it is alleged that T. Coleman Du Pont, acting for and on behalf of a corporation thereafter to be formed (the defendant), entered into an arrangement with Frank M. Andrews to take over the enterprise on behalf of the corporation and to provide for the payment of the obligations incurred in the formation thereof, including an item of $200,000 to be paid to the plaintiffs' testator in consideration of the services rendered and to be rendered by Gardiner in connection with the enterprise, and that the said Du Pont acting for and on behalf of the corporation thereafter to be formed promised and agreed to provide for and pay out of funds to come into the treasury of the said company the obligations and expenses incurred in the promotion thereof, including the sum of $200,000 to be paid to plaintiffs'

testator as aforesaid, the same to be contingent upon the closing of the deal with the Equitable Life Assurance Company.

The seventeenth paragraph of the complaint reads as follows: "Upon information and belief, that in consideration of the said promises and agreements, said Andrews turned over and transferred to said Du Pont, acting for and on behalf of said company thereafter to be organized, the enterprise and project referred to, and said Du Pont, on behalf of said corporation, accepted and took over the same, and as part payment and consideration therefor, and for services rendered and to be rendered by the plaintiffs' testator in connection therewith, acting for and on behalf of said corporation, made and entered into an agreement with the plaintiffs' testator, wherein and whereby he agreed that there was to be paid out of funds to come into the treasury of said company one hundred thousand dollars ($100,000) in cash and one hundred thousand dollars ($100,000) par value of the common stock of said company, same to be contingent upon the final closing of the deal then in progress for the purchase of the Equitable site and the erection of a building thereon, the cash commission to be paid out of the first moneys available from the sale of the preferred stock and second mortgage bonds of the company."

It is alleged that the deal above referred to was consummated between the Equitable Life Assurance Society and the said Du Pont, and that a modern office building had been erected on the Equitable site, from which the defendant was receiving the rents, and that there had come into the defendant's treasury from the sale of its preferred stock and second mortgage bonds moneys in excess of $3,000,000, and far more than sufficient to pay the cash commission of $100,000 agreed to be paid to the plaintiffs' testator, and that there had been issued by the defendant shares of its common stock to an amount far in excess of the $100,000 par value of common stock agreed to be delivered to the plaintiffs' testator as provided for in the agreement.

When the cause came on for trial, counsel for the defense moved that the first cause of action be tried in equity, and that the second cause of action, if construed as a promoter's contract, be dismissed. If the second cause of action was not to be construed as a promoter's contract, but in effect as a different way of repeating the facts set out in the first cause of action, then that the second cause of action also be tried in equity.

The court took the matter under advisement, and then announced that in his opinion the first cause of action stated a cause of action in equity; that the second cause of action might be considered as a cause of action arising out of a so-called promoter's contract; that, so regarded, he thought it stated a cause of action at law, which entitled the plaintiffs to a jury. He added that, if at the trial the testimony failed to indicate that after the corporation came into existence a new contract was made, as distinguished from a so-called ratification of the promoter's agreement, he would feel bound to dismiss the complaint as to that cause of action.

In the discussion which took place between the court and counsel, it was suggested that no services were rendered by Mr. Gardiner to anybody after August 9, 1912, and that the defendant corporation was not organized until April 24, 1913. The court declared that, if it should appear that such were the facts, he thought a motion to dismiss the second cause of action would have to be granted; that if counsel for the plaintiffs elected to stand on the first cause of action, it would be tried in equity; that if he elected to stand on the second cause of action, he would try without a jury first the third separate defense, reserving the right to call in a jury if he deemed it proper as the case developed; the third separate defense being that the representations made by Andrews to Du Pont, that Gardiner had rendered services of value, were false—that being a defense cognizable solely in equity, there being no representations that these false representations were also fraudulent; that the proper order of procedure in the trial of a case at law to which there was an equitable defense was that such defense must first be tried.

This statement of the District Judge gave counsel full information as to what might be expected, and saved the time and expense which would have been involved if the parties had gone to trial and testimony had been taken. This was made unnecessary by a stipulation of counsel as to the facts.

Before putting that stipulation on the record, counsel for the plaintiffs made two motions, both of which were denied, and exceptions were granted:

First. That the third defense to the first cause of action be dismissed, on the ground that no facts were set up to show a legal or an equitable defense, and the plaintiffs were entitled to their jury trial.

Second. That there was no allegation on the part of the defendant to return or offer to return the fruits of the contract which it took, and, having taken the benefit, it must assume the burden.

Thereupon the stipulation of the parties was read into the record. It was stipulated, first, that the contract alleged in paragraph seventeenth of the complaint as having been made between the plaintiffs' testator, George N. Gardiner, and T. Coleman Du Pont, is set forth in the following letter:

"August 9, 1912.

"Mr. T. Coleman Du Pont, Wilmington, Delaware—Dear Sir: Confirming my conversation with you and recording our understanding in connection with the Equitable Building deal, there is to be paid Mr. George N. Gardiner a commission for services rendered, and to be rendered, of $100,000 cash and $100,000 par value of the common stock of the company, same to be contingent upon the final closing of the deal now in progress for the purchase of the Equitable site and the erection of a building thereon. The cash commission will be paid out of the first moneys available from the sale of preferred stock and second mortgage bonds of the company.

"Yours very truly, [Signed] Frank M. Andrews."

"Dear Frank: The above is just as I understood it, and provisions will be made to take care of this as early as possible.

"[Signed] T. C. Du Pont."

Second. That from the date of said letter, August 9, 1912, to about December 12, 1912, no one called upon George N. Gardiner to render any services to Mr. Andrews, Mr. Du Pont, the Du Pont Company, the defendant corporation, or any other person or corporation, and on or about December 12, 1912, Mr. Du Pont informed Mr. Gardiner that no future services would be required of him. Other matters stipulated will be referred to in the opinion.

Counsel for the defense moved to dismiss the complaint as an entirety, on the ground that the facts alleged were not sufficient to constitute a cause of action at law or in equity. The court thereupon dismissed the complaint and each cause of action thereof.

Kellogg & Rose, of New York City (Abram J. Rose and Alfred C. Pette, both of New York City, of counsel), for plaintiffs in error.

Simpson, Thacher & Bartlett, of New York City (Julius F. Workum and Adrian L. Foley, 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). This is the third time that the subject-matter of this litigation has been before this court. It came here first in Du Pont v. Gardiner, 238 Fed. 755, 151 C. C. A. 605. We held at that time that an injunction was improperly granted restraining Gardiner from maintaining an action at law against Du Pont. All that we decided in that case was that in an action brought on a contract which was not under seal it was a good defense at law that the contract was induced by fraudulent representations. The matter came here next in Gardiner v. Du Pont, 250 Fed. 227, 162 C. C. A. 363, and we decided that the evidence was insufficient to sustain an action against Du Pont for breach of contract; the evidence not indicating that Du Pont was binding himself individually, or

that the parties believed he was binding himself, but that the understanding was that the contract should be performed by a corporation to be formed.

In the present suit the action is brought against the corporation which the parties contemplated should be formed and which later was formed. It having been decided that the contract was not the personal obligation of Du Pont, we must now determine whether there exists any obligation on the part of the defendant corporation.

[1] It has been held in some jurisdictions that, if the promoters of a corporation necessarily perform services or incur expenses in obtaining a charter, in securing subscriptions to the capital stock, and in otherwise perfecting the organization and such services were necessary and reasonable, and not rendered gratuitously, but with the understanding and expectation of the promoters that they were to be paid for, a promise to pay by the corporation after its organization and acceptance of the benefits of such services or expenses will be implied. Farmers' Bank of Vine Grove v. Smith, 105 Ky. 816, 49 S. W. 810, 88 Am. St. Rep. 341; Low v. Connecticut & Passumpsic Rivers R. Co., 45 N. H. 370; Hall v. Vermont & Massachusetts R. Co., 28 Vt. 401. In laying down the above rule it has been said that any other doctrine would render it difficult to organize any corporation, however necessary. But the weight of authority seems clearly to be that there is no such liability on the part of a corporation to its promoters, in the absence of an express promise by it after its organization, unless, as is sometimes the case, such liability is imposed by the charter or the general law. Melhado v. Porto Algere, New Hamburgh & B. Ry. Co., L. R. 9 C. P. 503; New York & New Haven R. Co. v. Ketchum, 27 Conn. 170; Rockford, Rock Island & St. L. R. Co. v. Sage, 65 Ill. 328, 16 Am. Rep. 587; Weatherford, Mineral Wells & Northwestern Railroad Co. v. Granger, 86 Tex. 350, 24 S. W. 795, 40 Am. St. Rep. 837.

Then it is said that a corporation which has had the benefit of a promoter's contract accepts it cum onere, and is liable thereon. The rule on this subject is stated in Cook on Corporations (7th Ed.) vol. 3, p. 2411, as follows:

"A corporation, accepting the benefits of the contract of its incorporators, must accept the burden, and a promoter's contract, which has been ratified or adopted by the corporation, or the benefits of which have been accepted by the corporation with knowledge of such contract, may be enforced against it."

And see Morgan v. Bon Bon Co., 222 N. Y. 22, 118 N. E. 205.

But it is important to understand exactly what is meant when it is said that, if a corporation accepts the benefit of a contract made by its promoters, it takes it cum onere. In Re Rotherum, etc., Co., 50 Law T. (N. S.) 219, this language is used by one of the justices:

"It is said that Mr. Peace has an equity against the company, because the company had the benefit of his labor. What does that mean? If I order a coat, and receive it, I get the benefit of the labor of the cloth manufacturer; but does any one dream that I am under any liability to him? It is a mere fallacy to say that, because a person gets the benefit of work done by somebody else, he is liable to pay the person who did the work."

And see Weatherford, etc., Ry. Co. v. Granger, supra.

We do not challenge the proposition that a corporation, in accepting the benefits of a promoter's contract, takes it subject to the burdens, but we do not see wherein it has any application to the facts of this particular case. The theory, as we understand it, seems to be that Andrews made arrangements with Gardiner to procure information, which information was procured by Gardiner and was valuable to Andrews, and enabled him to prepare and formulate a plan for organizing and financing the project for the purchase of the Equitable site and the erection of an office building thereon; that after a tentative plan had been formulated by Andrews, and after information had been obtained by Gardiner in connection therewith, Du Pont entered into arrangements with Andrews to take over the enterprise and to provide for the payment of the obligations incurred in the formation thereof; that a statement was made up, showing the obligations and expenses incurred, included in which was an item of $200,000 to be paid to Gardiner, in consideration of the services rendered and to be rendered by him; that in consideration of the turning over by Andrews to Du Pont of said enterprise and of the services rendered by Gardiner, Du Pont promised that there should be paid out of the treasury of the company the obligations and expenses incurred in the formation thereof; that defendant was organized by Du Pont, and in consideration of the turning over to it of said plan and enterprise promoted by Andrews and Du Pont, with Gardiner's assistance, and of the payments to it by Du Pont referred to in his offer, the defendant has had the benefit of Du Pont's agreement, and is therefore impliedly bound to pay the Gardiner commission.

[2] So far as this argument is concerned, it is enough to say that to make the principle applicable the corporation must have accepted the benefits with knowledge of the facts. All of the cases which recognize the doctrine so hold. And there is no evidence in this record that the corporation knew of the agreement made by Du Pont in the Andrews letter. It is true it is said that two of the directors, Du Pont and Dunham, had actual knowledge of the letter at the time of the taking over of the enterprise by the defendant. So far as the knowledge of Du Pont is concerned, it is clear that it was not imputable to the corporation. A corporation is not charged with notice of facts known to a director in a transaction between him and the corporation, in which he is acting for himself and not for the corporation. Davis Improved Iron Wagon Co. (C. C.) 20 Fed. 699; Commercial Bank v. Cunningham, 24 Pick. (Mass.) 270, 276, 35 Am. Dec. 322; Burt v. Batavia Paper Manufacturing Co., 86 Ill. 66. The general rule that the knowledge of the agent is imputed to the principal rests upon the presumption that the agent will disclose what it is his principal's business to know and the agent's duty to impart. But the rule does not apply where the agent contracts with his principal, because in such a case there is no reason to presume that the agent will impart information which it is for his interest to suppress. The knowledge of a promoter is not to be imputed to his corporation. Machen on Corporations, vol. 1, § 348.

It is also true that the knowledge of Dunham cannot be imputed to the corporation. At the time Dunham obtained knowledge of the transaction, he was not a director. In Houseman v. Girard Mut. Bldg. & Loan Ass'n, 81 Pa. 256, quoted in Gilkeson v. Thompson, 210 Pa. 355, 359, 59 Atl. 1114, 1115, Judge Sharswood said:

"It is only during the agency that the agent represents, and stands in the shoes of his principal. Notice to him is then notice to his principal. Notice to him 24 hours before the relation commenced is no more notice than 24 hours after it had ceased would be."

It is not necessary that we should express our opinion concerning Judge Sharswood's statement. It is a proposition not everywhere accepted. While the knowledge of an agent, according to the trend of recent decisions, may be attributed to his principal, it cannot be so attributed unless it is clearly shown that the agent, while acting for the principal in a transaction to which the information is material, has the information present in his mind. Harrington v. United States, 11 Wall. 356, 20 L. Ed. 167; Vulcan Detinning Co. v. American Can Co., 72 N. J. Eq. 387, 67 Atl. 339, 12 L. R. A. (N. S.) 102; Suit v. Woodhall, 113 Mass. 391; Slattery v. Schwannecke, 118 N. Y. 543, 23 N. E. 922; Booker v. Booker, 208 Ill. 529, 70 N. E. 709, 100 Am. St. Rep. 250. Or unless, according to some of the authorities, the information was acquired so recently or under such circumstances that it will be presumed to have been in his mind at the time of the transaction in question. Alger v. Keith, 105 Fed. 105, 44 C. C. A. 371; Henry v. Omaha Packing Co., 81 Neb. 237, 115 N. W. 777; Brothers v. Kaukauna Bank, 84 Wis. 381, 54 N. W. 786, 36 Am. St. Rep. 932; Jenkins Bros. Shoe Co. v. Renfrow, 151 N. C. 323, 66 S. E. 212, 25 L. R. A. (N. S.) 231.

In Cook on Corporations (7th Ed.) vol. 3, § 727, p. 2591, it is said:

"The corporation is sometimes chargeable with knowledge of facts which are known to one of its directors; but there are so many exceptions to this rule that the only safety lies in a study of the cases themselves."

We shall not enter upon a detailed study of the cases, not finding it necessary, in view of the fact that it does not affirmatively appear upon this record that Dunham was present at the time Du Pont's offer was submitted to and acted upon by the board. It is true the record states that the vote taken on the offer was unanimous. But that affords no proof that a full board was present. It simply shows that no one who was present voted against the acceptance of the offer.

[3]. The English courts hold that a contract made by promoters in behalf of a corporation projected, but not yet formed, cannot by adoption bind the company when incorporated. They hold that a new contract is necessary. The adoption and confirmation by the deed of settlement, or its modern equivalent, the memorandum of association, will not render the contract binding on the company. Gunn v. London, etc., Fire Ins. Co., 12 C. B. (N. S.) 694; In re Northumberland Ave. Hotel Co., 33 Ch. D. 16. In the same way the confirmation by the directors of a preincorporation contract is under the laws of England insufficient to bind the corporations to the contract. In re Dale

& Plant, 61 L. T. 206; North Sydney Investment, etc., Co. v. Higgins, [1899] A. C. 263, 271.

In this country our courts have held, and the great weight of authority supports the proposition, that a preincorporation contract may be adopted by the corporation and become binding on it, if it expressly or impliedly adopts it after it comes into existence. In re Lance Lumber Co., 237 Fed. 357, 150 C. C. A. 371; In re Ballou (D. C.) 215 Fed. 810; In re Quality Shoe Shop (D. C.) 212 Fed. 321; Cook v. Sterling Electric Co., 150 Fed. 766, 80 C. C. A. 502; Bridgeport Electric, etc., Co. v. Meader, 72 Fed. 115, 18 C. C. A. 451; Seymour v. Spring Forest Cemetery Association, 144 N. Y. 333, 39 N. E. 365, 26 L. R. A. 859; Forbes v. Thorpe, 209 Mass. 570, 95 N. E. 955; Brautigam v. Dean, 85 N. J. Law, 549, 89 Atl. 760; Streator Independent Tel. Co. v. Continental Tel. Construction Co., 217 Ill. 577, 75 N. E. 546; Stanton v. New York, etc., R. R. Co., 59 Conn. 272, 22 Atl. 300, 21 Am. St. Rep. 110; Girard v. Case Bros. Cutlery Co., 225 Pa. 327, 74 Atl. 201; Machen on Corporations, vol. 1, § 329; 14 C. J. 257.

But the fundamental question which the present suit presents is not whether the defendant after its incorporation adopted an agreement previously made between its promoters, Andrews and Du Pont, as embodied in the letter of August 9, 1912. There is nothing in the record to show that the defendant corporation ever took action upon that particular agreement, or that it was ever brought directly to its attention. The contract which the defendant made with Du Pont, growing out of his offer and its acceptance, immediately after its incorporation on April 24, 1913, is the one contract which the defendant made upon which the plaintiff can rely. However, in determining the liability of the defendant under that contract, it will be necessary, as we shall presently see, to consider the meaning of the agreement made between Andrews and Du Pont in the letter of August 9, 1912, to which reference has already been made, and which we shall more particularly consider in a subsequent portion of this opinion.

[4] We now proceed to consider the contract the defendant made with Du Pont. It appears from the facts stipulated that the defendant was organized as a corporation on April 24, 1913, with Du Pont as one of the incorporators and directors. On the same day that the company was organized Du Pont submitted to it an offer which embraced 12 distinct propositions of things that he would cause to be done on its behalf by the Equitable Life Assurance Society of the United States and by other parties therein named. And in submitting this offer of the things he would cause to be done he stated that it was "in consideration and on condition that" it (the defendant) agreed that it would do certain things set forth in 11 paragraphs, of which paragraph 10 alone can have any possible relation to the matter now under consideration. By that paragraph the defendant was to—

"assume and discharge and reimburse me [Du Pont] for all my expenses in connection with: (1) Negotiating for and securing the delivery of the various instruments and agreements hereinabove mentioned; and (2) in connection with work done and materials supplied for construction of said building in anticipation of the arrangements about to be made; and (3) all other ex-

penses of every kind either incurred or which may be incurred by me in bringing about such arrangements, including the incorporation of your company and the preparation of instruments for use in perfecting such arrangements."

Neither in the things which Du Pont was to do nor in the things which the defendant was to do, if the offer was accepted, was there any express mention of Gardiner. The offer was accepted by the board of directors unanimously, Du Pont not voting. The vote directed that the officers of the company should execute and deliver all agreements and other instruments in writing and other things necessary and proper to carry out and consummate the transaction according to the terms of the offer.

If paragraph 10 simply imposes upon the defendant an obligation to assume and discharge and reimburse Du Pont for all of his expenses, either incurred or which may be incurred by him in doing certain things, and for which he had become or should become personally liable, then this suit cannot be maintained; for the commission sought to be recovered in this suit is not an expense incurred by Du Pont for which he became personally liable, this court having already so decided in the former case. And by stipulation of the parties it is agreed that Gardiner never rendered any service to Du Pont, and the latter never incurred any obligations to him, unless one was created by the letter of August 9, 1912. If that is the meaning which must be given to the agreement between the defendant and Du Pont, then Du Pont failed in his offer to the defendant to incorporate and provide for the claim of Gardiner, and has broken his promise to Andrews that he would see that the corporation paid it.

This action then must fail, unless the words "expenses * * * incurred * * * by me," as employed in the agreement made between the promoter, Du Pont, and the defendant corporation, are entitled to receive a broader construction than that already considered. To maintain the action it is necessary that the words quoted should be sufficiently comprehensive to include expenses incurred by Andrews as the original promoter, but which Du Pont, in taking over the enterprise from Andrews, agreed should be paid to Gardiner by the corporation which Du Pont was to organize. We must, so far as this record is concerned, regard this commission of Gardiner's as an "expense" of the enterprise. Whether the original undertaking between Andrews and Gardiner was, at the time the services were rendered, that they were to be paid for by Andrews, or whether Gardiner was to look to the corporation when it was organized, is not disclosed upon the record, and is immaterial so far as the issue now under consideration is concerned.

The important question is whether the agreement made by Du Pont with Andrews that this commission to Gardiner for services rendered in connection with the promotion of the enterprise should be paid by the corporation he was to form can be regarded as an expense connected with the enterprise which Du Pont can be said to have incurred by this recognition of it. If it can be so regarded, the defendant corporation has agreed to pay it, and this action can be maintained. If it

cannot be so regarded, the defendant has not promised to pay it, and the action cannot be maintained. The fact that Du Pont did not obligate himself personally to pay this expense does not preclude it from being regarded as an expense of the enterprise incurred by him. It is not at all unusual in the case of promoters' contracts for A. to incur expense with the understanding that B. is to look for payment to C. And it does not seem to us a strained or improper construction of the agreement to hold that, when Du Pont found it necessary or desirable, in taking over the enterprise, to promise that Gardiner's commission should be paid by the corporation, he thereby made or recognized its payment as an expense of the enterprise which he had incurred by virtue of the letter of August 9, 1913. Therefore the defendant, by its acceptance of Du Pont's offer on April 24, 1913, to pay the expenses incurred by him, became liable to pay the Gardiner commission as Du Pont promised.

We are dealing with a promoter's contract, and the actual intention of the parties should be given effect as in the case of other contracts. We must assume that Andrews, in turning over to Du Pont the enterprise which he was promoting, was influenced by Du Pont's promise that Gardiner's commission should be paid. We cannot assume that Andrews would have turned the enterprise over, unless Du Pont incurred an expense incidental to the prosecution of the enterprise, the payment of which expense was to be contingent upon the action of the corporation to be formed. That corporation was in effect Du Pont. He was to incorporate it, and to name its board of directors, and would presumably control its policy. Good faith seems to require the construction we have placed upon the words the parties used. The question as to any false or fraudulent representations having been made to Du Pont by Andrews by which he was induced to agree that Gardiner should be paid is not before us upon this record. The allegations in the answer upon that subject did not influence the court below in arriving at its conclusion. The learned District Judge expressly disclaimed any knowledge whatever as to whether any such false or fraudulent representations were in fact made. His language on this phase of the matter was as follows:

"In all that I have stated I want it distinctly understood that I know nothing, nor do I want this record to indicate that Mr. Andrews made any false representation, knowing it to be false, or anything of the kind."

That court did not know, and this court does not know, anything of the kind. At this stage of the case, and upon this record, that question is not in any way before us. If any such representation was made, that was a matter of defense, and had nothing whatever to do with the sufficiency of the complaint, nor of the facts upon which the plaintiff relies. That was the only question before the lower court, and it is the only question before this court. The court was asked to dismiss the complaint, and the court had intimated that, if the plaintiff went to trial and proved certain facts, he should feel compelled to dismiss the complaint. Thereupon certain facts were stipulated by counsel on both sides as constituting the fundamental facts which would be

proven by the plaintiff, if the case should go to trial. So that upon the complaint, supplemented by the stipulated facts which the plaintiff could prove, the complaint was dismissed. The sole difference between the lower court and this court grows out of the meaning to be attached to the words "expense incurred by me" in the acceptance by the defendant of Du Pont's offer. The agreement of the defendant that it would pay the debts of the enterprise which Du Pont had incurred was in the most general and comprehensive terms. It was that the defendant would pay "all other expenses of every kind either incurred or which may be incurred" by Du Pont in bringing about "such arrangements." Such arrangements, as we understand them in the connection in which they are used, relate to the consummation of the enterprise he had undertaken.

[5] Upon the pleadings and the facts as stipulated, it was error therefore for the court to dismiss the complaint as respects the first cause of action. The agreement made between the defendant and Du Pont on April 24, 1913, bound the former to pay the Gardiner commission as an expense connected with the enterprise which Du Pont had incurred; and under the law as laid down in this circuit it stated a cause of action in equity. Goodyear Shoe Machinery Co. of Portland v. Dancel, 119 Fed. 692, 56 C. C. A. 300; Id., 144 Fed. 679, 75 C. C. A. 481.

The decree is reversed, and the cause remanded to the District Court, with directions to reinstate so much of the complaint as relates to the first cause of action, and to further proceed as may be required and as shall be in conformity with this opinion.

HOUGH, Circuit Judge (dissenting). "Expense" is a word that always implies disbursement or liability on the part of the expense incurrer. If, as this court has heretofore held, Du Pont incurred no personal liability to Gardiner, and if, as we now hold with obvious truth, Gardiner never rendered any services to either Du Pont or the defendant company, it is impossible for me to perceive how Gardiner's claim can be regarded as an "expense incurred" by any one, except perhaps Andrews.

The material facts have long been patent in the record of Du Pont v. Gardiner, supra; that evidence has never been varied in any essential; the subsequent proceedings are but a game of legal hide and seek. Du Pont promised to make an intended corporation pay Gardiner; he was induced so to do by what he regarded as false representations, and so did not keep his promise. After he became (rightly or wrongly) convinced of Andrews' falsity, of course he never intended to keep that promise.

It is now held that Du Pont smuggled into his long subsequent agreement with this defendant corporation a contract to pay as an "expense" something he was not liable for, and for which he thought it morally impossible any one could be made to respond. From this proposition I dissent.

EDWARDS, Internal Revenue Collector, v. CHILE COPPER CO.

(Circuit Court of Appeals, Second Circuit. April 27, 1921.)

No. 167.

1. **Internal revenue ⇐38—Corporation paying stamp tax under protest held entitled to maintain action for its recovery.**
   A corporation, having offered its bonds for sale, received installments thereon from subscribers, and being obligated to issue the bonds on receipt of final payment on a specified date, which, to avoid a threatened heavy penalty, paid under protest a tax for stamps required to be affixed to the bonds by an erroneous ruling of the Commissioner of Internal Revenue, *held* not to have made such payment voluntarily, and entitled to maintain an action against the collector for its recovery.
2. **Internal revenue ⇐19(1)—Bonds of corporation, issued to take up temporary bond, not subject to stamp tax.**
   War Revenue Act Oct. 3, 1917, § 800 (Comp. St. 1918, § 6318a), imposing a stamp tax, inter alia, on bonds issued by corporations, and effective from December 1, 1917, *held* not to apply to bonds issued by a corporation after that date as a substitute for and to take up a temporary bond for the amount of the entire issue, which had been issued a year before as a valid obligation and delivered to the trustee to secure subscribers to the bonds, who had paid a 50 per cent. installment on their subscriptions and were entitled to delivery of smaller denomination bonds on payment of the final installment a year later.

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

Action by the Chile Copper Company against William H. Edwards, Collector of Internal Revenue, Second New York District, to recover $17,500 paid as a stamp tax on certain bonds. A demurrer was interposed and overruled. Judgment was entered for plaintiff. Defendant brings error. Affirmed.

Francis G. Caffey, U. S. Atty., of New York City (Vincent H. Rothwell and Richard S. Holmes, Sp. Asst. U. S. Attys., both of New York City, of counsel), for plaintiff in error.

Root, Clark, Buckner & Howland, of New York City (Elihu Root, Jr., H. H. Nordlinger, Clarence M. Tappen, and Alexander B. Royce, all of New York City, of counsel), for defendant in error.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. On March 9, 1917, plaintiff below authorized an issue of bonds and executed a trust agreement securing them, by the action of its board of directors. On the same day the bonds were underwritten by its bankers. On April 16th the issue of bonds and the execution of the trust agreement was ratified by the stockholders, and on the following day the right to subscribe to this issue, $35,000,000, series A, was offered to the stockholders. On May 1st the underwriters requested the plaintiff below to issue a temporary $35,000,000 series A bond to the Guaranty Trust Company of New York. Such issue was authorized by the directors, and a trust agreement executed on May 3d, and a temporary bond was executed on

May 24th, and delivered to the trust company May 25th, the following day. A record was made in the books of the plaintiff below, showing this liability for $35,000,000, and the unpaid installments as accounts receivable. On May 29th the first installment of 50 per cent. on the purchase price of the bonds was paid by the stockholder subscribers, and installment receipts, binding the company to deliver permanent bonds on payment of the second installment, were given on May 29, 1918. Between June 1st and 7th the first installment of 50 per cent. purchase price of the bonds was paid by the underwriters, who were forthwith given installment receipts, likewise binding the company to deliver permanent bonds on payment of the second installment of May 29, 1918. The United States entered the war on April 6, 1917, and on October 3d passed the War Revenue Act. On December 1st the stamp tax under the War Revenue Act became effective. On May 9, 1918, the permanent bonds were executed and delivered to the Guaranty Trust Company, and on May 29th the second installment of 50 per cent. of the purchase price of the bonds was paid by the receipt holders, and permanent bonds were delivered to them. The Revenue Act of October 3, 1917, provided that on and after December 1, 1917, there shall be levied, collected, and paid—

"for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person, corporation, partnership or association who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule." Comp. St. 1918, § 6318a.

And Schedule A, referring to stamp taxes, provides:

"Bonds of indebtedness: Bonds, debentures, or certificates of indebtedness issued on and after the first day of December, nineteen hundred and seventeen, by any person, corporation, partnership, or association, on each $100 of face value or fraction thereof, 5 cents." Section 6318h.

The Commissioner of Internal Revenue contended that the issue of the bonds in question occurred when the permanent and engraved bonds were handed to the subscribers and underwriters on May 29, 1918, after the effective date of the stamp tax, and that therefore the bonds in question were taxable. Adhering to this contention, the Commissioner of Internal Revenue imposed a tax of $17,500 which tax was paid under protest. It was held below that the bonds were issued at a date prior to the effective date of the stamp tax, and that the bonds were not taxable, and the demurrer to the complaint was overruled, and judgment for the plaintiff below followed.

[1] It is urged upon us by the defendant below that the collector is not a proper party defendant. The argument is that the collector has delivered to the treasury of the United States all moneys received from the plaintiff below, and that there is no obligation on him to make a refund. The complaint alleges that there is $17,500, which was received by the defendant below and still retained by him without right,

and that he refuses and continues to refuse to pay the same, or any part thereof, although payment has been duly demanded, and that he now holds money to the use of the plaintiff below. By the demurrer this allegation is deemed to be admitted; and, further, it is contended that there was no duress exercised by the collector in the collection of this tax, and therefore the action is not maintainable. But the complaint alleges that on May 23, 1918, when the plaintiff below found itself obligated to deliver the bonds to subscribers within six days, the Commissioner ruled that the stamps must be affixed to the bonds so delivered. Under the circumstances, there was no way, other than the purchase of the stamps, by which the plaintiff below could avoid a risk of the imposition of a fine amounting to $3,500,000, if it refused the payment of the tax pursuant to the ruling of the collector. Title 8 of the Act of October 3, 1917 (Comp. St. 1918, § 6318a et seq.). Under the circumstances, the prudent thing to be done was to pay the tax under protest, as was done, and seek to maintain an action to recover such tax so paid. If the collector had no right to collect the tax, his doing so in the name of the government did not protect him. Atchison, etc., Ry. Co. v. O'Connor, 223 U. S. 280, 32 Sup. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050. One who denies the legality of the tax should have a color of certain remedy after payment under protest. He cannot interfere by injunction with the government's collection of its revenue, and the action at law to recover back what he has paid is the alternative left. Atchison, etc., Ry. Co. v. O'Connor, supra. The citizen who is obligated to pay the tax which he deems illegal may do so, even though to his disadvantage, by paying under protest and later asserting his legal right of protest by the liberty of promptly bringing suit for its recovery. He has an equal right to do this, as he might have the legal right to interpose a defense for the collection of the tax. The language of Mr. Justice Matthews in Swift & Co. v. United States, 111 U. S. 22, 4 Sup. Ct. 244, 28 L. Ed. 341, is pertinent:

"The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction, or discontinue its business. It was in the power of the officers of the law, and could only do as they required. Money paid, or other value parted with, under such pressure, has never been regarded as a voluntary act, within the meaning of the maxim, 'Volenti non fit injuria.'" 111 U. S. 28, 29, 4 Sup. Ct. 247, 28 L. Ed. 341.

As it was said in Maxwell v. Griswold et al., 51 U. S. (10 How.) 241, 13 L. Ed. 405:

"Now, it can hardly be meant in this class of cases that, to make a payment involuntary, it should be by actual violence, or any physical duress. It suffices if the payment is caused on the one part by an illegal demand, and made on the other part reluctantly and in consequence of that illegality, and without being able to regain possession of his property, except by submitting to the payment." 51 U. S. (10 How.) 255, 13 L. Ed. 405.

In Edwards, etc., v. Wabash Ry. Co., 264 Fed. 610, this court permitted a recovery where a tax was imposed illegally by a collector under the same Stamp Tax Act, holding that under the statute, where a tax is imposed upon the original issue, it is intended not to be imposed

on transfer stock certificates, in which case a tax is imposed on the holder, and that a corporation which had paid a tax on the face value of its total capital stock is not liable to a further stamp tax on issuing, pursuant to articles of incorporation, certificates in place of stock which carry privilege of conversion into another form. We think that under these authorities, if the tax was illegally imposed, the plaintiff below has sought the proper remedy, and is entitled to recover, and that the defendant below, the collector, is a proper party defendant.

[2] The resolution authorizing the execution of the temporary bond provided that the company—

"should issue and deliver the same to the Guaranty Trust Company of New York, such bond to be held by the said Guaranty Trust Company of New York substantially under the terms expressed in the following draft letter:

" 'New York City, May 24, 1917.

" 'Guaranty Trust Company of New York, 140 Broadway, New York City—

Gentlemen: Chile Copper Company hands you herewith its collateral trust gold bond series A for $35,000,000; principal amount issued under and secured by the trust agreement, dated April 1, 1917, between Chile Copper Company, Guaranty Trust Company of New York, as trustee, and Chile Exploration Company.

" 'The company is issuing bearer receipts to the principal amount of $35,000,000, which are exchangeable at your office (upon the terms and conditions stated in such receipts) for an equal principal amount of said collateral trust gold bonds series A.

" 'The $35,000,000 bond transmitted herewith is delivered to you, so that, without further action by Chile Copper Company, the holders of such receipts may be in a position to obtain the bonds in accordance with the terms and conditions of the receipts. * * *' "

The installment receipts, issued when payment was made, provided:

"The bonds above mentioned have been issued by the company and deposited with Guaranty Trust Company of New York, to be held by said trust company pending the payment of such remaining installment pursuant to the provisions hereof."

We think that, within the meaning of the statute, bonds were issued when, on June 7, 1917, the first installment of the subscribing stockholders and underwriters had been paid in full. The bond had been delivered to and authenticated by the Guaranty Trust Company prior thereto, on April 1, 1917. It is clear that there was a binding obligation thereon when the first installment was paid. If, on June 7th, the stamp tax was effective, a tax would have been imposed upon this temporary bond, and if, at a later date, the engraved bonds were substituted therefor, no tax could be imposed. Edwards, etc., v. Wabash Ry., supra. The intention of the parties is clear. The Guaranty Trust Company was to hold the $35,000,000 temporary bond in trust as security for the amount paid by the subscribers and underwriters until the payment of the second installment and the delivery of the permanent bonds. About June 1st, the underwriters advanced, on the faith of this security, subscriptions of over $17,000,000, and the intention was that they were to receive permanent small denomination engraved bonds about a year later, when the final payment was made. The issuance of the temporary bond was for the purpose of security only. The plaintiff below entered the entire amount of the bond as an outstanding obliga-

tion. The book entry shows that the maker intended to pass title to the temporary bond of the Guaranty Trust Company, and intended that when it did so such bond should be an obligation of the company, issued and outstanding. And when the underwriters and subscribers paid money on the faith of this security, and when receipts therefor in the form mentioned above were given, a binding obligation to the extent of the money so advanced was created. The underwriters and subscribers, in so advancing the money, could rely implicitly upon the covenants and provisions of the trust agreement and the terms of the temporary bond, which was given as security. The temporary bond was properly issued and duly authenticated. The Guaranty Trust Company did not hold it as a mere agent. It was the bearer and holder of the bond. By the terms of the transaction, the authentication upon the bond was conclusive evidence hat the bond had been issued, and that the Guaranty Trust Company was entitled to the benefit of the trust created by the trust agreement. The Guaranty Trust Company took as trustee for itself and its fellow underwriters and subscribers. This was an issue. The liability to a stamp duty, as well as the amount thereof, is determined by the terms found in the instrument. United States v. Isham, 17 Wall. 496, 21 L. Ed. 728.

Under the British Finance Act of 1899, which imposed a stamp duty, it was said in Attorney General v. Liverpool Corp. [1902] 1 Kings Bench, 411, in a case somewhat parallel to the one at bar, where stamps upon bonds were involved (the stock of the city of Liverpool being the equivalent of bonds), and where a contract had been entered into whereby the corporation was bound to deliver the bonds upon fulfillment of certain conditions, and script certificates redeemable for permanent certificates had been issued, and where the question of what was meant by issue of the securities was presented, it was said that—

"* * * By the time the corporation had issued the necessary certificates, whereby they bound themselves, upon the creditor complying with the remainder of the terms of the allotment, to issue the stock to him and to enter him as a stockholder, they had, in my opinion, issued the loan capital."

It was never intended by the statute to impose the tax on the exchange of the permanent bonds for temporary bonds, or upon the exchange of registered or unregistered bonds, or vice versa, or for the substitution of several small bonds for one large one, and vice versa. For us to hold, as contended for by the defendant below, would be to reach such a conclusion. No additional tax is required upon the issuance of a permanent or definite bond in substitution for a temporary bond which has been delivered. The term "issued," as used in the statutes, implies not merely delivery, but delivery of an instrument creating or renewing an obligation, and not merely furnishing a different expression of a pre-existing obligation.

We think that the bonds were issued prior to the effective date of the Stamp Tax Act, and that the demurrer was properly overruled.

Judgment affirmed.

STURM et al. v. WIESS et al.

WIESS et al. v. STURM et al.

(Circuit Court of Appeals, Eighth Circuit. May 3, 1921.)

Nos. 5638, 5639.

1. **Mines and minerals ⊂=74—Purchasers of interest in oil leases held protected as bona fide purchasers.**
   Purchasers of a half interest in oil leases for $5,000, which was then considered more than the value of the entire leases, who agreed to develop the property at their own risk, and who expended therein more than $20,000, with the result of bringing in valuable wells, *held* protected as bona fide purchasers, as against claims of stockholders of the former corporation that a judgment against it, under which the leases were sold, and under which the purchasers derived title, was fraudulent, which claims were not known to them and were not asserted until six years after the suit, and after the property had been rendered valuable by their expenditure.
2. **Equity ⊂=72(4)—Doctrine of laches strictly enforced respecting claims to mining property.**
   In view of the uncertain and fluctuating value of mining property, persons having claims to such property are bound to the utmost diligence in enforcing them, and there is no class of cases in which the doctrine of laches is more relentlessly enforced.
3. **Corporations ⊂=619—Property of corporation acquired by liquidating director held in trust for all stockholders.**
   Where the directors of an insolvent corporation, whose indebtedness was to its stockholders for money lent by them in proportion to their stock holdings, were authorized by the stockholders to sell its property to apply on the indebtedness, and one of the directors, who was also a creditor, afterwards acquired title to the property under a judgment obtained on notes held by him and another, he held such title in trust for the benefit of all stockholders.
4. **Corporations ⊂=546—Speculative purchaser of stock of insolvent corporation held not entitled to share in recovery by original stockholders.**
   A stranger, who for speculative purposes and for a nominal price, bought stock of an insolvent corporation, knowing that its property had been sold, and who stood by while the purchasers at large expense developed the property and made it valuable, *held* not entitled to share in an equitable interest therein recovered by the original stockholders.

Appeal from the District Court of the United States for the Western District of Oklahoma.

Suit in equity by Lizzie E. Wiess, executrix, and others, against H. L. Sturm, executor, and others. From the decree, both parties appeal. Reversed.

C. B. Stuart, of Oklahoma City, Okl. (Stuart, Sharp & Cruce, of Oklahoma City, Okl., and John Broughton and L. A. Carlton, both of Houston, Tex., on the brief), for plaintiffs.

Charles A. Steele, of Tulsa, Okl., H. L. Stuart, of Oklahoma City, Okl., and A. B. Honnold and Preston C. West, both of Tulsa, Okl. (Roger S. Sherman, A. A. Davidson, Gray Carroll, and H. D. Mason, all of Tulsa, Okl., and W. A. Ledbetter, R. R. Bell, and E. P. Ledbetter, all of Oklahoma City, Okl., on the brief), for defendants.

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

LEWIS, District Judge. This suit was instituted in April, 1914, by William Wiess, Joseph S. Cullinan, Fred Fleming, and Estelle B. Sharp as executrix of the estate of W. B. Sharp, deceased, against H. L. Sturm and James R. Sharp, executors of the estate of J. W. Sturm, deceased, J. W. Sloan, J. E. Crosbie, G. S. Davis and another, and comes here on cross-appeals. Its purpose was to obtain an adjudication of alleged equitable rights and interests in three oil and gas leases on three separate tracts in Pawnee County, Oklahoma. They were all given in the summer of 1904, and in January, 1906, by several assignments, there was lodged in the Tex-I-Kan Petroleum Company, a Texas corporation, an undivided three-fourths interest in the lease on 80 acres, and an undivided half interest in each of the other two leases, each on 40 acres. Each lease required that the land should be prospected for oil and gas, that the lessors should receive one-eighth of the oil produced, and stipulated amounts per annum for gas from each well. The right to maintain the suit is based on the fact that each plaintiff claims to be a shareholder in the Tex-I-Kan company, which had failed, and it is alleged that J. W. Sturm and defendants Crosbie and Davis, through certain fraudulent acts, obtained and continue to hold title to all of the leaseholds. The challenged titles were procured in this way: In July, 1909, one Sharp recovered judgment in an action which he began in December, 1908, in the United States Circuit Court for the Western District of Oklahoma against the Tex-I-Kan company for $14,505.41. On execution sale in January, 1910, the three leaseholds, and some personal property on the premises, used to develop, pump and handle oil and gas, were bought in by Sharp for $4,716. The United States Marshal delivered his deed, dated February 18, 1910, conveying to Sharp the property sold, and thereafter, in October, 1911, Sharp conveyed all he had purchased to J. W. Sturm, and thereafter, in 1912, Sturm conveyed an undivided half interest in what he received from Sharp to Crosbie, who in turn assigned an undivided half in what he received from Sturm to Davis, for which Crosbie and Davis paid $5,000. So that the leasehold interest in the three tracts that had belonged to the Tex-I-Kan company had become vested, one-half in Sturm, and the other half in Crosbie and Davis. It is alleged that J. W. Sturm and the defendant Sloan were officers and stockholders in the company, that they assigned the company's notes which they held to J. W Sharp without consideration therefor, and procured him to bring said action thereon against the company in the United States Circuit Court and to recover judgment for their benefit, that he afterward sued out execution and had the sale made, at which he purchased the company's property for their use and benefit and later conveyed it to Sturm, that the plaintiffs were without knowledge that that was being done, and that as against them and other stockholders all of those proceedings were void.

The right to the relief sought was said to grow out of a trust relation between Sturm and Sloan, two officers in the corporation, and the

stockholders; and Crosbie and Davis were said to have purchased with knowledge of that relation. The principle relied on, in so far as Sturm's estate may be affected, was stated in Morgan v. King, 27 Colo. 539, 63 Pac. 416, and by this court in Wheeler v. Building Co., 159 Fed. 391, 89 C. C. A. 477, 16 L. R. A. (N. S.) 892, 14 Ann. Cas. 917, though it must be observed that in neither of those cases did corporate property pass by judicial sale, but the transactions were private and dominated by those in control of the corporation, to their advantage. Indeed, it is admitted here that a corporate officer who is a bona fide creditor has a right to judicial process against corporate assets in satisfaction of the debt, subject to notice to other stockholders, or others interested, of his intended action, thus affording them an opportunity for self-protection. And it is claimed that plaintiffs had no notice, and that Sturm and Sloan went about it in a way to prevent notice and for that purpose.

The decree ordered that the judgment procured by Sharp, the sale at which he purchased, and the Marshal's deed to him, his conveyance to Sturm and Sturm's conveyance to Crosbie and Davis be canceled, and found that the shareholders in the Tex-I-Kan company were the equitable owners of the three leaseholds in proportion among them to the shares that each held, to-wit: J. W. Sturm's estate 368⅔ shares, William Wiess' estate 15⅓ shares (Wiess died pending the cause), Joseph W. Cullinan 10 shares, W. B. Sharp's estate 10 shares, and Fred Fleming 82⅔ shares; but it held that Fleming had no standing as a party to the cause, though entitled as a stockholder to participate pro rata in the fruits of the litigation. Crosbie and Davis and Sturm's estate were ordered to make an accounting for the oil taken from the premises by them, and that the leaseholds be sold by the Master and the proceeds divided among the shareholders.

[1] Considering, first, the record as to Crosbie and Davis, the material facts are these: The Tex-I-Kan company was incorporated in May, 1904, and in July, 1909, the proper State official, acting under a Texas statute, declared that the company had forfeited its franchise rights as a corporation to do business, on account of its neglect to pay the required franchise tax; and since that time it has been defunct. It had an authorized capital of $50,000, divided into 500 shares, which were not all issued. Its assets were the leaseholds and personal property above noted. It drilled for oil on the leased property, but the venture was a failure. It put down wells to a depth of 1,700 feet, but they did not produce enough to pay the expense of keeping them going. It obtained the money it needed from its stockholders and gave them its notes, and spent the money thus borrowed in trying to find oil. It could not pay its notes nor the interest that accrued on them. It became wholly insolvent. At its last stockholders' meeting, held in January, 1908, it was resolved

"that the officers of the company be authorized and requested to make an effort to realize on the assets of the company, and to pay the debts of the company."

At that meeting J. W. Sturm, J. W. Sloan and Fred Fleming were elected directors, and they constituted the board. Sturm was made

president, and Sloan, secretary and treasurer. Sturm held the company's note for $2,184.75, and had also purchased notes of the company given to other of its stockholders along with their stock. Sloan held the company's note for $1,080. All of these notes were long past due. Nothing had ever been paid on them. These were the notes which Sturm and Sloan assigned to J. W. Sharp and which he put into judgment, as above stated. After he obtained judgment, took out execution and had the levy made, the court, under a State statute, ordered an appraisement of the property levied upon by disinterested parties. They appraised the value of the company's interest in the leases at $650, and the personal property at $2,528. Sharp bought it all in for $4,716. After Sharp received the Marshal's deed it was about a year and a half before he conveyed what he purchased to Sturm; and after that the matter rested for six months before Sturm conveyed to Crosbie and Davis.

In addition to the $5,000 that Sturm was to receive for an assignment of the half interest to Crosbie and Davis, they agreed that they would, at their own risk and expense, develop the properties by sinking deeper wells on the tracts than had theretofore been put down. If the wells should prove to be profitable they were to first take out the expense of sinking them; otherwise they would sustain the entire loss. Crosbie and Davis at once began the sinking of these wells, on which they expended more than $20,000, and within about three months after obtaining the assignment from Sturm they brought in a valuable well at greater depth on one of the tracts. They continued development and all three tracts proved to be highly valuable for oil. When Crosbie and Davis attempted to enter one of the tracts they were resisted with force by adverse claimants. It was asserted that the rights under the leases under which Crosbie and Davis were claiming, and which they had gotten from Sturm, had lapsed. Values had suddenly increased since the putting down of the first deep well. Crosbie thereupon sought counsel, and was advised to settle with the adverse claimants, which he did at once by paying them $14,000. While Crosbie and Davis were spending their money and taking a chance as to whether they would ever receive any returns, none of the plaintiffs made any claim of any right or interest on behalf of the old Tex-I-Kan company or its stockholders. In June, 1913, seven months after the death of Sturm, and long after Crosbie and Davis had brought in paying wells, Sloan sued Sharp, Sturm's executors and Crosbie in the State court, and alleged that he entered into an agreement with Sturm, deceased, when he and Sturm assigned the notes given by the company to Sharp, that Sharp, acting in their behalf, should sue the company, obtain judgment against it, buy in the company's property and assign the three leases to Sturm for the benefit of Sturm, and himself, he to have a third interest, substantially in proportion to the stock theretofore held by him and Sturm in the old company and the indebtedness of the old company to them. Crosbie at that time had not paid the $5,000 represented by his note to Sturm for the assignment from Sturm, and Sloan alleged that he was entitled to one-third of the $5,000 due from Crosbie, and prayed that Crosbie be required to deposit the sum

in court for division between him and Sturm's estate. That suit was never tried. Sturm's estate bought Sloan out. The court below held that inasmuch as the $5,000 for the assignment from Sturm had not been paid prior to the bringing of the suit by Sloan, that that suit advised Crosbie of sufficient facts to put him on inquiry as to Sturm's title, and that if that inquiry had been pursued Crosbie and Davis would have been advised of the claimed invalidity of all of those proceedings; and therefrom the court reached the conclusion that Crosbie and Davis were not innocent purchasers for value. In reaching that conclusion the court gave no weight to the large expenditures made by Crosbie and Davis before their rights under the assignment from Sturm were challenged or put in question. We think the court erred in that respect, for these reasons: Sloan's suit was not brought until after Crosbie and Davis, by large expenditures of their means, had made the property of great value, and there is nothing to impugn their good faith in doing so, and in reliance upon the validity of their title; because Crosbie testified that he had no recollection whatever of ever hearing anything about the Tex-I-Kan company until after the wells were put down by him and Davis, and that no question was raised about the title conveyed to them by Sturm until after some of the wells had come in; Sloan's suit was not brought by him as a stockholder in the Tex-I-Kan company and he asserted no rights as such, but his claim therein set up was rested on an agreement with Sturm, i. e., that he and Sturm would take whatever they obtained through that suit in the proportion of their stock holdings in the old company and the indebtedness of the old company to them, and that suit did not challenge but confirmed on the part of Sloan the assignment to Crosbie,—the only relief that he asked against Crosbie being a one-third interest in Crosbie's $5,000 note given for the assignment and then unpaid; if all stockholders had consented, actually or impliedly, to the sale of the company's assets under Sharp's judgment, those proceedings could not have been avoided thereafter by them, and there is no proof that Crosbie and Davis knew they had not consented; and because the laches of the plaintiffs at the time they brought this suit barred them from the right to any relief against Crosbie and Davis, for the transactions of which they complain were not void, but only voidable.

There is no proof that Crosbie or Davis had actual notice of the facts on which the plaintiffs rely, and if they had ferreted out those facts they would have learned that Sturm and Sloan were officers of the old company, that they had been given authority to sell its property, and that Sharp's judgment was obtained on the company's debt evidenced by its notes long past due. But they were not put upon that inquiry. Reed v. Munn, 148 Fed. 737, 756, 80 C. C. A. 215.

[2] Between the bringing of the suit by Sharp against the company and the assignment to Crosbie and Davis, four years had elapsed, and a year and a half more passed before this suit was brought. Crosbie and Davis had developed property that had been practically abandoned by the corporation and its stockholders as worthless. They had given it no attention whatever since January, 1908, when they ordered it

sold as a means of paying the company's debts. In Patterson v. Hewitt, 195 U. S. 309, 321, 25 Sup. Ct. 35, 38 (49 L. Ed. 214) it is said:

"There is no class of property more subject to sudden and violent fluctuations of value than mining lands. A location which today may have no salable value may in a month become worth its millions. Years may be spent in working such property apparently to no purpose, when suddenly a mass of rich ore may be discovered, from which an immense fortune is realized. Under such circumstances, persons having claims to such property are bound to the utmost diligence in enforcing them, and there is no class of cases in which the doctrine of laches has been more relentlessly enforced."

See also Hammond v. Hopkins, 143 U. S. 224, 250, 12 Sup. Ct. 418, 36 L. Ed. 134; Johnson v. Mining Co., 148 U. S. 360, 370, 13 Sup. Ct. 585, 37 L. Ed. 480; Alsop v. Riker, 155 U. S. 448, 460, 15 Sup. Ct. 162, 39 L. Ed. 218; Johnson v. Transit Co., 156 U. S. 618, 647, 15 Sup. Ct. 520, 39 L. Ed. 556.

The decree provides that Crosbie and Davis shall be reimbursed for the expenditures that they made, but that is not the full measure of their rights. They took the hazard of losing all they put in. In Patterson v. Hewitt, supra, it is further said:

"While it is true the court might impose upon the appellants the payment of their proportionate share of labor and expense as a condition of relief, it could not compensate the defendants for the risk assumed by them that their exertions would come to naught."

It is fair to assume that if those exertions had come to naught, these plaintiffs would not have stood ready to share any part of it. They waited until they were assured that the property had been made valuable at the expense and risk of Crosbie and Davis, and then asserted their rights, after they felt assured that to do so would be profitable to them. The interests of Crosbie and Davis should be confirmed in them as against all stockholders.

Moreover, putting out of the case for the moment the rights of Crosbie and Davis as against plaintiffs, even so, the interest assigned to them by J. W. Sturm could not be withheld from them in a court of equity by his estate, when it is found that its equitable interest in the property on a stock basis in the old company is as great as that which he assigned to them; and if plaintiffs had been entitled to prevail against them they should have been thus protected. But the plaintiffs failed and their complaint should have been dismissed as to Crosbie and Davis, with costs to them.

[3] The defendant Sloan had no interest in the subject matter in controversy in this suit which the court adjudged belonged to stockholders, but did claim some interest in the lands leased, which he alleged was obtained entirely independent of any claim or title derived from the Tex-I-Kan company. He relinquished to Sturm's estate, on settlement of the suit which he brought, any interest which he theretofore asserted in the leases. Having been brought in as a defendant he denied, in his answer, the charges of fraudulent conduct made against him, Sturm and Sharp, and defended against them. We see no occasion for extending the decree against him, further than for costs. But how stands the case between the stockholders and Sturm's

estate? J. W. Sturm died in November, 1912, one year and seven months before the bringing of this suit. He could not be heard in defense of the charges that were made, or in explanation touching his conduct. He was the chief party in interest. He had taken over the company's notes given to other stockholders for money advanced, when they desired to get out of the company, and had also bought their stock. He carried the burden of the old company's debts. He had been authorized at a stockholders' meeting in 1908 to sell the company's property and pay its debts. He did not act hastily in executing that instruction, but waited almost a year before assigning the company's notes which he held to Sharp, in order that Sharp might bring suit. He might have sued in his own name. Sloan could have brought suit on his note, but instead of taking that course they had Sharp bring the one suit. That suit was not pressed to judgment and execution with haste, and after Sharp bought in the property Sturm waited until in October, 1911, before he took the assignment from Sharp. If he could have been heard at the trial we might have learned that during the lapse of almost four years between the authorization by the stockholders and the taking of the title in Sturm's name, Sturm was waiting with the hope that other stockholders would manifest an interest, that something would be done, that he would get back the money that he had advanced for their benefit; and after he took the title from Sharp he waited again for six months and then assigned the half interest to Crosbie. The record is barren of fraudulent conduct on the part of J. W. Sturm. The most that can be contended for is that his relation to the corporation and his acts raised a constructive trust in behalf of the other stockholders. That appears to have been the principle on which the trial court acted. We think there is enough to sustain it.

[4] But the plaintiff Fred Fleming stands in a very different attitude than the other plaintiffs, and his relation to J. W. Sturm and his estate, and to the property involved, is vastly different. The court found that Fleming owned 82⅔ shares, that while his standing was not such as to entitle him to appear as a plaintiff he was entitled to prorate with other stockholders in the recovery. We do not think so. In May, 1908, Fleming was adjudged a bankrupt and the title to his 82⅔ shares thereupon became vested in his trustee. During the administration of the bankrupt estate these shares were sold by the trustee under approval of the bankruptcy court, along with other odds and ends of the bankrupt estate, for $500, to three gentlemen who took them as trustees for the creditors of a bank in which Fleming had theretofore been largely interested and which had failed. Some time thereafter, and in 1911 or 1912, the exact date not being definite in the record, Fleming, through a man by the name of White, who lived in Oklahoma and was a stranger to the three trustees, who lived in Texas, purchased back from these three trustees the certificate for 82⅔ shares for $25. White told the trustees at the time of the purchase that all of the property of the Tex-I-Kan company had been sold, and Fleming testified that he knew at the time White made the purchase that all of the company's property had then been sold. Later the trustees were informed that the shares might become of considerable value. They thereupon com-

plained to Fleming and called his attention to the fact that they had been induced to sell for a nominal sum on the representation that the shares had little if any value. Whereupon Fleming made a written contract with the trustees that he would give back to them one-half of the net amount which he might eventually receive for the shares. It thus appears that when Fleming, through White, purchased the certificate for $25 in 1911 or 1912, he then knew that the property of the Tex-I-Kan company had all been sold. Before he made that purchase he was a stranger to the Tex-I-Kan company and to the relations between it and its stockholders, and to Sturm. He had no interest whatever in its property, and being a stranger he bought solely for speculative purposes, and when the three trustees took back from him they placed themselves in the same position. He then stood by with "shut eyes and hand on mouth," awaiting developments. White had doubtless advised him that the chance was worth a song. Such suitors are not regarded with favor in equity. Their delay, without more, bars them. This court, in Curtis v. Lakin, 94 Fed. 251, at 256, 36 C. C. A. 222, 227, said:

"Where delay is occasioned by motives of the latter sort,—that is, by waiting to see whether developments undertaken by those in possession will be successful or otherwise,—a litigant is justly chargeable with bad faith, which courts of chancery always aim to discourage."

And the Supreme Court, in Randolph v. Quidnick Co., 135 U. S. 457, 10 Sup. Ct. 655, 34 L. Ed. 200, announced the rule that a court of equity will not lend its aid to a mere speculative purchase. Equity refuses to lend its aid to one seeking its active interposition, who has been guilty of unconscientious or inequitable conduct in relation to the matter in litigation. 1 Pomeroy's Equity Jurisprudence, § 397 et seq.; McKnight v. Taylor, 1 How. 161, 11 L. Ed. 86. If the shares are allowed to participate, the part apportioned to them would come out of the estate of Sturm. After the death of Sturm, and after Crosbie and Davis, at their hazard, had developed the property into one of large value, Sturm's executors then joined with Crosbie and Davis in further development and operation of the properties. The executors thus made expenditures and assumed obligations for the estate while Fleming, resting on his speculative investment, continued to stand by and wait until this suit was brought in April, 1914. The legal title to all of the company's properties had passed out of it and was vested in Sturm long prior to Fleming's purchase of the certificate. His equities, if any, in the property are not as great, and do not appeal with as much force to the conscience of a chancellor, as those of the estate of Sturm. Even if the equities of the two were equal, Sturm's estate, holding the legal title, must prevail. We think he is not entitled to participate at the expense of Sturm's estate.

The appeal of the executors of William Wiess challenges the finding of the court as to the number of shares owned by the Wiess estate, the claim being that the court should have allowed 35⅓ instead of 15⅓ shares. On this subject the proof was somewhat in conflict and in no respect clear, and we are not able to say that the court erred in that regard.

Inasmuch as Sturm took the property in trust for the other plaintiff stockholders they should be made whole in their rights, notwithstanding Sturm conveyed a half interest to Crosbie and Davis. It is therefore necessary that the shares found by the court to belong to Wiess, Cullinan, and W. B. Sharp's estate be doubled in number, or else cut in half the 368⅔ shares held by Sturm's estate, for the purpose of pro-rating in the remaining half held by the estate of Sturm. Sturm's estate should account for the $5,000 received from Crosbie and Davis and the net proceeds, if any, from the property, and be credited with the indebtedness of the company to Sturm which went into the judgment. With instructions to enter a decree in accordance with the views herein expressed, the decree appealed from is

Reversed.

MOORE et al. v. LEE TIRE & RUBBER CO. OF NEW YORK, Inc.

(Circuit Court of Appeals, Eighth Circuit. May 3, 1921.)

No. 5722.

1. **Appeal and error ⊜997(3)—Directed verdict reviewable only for lack of supporting evidence.**
   Where both parties moved for directed verdict, the verdict directed will be sustained, if supported by any substantial evidence.

2. **Trial ⊜386(4)—Requested declaration of law, bad in part, properly refused.**
   A requested declaration of law, in an action submitted on request by both parties for direction of a verdict, *held* properly refused, where it was in part based on findings to be made and also contained a declaration clearly erroneous under the issues.

3. **Contracts ⊜71(2)—Extension of time good consideration for indorsement.**
   The personal indorsement by the manager of a business, who also owned an interest therein, of trade acceptances given for merchandise, was based on a good consideration, where, by such indorsement, he obtained an extension of the time of payment of the debt, as the trade acceptances would not have been accepted, except for his indorsement.

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

Action at law by the Lee Tire & Rubber Company of New York, Incorporated, against L. C. Moore and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Barnard J. Stewart, of Salt Lake City, Utah (Daniel Alexander and D. A. Skeen, both of Salt Lake City, Utah, on the brief), for plaintiffs in error.

Mahlon E. Wilson, of Salt Lake City, Utah (Hiram E. Booth, E. O. Lee, Carl A. Badger, and Benjamin L. Rich, all of Salt Lake City, Utah, on the brief), for defendant in error.

Before CARLAND, Circuit Judge, and LEWIS and COTTERAL, District Judges.

CARLAND, Circuit Judge. The parties will be referred to as in the trial court. The plaintiff brought this action against defendants to recover a balance of $5,120, claimed to be due and owing from them as copartners under the firm name and style of L. C. Moore Company for goods, wares, and merchandise sold to them as such copartners. At the trial both parties at the close of all the evidence moved for a directed verdict. The defendants also requested what is called a declaration of law. The court directed a verdict for the plaintiff and refused the so-called declaration of law. Defendants have brought the case here, assigning as error the granting of the motion of plaintiff for a directed verdict, the refusal to direct a verdict for defendants, and the refusal to declare the law as requested.

It will not be necessary to consider whether the court erred in refusing to direct a verdict for defendants as the consideration of the assignment that the court erred in directing a verdict for the plaintiff necessarily determines the former, and we have no authority to direct the entry of judgment. Slocum v. N. Y. Life Ins. Co., 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914D, 1029.

[1] Coming to the alleged error in the direction of a verdict for the plaintiff, the only question to be considered is as to whether there is any substantial evidence to support the verdict. La Crosse Plow Co. v. Pagenstecher, 253 Fed. 46, 165 C. C. A. 644, and cases cited. Upon this proposition the record shows that defendants do not dispute the correctness of the amount of the verdict. Their defense is that the defendants were not liable for the debt as copartners, but that the debt is due and owing by the U. Built Tire Company, a corporation of Utah, doing business under the trade-name of L. C. Moore Company. The contested issue, therefore, at the trial, was as to whether the corporation mentioned was liable for the debts, or the individual defendants. Both parties by their motions for a directed verdict agreed that the court should determine this issue. We are not concerned as to whether the court made a correct finding of the facts upon this issue, but are simply to determine whether there was substantial evidence to support the finding made. There was evidence tending to show that in February, 1918, George H. Wright, agent of the plaintiff, visited Salt Lake City, Utah, for the purpose of establishing a distributor for the sale of automobile tires manufactured by it. On this visit he met L. C. Moore and Daniel Alexander, the former at the place of business of L. C. Moore Company, 443 South Main street. He saw the sign "L. C. Moore Co." on the door at the number aforesaid, talked with Moore, who expressed a wish to become distributor for plaintiff's tires, and said he would have to talk with his partners, although he was authorized to act for them. Before giving the matter serious consideration, Moore wanted Mr. Wright to meet Daniel Alexander.

Wright met Alexander at the Hotel Utah, and talked over terms, prices of tires, discounts, and territory. At the end of the conversation, Alexander told Wright to make up an order not exceeding $5,000, and that to insure prompt payment, and show the reliability of the company, Alexander and the other members of the company would sign the order.

Alexander said that Moore, Terzopoulos, and Jacobson, were partners. The order was made out and signed by L. C. Moore Company, L. C. Moore, Daniel Alexander, William Terzopoulos, and S. Jacobson. An agreement in writing, dated February 20, 1918, was entered into between the plaintiff and L. C. Moore Company, whereby the L. C. Moore Company was constituted a distributor for the plaintiff, and the terms and conditions which were to govern the parties in reference to the sale of plaintiff's tires were fixed. In July, 1918, Wright saw Moore again at the place above stated, and told him that the account with the plaintiff was behind, and that payment must be made. Moore said that collections were bad, and that later he would take care of the account. Wright suggested that trade acceptances, to be signed by all four members of the firm, be made out, and he (Wright) would send them to the plaintiff and recommend their acceptance, with dates conformable to their ability to pay. Moore said that he could do nothing until he consulted Alexander. Wright saw Alexander, who told him that trade acceptances would be all right, but that he (Alexander) could not get all four signatures, as Jacobson was in the hospital, but to send the acceptances to the plaintiff, signed by the L. C. Moore Company, by L. C. Moore, Manager, and plaintiff could make out new acceptances and send the same to him (Alexander), and he would have the other members sign them; that he considered Jacobson, Terzopoulos, Moore, and himself responsible for the debt.

Pursuant to this conversation, the trade acceptances were made out on which this suit is brought. They were accepted by L. C. Moore Company, by L. C. Moore, Manager. In September, 1918, Wright was again in Salt Lake City, saw Moore, and told him plaintiff was not satisfied with the account; that plaintiff required indorsements of the acceptances. Later Wright went with Moore to Alexander's office. Alexander said that, owing to Jacobson's continued illness, all the signatures could not be obtained, and that he (Alexander) did not want to sign without the others. After leaving Alexander's office, Moore indorsed the acceptances individually. Terzopoulos, called by plaintiff, testified that he was a member of the L. C. Moore Company, associated with Alexander, Moore, and Jacobson; that they were all acting together. Moore testified that Terzopoulos, Jacobson, Alexander, and himself met at Alexander's office and discussed the idea of going into a deal with plaintiff. This was prior to the making of the first order above mentioned. The evidence thus detailed, standing alone, would support the verdict beyond question, as the trial court had the right to draw the same inferences from the facts proven as a jury would.

On the part of the defendants, evidence was introduced tending to show that on July 11, 1916, a corporation under the name of New Process Double Tread Tire Company, with a capital stock of $5,000, was incorporated under the laws of the state of Utah. The capital stock was divided into 5,000 shares, of $1 per share, of which stock the defendant S. Jacobson owned 1,000 shares, Daniel Alexander 550

shares, William Terzopoulos 500 shares, N. Offer 500 shares, and L. Strike 450 shares. Subsequently the articles of this corporation were amended by increasing the capital stock to $25,000, and changing the name of the corporation to U. Built Tire Company. Shortly after these amendments and change of name, L. C. Moore purchased 50 per cent. of the capital stock of the U. Built Tire Company, and at the time that the indebtedness to the plaintiff was incurred the stock of the U. Built Tire Company was owned as follows: L. C. Moore, 50 per cent.; S. Jacobson, 25 per cent.; Daniel Alexander, 9 per cent.; William Terzopoulos, 9 per cent.; and L. Strike, 7 per cent. There was oral testimony that in December, 1917, the stockholders of the U. Built Tire Company met and resolved to amend the articles of incorporation by changing the corporate name to L. C. Moore Company; that the proper papers were made out for this purpose and delivered to Moore, but in some way they became lost, and were never filed as required by law with the county clerk or the secretary of state. So that for all practical purposes the attempt to change the name of the corporation amounted to nothing.

It is claimed, however, that the defendants, in whatever business was transacted with the plaintiff, were acting as directors or managing agents of the U. Built Tire Company, and that the indebtedness to recover for which the present suit was brought, is due and owing by that corporation, and not by the defendants individually. This is not a case alone where persons have in good faith acted as a corporation, or in the name of a corporation, which for some reason was not legally organized, or the name was not legally changed; but there is additional evidence that they acted as individuals associated together, regardless of incorporation. It is not claimed that the L. C. Moore Company was ever incorporated, and it is, to say the least, somewhat unusual for a corporation to have a trade-name. We have no doubt but that there was evidence which clearly supported the verdict, and that is as far as we need go on this proposition.

[2] At the conclusion of the evidence, in addition to the request for a directed verdict, the defendants requested the court to give the following declaration of law:

"The rule that a corporation has but one legal name, and that that name is the name formally conferred upon it by the state, does not mean that a corporation can never act under a different name. While it may be desirable that a corporation act only by its legal name, still a corporation may, in good faith, do business under a name other than its legal name, and may assume a name for the purpose of its business. If, in good faith, a contract is executed by a corporation under an assumed name, or if a corporation does business under an assumed name, the corporation is just as much bound as if it had used its legal name, and a contract entered into by or with a corporation, in good faith, under an assumed name, by the respective parties to the contract, and without fraud, may be enforced by either party, if the identity of the corporation acting under the assumed name is established by the proof, and if you find from the evidence that the U. Built Tire Company was a corporation of the state of Utah, and that this corporation was acting and doing business under the name of L. C. Moore Company, and that the account sued upon was an account with the U. Built Tire Company, doing business under the name of L. C. Moore Company, then you are instructed to bring in a verdict for the defendants and each of them of no cause of action."

The court refused to give this so-called declaration of law, and we think rightly, first, because the so-called declaration of law is both a declaration of law in its first part and a charge to the jury commencing with the words "and if you find." The trial court was not obliged to pick out from the matter requested what was law and what was a charge to the jury on the facts.

[3] Again, L. C. Moore was beyond question liable individually for the debt, and, considering the last part of the request as a charge to the jury, it could not have been given, for the reason that the plaintiff was entitled to a verdict against Moore in any event. Moore claims that he indorsed the acceptances individually without consideration, but there is no evidence in the record that that claim is true. It does appear that he was the general manager of the association or corporation, whatever may be the fact, and as a stockholder he obtained an extension of the time of payment of the debt by his indorsement, as the trade acceptances would not have been accepted, except for his indorsement. International Harvester Co. v. Patterson, 257 Fed. 411, 168 C. C. A. 451.

The judgment is affirmed.

MUCK et ux. v. WEYERHAEUSER TIMBER CO.

(Circuit Court of Appeals, Ninth Circuit. June 6, 1921.)

No. 3620.

1. **Public lands ⇐106(1)—Finding by Land Office as to location of boundary of patented tract is conclusive in suit to establish boundary.**
The findings of the tribunals of the Land Office that the boundary of two patented donation claims was intended to be the river bank, and not a surveyed line a short distance therefrom, made in proceedings to enter as a homestead a strip of land between the donation claim and the river, are findings on questions of fact involving the interpretation of the survey notes, and are conclusive in a subsequent suit by the owner of the donation claims against the applicant for homestead to settle the disputed boundary between the lands.

2. **Boundaries ⇐26—Objection that there was an adequate remedy at law held not to prevent suit in equity under statute to establish boundary.**
The objection that there was a plain, speedy, and adequate remedy at law by ejectment does not prevent a suit in equity under Or. L. §§ 518–522, to determine disputed boundary lines between an owner of patented lands and the holder of an adjoining possessory claim, where there were allegations supported by evidence that defendant or his agents fraudulently attempted to destroy original witness trees and to efface original markings, and did mark other trees to make them appear to be the original trees.

3. **Courts ⇐335(1)—State rule that request for affirmative equitable relief waives objection to equitable jurisdiction adopted by federal court.**
Though the United States courts of equity could not grant equitable relief, if the case were one purely cognizable at law, they can, where the subject-matter of the suit is one belonging to a class where equity has jurisdiction, conform to the state rule that, if defendants by answer pray for affirmative equitable relief, they waive any objection to the jurisdiction of equity.

Appeal from the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Suit by the Weyerhaeuser Timber Company against Alwin A. Muck and wife, to settle a dispute over a boundary line. Decree for plaintiff, and defendants appeal. Affirmed.

Arthur I. Moulton, of Portland, Or., for appellants.

Carey & Kerr, C. A. Hart, and P. P. Dabney, all of Portland, Or., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. The Timber Company sued Muck and wife to settle a confused and disputed boundary line of a strip of land along the Willamette river, Oregon. Muck has had possession for several years, and claims under right to enter the land as a homestead, while the Timber Company contends that its lands extend to the river. From a decree in favor of the Timber Company, Muck appealed.

The Timber Company owns a tract which was a part of two donation land claims appropriated in 1855 by James Loomis and James John, respectively, and patented in 1866. Muck's contention is that the surveyed westerly boundary of the donation claims running along the river did not coincide with the meander line of the river, and that there is a strip of vacant land subject to homestead entry. The land office rejected Muck's application, on the ground that the records of the land office did not show a lotting of the tract applied for, and that the field notes and record of surveys of the donation claim showed no vacant land between the west line of the claims and the Willamette river, and because, according to the field notes of the survey of the claims, the right bank of the Willamette river is the boundary thereof from the northwest corner of the Loomis to the southeast corner of the Johns claim, "and it is so shown on the plat of the township approved September 25, 1862." On appeal from the decision of the Commissioner, the Secretary of the Interior affirmed the ruling of the Commissioner, saying:

"The plat of survey of the donation land claims was filed in 1862. Prior to that time James Loomis had filed his application for 640 acres of land, which application described the lines by courses and distances, starting from a point on the bank of the Willamette river and running to the same point after following out certain boundary along the meanders of the river bank of the Willamette river to the place of beginning. The John claim commenced at a similar point, and running to the Willamette river, thence southeasterly along the said river to the place of beginning."

The Secretary held that the application showed that it was the intention of the donation land claims to appropriate the land up to the banks of the Willamette river; that, in surveying out the claims, courses and distances were followed, but according to the records of the General Land Office the courses and distances correspond with the meander line of the Willamette river; that the survey had been in existence for nearly 50 years, and—

"although instructions were subsequently issued to the Surveyor General to survey out any other vacant public land into lots that were made fractional

In this township, the alleged vacant government land in this township, the alleged vacant government land applied for by Muck was never returned as government land, nor has it ever been platted in a tract or lot."

The Secretary cited Railroad Co. v. Schurmeir, 74 U. S. (7 Wall.) 272, 19 L. Ed. 74, in support of the view that the water course, not the meander line as actually run on the land, is the boundary. On motion for rehearing the Secretary re-examined the field notes, and after quoting from them abided by his former decision that the river was the boundary line of the donation claims. Subsequent attempt to open the question with the Land Department by application for a survey of the alleged vacant tract was unsuccessful. Rehearing was applied for and former decisions were reaffirmed. Then a "petition for the exercise of supervisory authority" was filed with the Department of the Interior, and again the former rulings were affirmed.

Appellant now insists that the records disclose that the Land Department officials have misconstrued the language of the patents and of the field notes of the surveys upon which the patents are based, and that they have erroneously treated the original donation land notifications of Loomis and John as muniments of title. It is also argued that the decisions of the land officials were not competent evidence, and that the officials were without jurisdiction to grant away any estate that the United States may have had in the lands not included within the patents.

[1] But in our opinion the records referred to show that the ultimate question which the Interior Department examined and necessarily considered in order to act upon the applications and claims of Muck was whether the boundary lines, particularly the western line, of the donation claims was the meander of the Willamette river. We might quote at length from the several rulings to show that the Land Department officials made detailed examination of the field notes, the dates of the respective surveys, the exact position of certain monuments, what line had been adopted by the surveyor who marked the boundaries of the Loomis donation claim, and whether the line used by the surveyors was to be a meander line or a line bounding the claim on the west, so as to leave a strip of ground between the tract surveyed and the Willamette river. The variations in the lines of the survey and in the plats were considered together with the exact field notes of the survey of the Loomis claim as to courses and distances next to and along the river. "It is obvious," said the Secretary in discussing the motion for rehearing, "that the surveyor intended these as meander lines of the stream, and they have been and are accepted as such by the Land Department. They do not so depart from the meander line of the township survey as to constitute fraud or such material mistake as will warrant a finding that there remains a tract of public land as alleged by the applicant. The river, not the meander line, is the boundary of the donation claim, and the motion for rehearing is accordingly denied."

The interpretation of the survey notes became a question of fact, and the effect of the decisions of the Interior Department is conclusive in this proceeding. Gardner v. Bonestell, 180 U. S. 362, 21 Sup.

Ct. 399, 45 L. Ed. 574, is quite like the present case. There a dispute arose whether a particular strip was within or without the limits of a grant. After survey which excluded the tract, application was made to enter it as public lands. A contest arose between the applicant and those who claimed under the grant, and after successive appeals within the Interior Department the right to enter was sustained and patent issued. Litigation followed, and it was found that one of the questions decided by the land officials of the United States in a contest mentioned in the cross-complaint "was a question of fact, namely, the location of the western boundary of the grant made by Gov. Figueroa to Juan Reed." The Supreme Court sustained the ruling that the decision of the Land Department, having been founded upon disputed questions of fact, was not subject to review in the court; Justice Brewer saying that it was well settled in Knight v. United Land Ass'n, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974, that the power to make and correct surveys of the public lands belongs exclusively to the political department of the government, and that the action of that department within the scope of its authority is unassailable in the courts, except by a direct proceeding.

It was also insisted in that case that the last survey was a mere compilation, and not an actual resurvey, and that it included a large body of lands on the one side, which were not in fact within the boundaries of the tract of which judicial possession had been given, and excluded, on the other side, a large body which was within such boundaries, and which included the lands in controversy. But the court held that the Land Department, in a case within its jurisdiction of questions of fact, having found and adjudged that the land in litigation was outside the exterior boundaries of the grant, the finding was a matter of fact and based on testimony, and that such determination concluded the courts. St. Clair County v. Lovingston, 23 Wall. 46, 23 L. Ed. 59.

[2] Appellants challenge the jurisdiction of the court upon the ground that there was a plain, speedy, and adequate remedy at law by ejectment, and that the Oregon state statutes (sections 518–522, Oregon Laws) are not applicable. The state statutes provide that, in any case where there exists a dispute between two or more owners of adjacent or contiguous lands concerning the boundary lines thereof, either party may bring suit in equity for having the dividing line ascertained and established. Section 519 pertains to the complaint, which must show that plaintiffs and defendants are "owners" of adjacent lands, and that there is a controversy between the parties concerning their boundary lines. Section 520 pertains to the mode of proceeding.

Inasmuch as appellants claim only by a possessory right, it is not entirely clear that Muck is an "owner" of the tract in his possession and that the statutory remedy is available to the Timber Company. On the other hand, Muck claimed a right to acquire ownership, and the contest is one to settle a boundary line, and not one to try title. Besides this, there is an allegation in the complaint, and some testimony tending to support the allegation, that defendant or his agents wrongfully and fraudulently attempted to destroy certain original witness trees and to efface original markings, and did mark other trees so as

to make them appear to be the original witness trees. These allegations were sufficient, we think, to require the exercise of jurisdiction, and the court properly overruled the motion to dismiss based on the ground that there was a plain remedy at law. King v. Brigham, 23 Or. 262, 274, 31 Pac. 601, 18 L. R. A. 361. The case is in a general sense appropriate to equity. United States v. Texas, 143 U. S. 621, 647, 12 Sup. Ct. 488, 36 L. Ed. 285; McDowell v. Carothers, 75 Or. 126, 146 Pac. 800; Sprigg v. Hooper (La.) 9 Rob. 248.

[3] Furthermore, after motion to dismiss was denied, defendants by answer set up an affirmative defense of their claim as to the true boundary line, and prayed that the cause be dismissed, or, if dismissal were denied, that the court proceed to adjudge the westerly boundary line as specifically described in the answer. The rule of the Oregon decisions is that in boundary cases, where the answer prays for affirmative relief by way of asking that the line described in the answer be adopted, the defendant waives any objection that he might have urged against the right of a court of equity to establish the controverted boundary. Killgore v. Carmichael, 42 Or. 618, 72 Pac. 637; McDowell v. Carothers, 75 Or. 126, 146 Pac. 800. If the case were one purely cognizable at law, one where it would not be competent for the court to grant the relief sought, then the court would of its own motion prevent the matter from being drawn into equity. But regarding the subject-matter as belonging to a class where equity has jurisdiction, we believe that the federal court could conform to the rule of the Oregon cases, and that defendant by seeking affirmative equitable relief waived objection to the jurisdiction. Brown v. L. S. Iron Co., 134 U. S. 530, 10 Sup. Ct. 604, 33 L. Ed. 1021; McGowan v. Parish, 237 U. S. 285, 35 Sup. Ct. 543, 59 L. Ed. 955.

We find no error, and affirm the decree.

Affirmed.

A. KLIPSTEIN & CO. v. DILSIZIAN et al.

(Circuit Court of Appeals, Second Circuit. May 11, 1921.)

No. 209.

1. Sales ⇐176(1)—Delay in delivery held waived.

A contract for the sale of a quantity of gum arabic stated no time for delivery, but provided that it was to be shipped from Red Sea to New York on a vessel named, "which is now on her way to Red Sea." Delivery was to be in New York, by the law of which state title does not pass till delivery is made. On arrival of the vessel in New York and tender of the property, the buyer refused to receive it. *Held* that, under the contract and the circumstances, the vessel being a slow sailing ship, there was no unreasonable delay in delivery, and that the buyer, who had previously made no complaint of delay, could not repudiate the contract on that ground after the vessel had arrived.

2. Sales ⇐77(2)—Duties of seller under "c. i. f." contract.

The expression "c. i. f.," in a contract, indicates that the price fixed covers the cost of the goods, insurance, and freight on them to the place of destination, and under such a contract the seller must ship the goods,

arrange the contract of affreightment to the place of destination, and pay its cost, and allow it from the purchase price, and procure insurance for the buyer's benefit for the safe arrival of the goods, and pay therefor.

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

Action at law by Garbiss Dilsizian and others, partners as Dilsizian Bros., against A. Klipstein & Co. Judgment for plaintiffs, and defendants bring error. Affirmed.

John J. Schwartz, of New York City (I. Maurice Wormser and David Burr Luckey, both of New York City, of counsel), for plaintiffs in error.

Harrington, Bigham & Englar, of New York City (Lawrence A. Sullivan, of New York City, of counsel), for defendants in error.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The plaintiffs below brought this action against the defendant below to recover damages for breach of contract, because the defendant below refused to accept a tender made on May 20, 1919, of 50 tons of gum arabic. This purchase was made pursuant to the terms of a contract between the parties dated April 23, 1918. The contract provided for the sale of 50 long tons of gum arabic, 1918 crop, freight average at 25 cents per pound net, c. i. f. New York. Payment was to be made by letter of credit at a bank in New York on which the seller was at liberty to draw a sight draft with invoice, bill of lading, and insurance certificates attached. Under the clause "Shipment" it provided, "From Red Sea to New York on vessel Phyllis, which is now on her way to Red Sea," and under the term "Remarks," "Sellers not responsible if shipment of merchandise or sailing of vessel prevented by any government regulations in country of export or destination, by act of God, perils of the sea, or by any other circumstances beyond the seller's control."

The complaint sets forth the terms of the contract, a copy of which is annexed and made a part of the pleading. It pleads the arrival of the Phyllis with the merchandise in question, as contracted for, and its tender to the defendant below, and its refusal to accept or pay for the goods, either by letter of credit, as provided for, or otherwise. It alleged a repudiation of the contract, canceling and withdrawing its letter of credit prior to the arrival of the Phyllis, and the tender of the goods, and that on the 20th of June, 1919, the defendant below, being then for a reasonable length of time in default of payment, the plaintiffs below elected to and did rescind, and notified the defendant below that they would hold it liable for the difference on the sale between the contract and market price of the goods, which was then 13½ cents per pound; that the storage charge of $85 was incurred; that the plaintiffs below have duly performed all their contractual obligations; and damages were demanded in the sum of $12,965.

The answer denied the allegations of breach of contract. It asked for a reformation of the contract. It alleged that an express condition of the contract was that the gum arabic should arrive in New York

in November, 1918, and that no letter of credit should be furnished until the buyer was notified that the import license had been obtained by the seller; that shipment was not confined to the Phyllis, then on her way to the Red Sea, but was permissible by other vessel; but it was required, however, to arrive in New York, to be there delivered to the defendant below at the latest in November, 1918. A counterclaim was pleaded.

On the trial, the counterclaim and the several defenses were abandoned, except the defense was insisted upon that an unreasonable length of time had expired before delivery, and it was urged that the contract had been breached by the plaintiffs below by failure to present the documents "within the time duly provided for in said agreement." Also it was contended that, by custom and usage in the purchase and sale of goods shipped by c. i. f. contract, the seller was required to promptly notify the buyer of the delivery to the carrier of the quantity shipped, date of bill of lading, and other information of shipment, and that the failure so to do, together with the failure to send on the documents in advance of the delivery in New York of the merchandise, constituted a breach of the contract. We think the complaint sufficiently alleges a cause of action for the buyer's failure to take delivery; its failure having been followed by a rescission of the contract.

It is contended on behalf of the defendant below, that this was a c. i. f. contract, and required the seller to make delivery of the gum arabic by promptly presenting and delivering the bill of lading, invoice of gum put on board, and insurance certificate, and provided for payment only by the seller's promptly presenting and delivering to the bank a sight draft for the amount of gum put on board at the contract price shown by the bill of lading, seller's invoice and insurance certificate attached.

[2] The c. i. f. contract is an expression which indicates that the price fixed covers the cost of the goods and insurance and freight on them to the place of destination. Under such a contract, the seller must ship the goods, arrange the contract of affreightment to the place of destination, pay its cost and allow it from the purchase price, and procure insurance for the buyer's benefit for the safe arrival of the goods and pay therefor. When the seller has done this, and forwarded the papers to the buyer, he has fulfilled his contract, and delivery is complete. There is no obligation by the seller to deliver the goods at the place of destination. But the liability of the parties here must be controlled by the terms of the contract into which they entered. It is a New York contract. Under the heading of "Weights" is the following: "New York official landed weights"—and it is further provided under "Remarks," "The price is fixed at 25 cents per pound net c. i. f. New York."

The entire contract contemplates a delivery of the gum arabic on the vessel Phyllis in a port of the United States. Delivery and payment therefor were to be simultaneous acts, and until delivery title remained in the seller. Where goods are delivered on board vessel, to be car-

ried, and a bill of lading is taken, a delivery by the seller is not a delivery to the buyer. The ship is a bailee for the delivery to the person indicated in the bill of lading as the one for whom they are to be carried, and this applies even in cases where bills of lading show that the goods are free of freight because they are the owner's property. Sheppard v. Harrison, L. R. 5 H. L. 116. The contract provides for shipment on a particular vessel from the Red Sea to New York, which was specifically identified as to name and location when the contract was made. The time of delivery cannot be read into the contract simply because, under the heading of "price," it is fixed at "net c. i. f. New York at 25 cents per pound." The only presentation provided for, for payment, was at a bank of New York where the buyer had a letter of credit. If the buyer had need for the documents as now contended, it was in its power to tender payment and demand delivery thereof at a time which would be reasonable under all the circumstances. It is apparent that the conditions of delivery and payment were concurrent. The goods in question were consigned to Dilsizian Bros. and were not consigned to the defendants below. Under section 100 of the Personal Property Law of the state of New York (Consol. Laws, c. 41), by rule 5, it is provided:

"If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

And section 101, subd. 2, of the same act, provides:

"Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods."

And section 103 provides:

"Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer. * * *"

By this statute, title passed only on delivery. It is quite evident that by that contract the parties did not intend title to pass until the goods were delivered at New York on the ship Phyllis. No definite date of delivery is stated in the contract. It does provide for delivery on the Phyllis, "which is now on her way to the Red Sea." By this provision the parties must be said to have intended the delivery to be made on the Phyllis within a reasonable time. What a reasonable time is must be determined by all the circumstances. The Phyllis was a sailing vessel. It is not mentioned when she left the Red Sea, nor is her port of departure or destination. The evidence discloses that no word had been asked for as to her time of arrival when, in August, a letter of credit was issued. The vessel began loading in September, 1918. She took on board 10,000 bags of gum arabic. She was obliged to obtain her clearance papers at Aden, 400 miles distant from her loading port. She then proceeded to Aden and took on a cargo of goatskins. At Aden her master mailed the bill of lading, which reached New York on December 31, 1918. It also appears that, as the Phyllis

arrived at Massowah, her loading port, on September 6, 1918, one of the members of the firm of the defendant below left that port for New York, arriving November 11, 1918. It was thus shown that it required two months' travel from Massowah to New York by fast steamer.

The Phyllis got her cargo from vessels which arrived from the Sudan, and which were transshipped on her, after which she was towed 400 miles to Aden, where she arrived in November, 1918. As the bill of lading was given October 30, 1918, it is evident that the intervening time was required for the transshipment. A mail-carrying vessel could not have reached the port of New York until December 31st. The Phyllis started her homeward voyage, and landed in New York on May 20, 1919. It lasted about five months, and was longer than her outward voyage; but she had 400 miles more to sail. She was a slow boat. Her speed, or the time, apparently, was not in the minds of the parties when the contract was entered into. Upon her arrival, however, with the gum arabic on board ready for delivery, notice was given to the defendant below, together with the invoice and offer of inspection and public weighing as provided for in the contract. There was no complaint from the defendant below from September, when notice that the Phyllis had reached the Red Sea was given on September 6, 1918 and was loading at Massowah, until her arrival in New York on May 20, 1919.

[1] We think that under these circumstances there was not an unreasonable delay in making delivery of the gum arabic as required by the terms of the contract. If there was delay, the defendant below, while the delay continued, remained silent indicating its desire to keep the contract alive, and when the goods arrived in May, 1920, they could not then suddenly, with justification, refuse to be bound by the contract. Brede v. Rosedale Terrace Co., 216 N. Y. 246, 110 N. E. 430. The contract was in the course of performance. The ship was making her course to New York, and in the absence of express terms as to time of delivery she had a reasonable time under all the circumstances, to make the voyage. Eppens v. Lomax Littlejohn et al., 164 N. Y. 187, 58 N. E. 19, 52 L. R. A. 811. An attempt to rescind the contract or refuse to be bound thereby, without warning or demand for the goods from the day of loading until their arrival in New York, indicated a desire to find a convenient excuse for avoiding the consequences of the contract. A drop in the market price of gum arabic in the meantime may have been the reason therefor.

In any event, the defendant below cannot escape, when it did not express its dissatisfaction at the delay before abandoning the contract, particularly when there is no evidence to indicate that the plaintiffs below could have hastened the voyage and made delivery in the ordinary course at an earlier date. The right of the defendant below to repudiate could arise only upon the theory that the obligation of plaintiffs below to deliver as an implied condition, within a reasonable time, had not been met. When the time is fixed, failure to make delivery justifies a refusal to be bound by the contract. Norrington v. Wright,

115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366; Cleveland Rolling Mill v. Rhodes, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920. Punctuality as to delivery was disregarded by the parties, and the defendant below cannot now make it a condition precedent to its own performance that the delivery should have been made in November of the preceding year, in the absence of some language in the contract to this effect, or some word from it during the period of delay insisting upon such delivery or some sufficient reason stated.

Judgment affirmed.

STANDARD OIL CO. OF NEW YORK v. FEDERAL TRADE COMMISSION.

TEXAS CO. v. SAME.

(Circuit Court of Appeals, Second Circuit. May 11, 1921.)

Nos. 111, 204.

1. **Trades-marks and trade-names and unfair competition ⇐80½, New, vol. 8A Key-No. Series—Meaning of "unfair method of competition" is for the courts.**

The meaning of the phrase "unfair method of competition in commerce," used in Trade Commission Act, § 5 (Comp. St. § 8836e), is a question for the court and not for the Commission to determine.

2. **Trade-marks and trade-names and unfair competition ⇐80½, New, vol. 8A Key-No. Series—Question for court not avoided by stating as finding of fact what is conclusion of law.**

The rule that the meaning of the phrase "unfair method of competition" is a question of law for the courts is not avoided by the Trade Commission's stating as a finding of fact what is a mere conclusion of law.

3. **Trade-marks and trade-names and unfair competition ⇐68—Requirement that dealers distribute only loaner's gasoline from leased devices is not "unfair method of competition."**

Where distributors of gasoline leased for a nominal rental the devices for distributing the gasoline at filling stations on which they had marked the brand of their gasoline, the requirement that the retailer should not distribute through such device any gasoline except that supplied by the distributor, without a requirement that the retailer could not lease similar devices from rival distributors, was not an "unfair method of competition," which could be prevented by the Federal Trade Commission, especially in view of the fact that supplying, from a pump marked with the name of one brand of gasoline, gasoline of a different brand, would be a deception of the buying public.

4. **Monopolies ⇐8—System which is not restricting competition is not tending to monopoly.**

Though one function of the Trade Commission is to discern and suppress in their beginning practices which tend to monopoly, such tendency is an inference from proven facts which is a question of law for the court, and which cannot be drawn where the evidence does not show any restriction on competition up to the present time, but instead shows that the business was keenly competitive.

5. **Monopolies ⇐17(2)—Leases of gasoline distributing devices, to be used only for distributing lessor's oil, does not substantially lessen competition.**

Leases, by gasoline distributors to retailers, of devices for the distribution of gasoline, which contained a clause prohibiting the retailer from distributing through such device gasoline not supplied by the distributor,

but which did not prevent the retailer from leasing other devices for the distribution of gasoline of other distributors, does not violate Clayton Act, § 3 (Comp. St. § 8835c), prohibiting leases which substantially lessen competition or tend to create a monopoly in any line of commerce.

Petition to Revise Orders of the Federal Trade Commission.

Separate petitions by the Standard Oil Company of New York and by the Texas Company against the Federal Trade Commission to have set aside orders of the Commission separately entered against both petitioners. Orders reversed.

Petitions praying that orders of the Federal Trade Commission separately entered against both petitioners dated April 27, 1920, be set aside. These litigations are the local fraction of upwards of 25 proceedings brought by the Commission against persons and corporations in widely separated regions, but all transacting the business of selling and distributing refined petroleum, and especially gasoline suitable for the engines of motor cars. The testimony in these two cases is the same and the pleadings and orders are alike except for names.

In September, 1919, the Commission complained against these petitioners that for more than four years previously they had been engaged in business, or had been conducting their business, in the manner set forth in the findings of fact made after the taking of voluminous evidence. Such findings may be thus summarized (omitting such formal matters as incorporations and the like):

(1) Petitioners produce and sell refined oil and gasoline, but are not engaged in the manufacture of oil pumps, storage tanks, and containers (hereinafter collectively called "devices").

(2) They have been and are engaged in the leasing and loaning of devices, and they also maintain numerous storage stations for oil and gasoline in various states, which stations are replenished by shipments from petitioners' refineries, and the oil so stored is sold and delivered from said stations to retail dealers in the several states.

(3) Each petitioner has leased and is now leasing, to retailers of its own gasoline, devices to be used by such retailers, and in so leasing petitioners have made and are now making contracts or leases with the retailers obtaining devices, under which any given retailer agrees to use his leased device solely for the purpose of storing and vending the product of whatever petitioner furnished him with the device.

(4) The rental or charge to such retailer for any petitioner's device is nominal, and does not afford a reasonable profit or return to the furnishing petitioner, considering the value of a device, which petitioners procure by buying from manufacturers thereof.

(5) Petitioners have furnished and are furnishing devices to retailers only upon condition that each lessee uses his leased device only for the purpose of storing and selling therefrom the goods of the lessor.

(6) A majority of the retailers so leasing devices require in their business only a single device, though others may and do procure from each of several dealers in oil a leased device, and use them all, provided that each device is used only to facilitate the distribution of the lessor's product.

Upon the fact findings, substantially stated above, orders have been based, entered April 27, 1920, whereby each petitioner was required to "forever cease and desist from (1) directly or indirectly leasing pumps or tanks, or both, and equipment for storing or handling petroleum products in furtherance of its petroleum business, at a rental which will not yield to it a reasonable profit on the cost of same after making due allowance for depreciation; (2) entering into contracts or agreements with dealers in its petroleum products or continuing to operate under any contract or agreement already entered into whereby such dealers agree or have an understanding that, as a consideration for the leasing to them of such pumps and tanks and their equipment, the same shall be used only for storing or handling the products of (the oil dealer proceeded against).

It is evident, and is admitted, that these cases and all the others above alluded to are designed by Trade Commission to break up the present well-known system of distributing and selling gasoline by "kerb pumps," unless the pump furnishers or lessors will agree that anybody's gasoline may be stored in and sold from pumps belonging to and furnished by a particular dealer.

Martin Carey and Peter M. Speer, both of New York City, for Standard Oil Co. of New York.

Edwin B. Parker and James L. Nesbitt, both of New York City, for Texas Co.

Adrian F. Busick and Eugene W. Burr, both of Washington, D. C., for Trade Commission.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). As the matter has not been argued, we have not referred to and will not dwell upon the pleadings put forth by the Commission, and assume, but not hold, that they comply with the rules suggested, if not prescribed, by Federal Trade Commission v. Gratz, 253 U. S. 427, 40 Sup. Ct. 572, 64 L. Ed. 993. In the language of the statute, we think the "findings of the Commission as to the facts are supported by testimony," so far as they go. But there are other facts thoroughly proven, admitted at bar, and aiding discussion.

Every pumping station is an advertisement; each bears the name of the oil producer whose gasoline is supplied therefrom, if the retailer honestly observes his bargain. The system is a great convenience to the public; it has increased enormously the ease with which motor drivers may obtain "gas" even in remote and thinly settled districts. It is the only method known or suggested, of keeping before the consuming public the oil manufacturers' trade-mark, and it has largely succeeded the system of distributing oil in barrels, which barrels bore the maker's trade-mark and were practically loaned to the vendees, to be returned empty.

The choice between owning and leasing pumps depends upon the extent of the retailer's business and the amount of his capital. The majority of small dealers have small capital, and therefore lease rather than buy. It is perfectly possible to buy from the same manufacturers who supply to the oil dealers the pumps leased by the latter. The competition between the various oil-selling persons and corporations is and has been very keen; each is desirous of extending the sale of his own brand, and the system of leased pumps, each bearing the trade-mark or trade-name of its lessor, is regarded by many, though not all, wholesalers as a profitable form of advertisement. There is no agreement, combination, or arrangement between the various wholesale lessors as to parceling out territory or abstaining from supplying pumps to a community already supplied by another wholesaler.

By these facts three questions of law are presented:

(1) Is the system outlined an "unfair method of competition in commerce," the prevention of which would be "to the interest of the public." Section 5, Trade Commission Act, 38 Stat. 719 (Comp. St. § 8836e).

(2) Is the above-stated method of leasing unlawful under section 3 of the Clayton Act (Comp. St. § 8835c), whereof the language here important is noted in the margin.[1]

(3) Does the business here involved amount to interstate commerce?

[1, 2] Whatever may be the exact meaning or extreme scope of the still novel phrase "unfair method of competition," it is settled that it is for the courts and not the Commission to determine as matter of law what is and what is not included in the phrase. Federal, etc., Commission v. Gratz, supra. And this rule is not avoided by stating as a finding of fact what is a mere conclusion of law. New Jersey, etc., Co. v. Trade Commission (C. C. A.) 264 Fed. 509.

The Commission justifies the order complained of by looking to the future rather than at the present—a position summed up in argument as follows:

"The loaning practice restrains competition and tends toward monopoly, for the reason that it destroys the freedom of solicitation for business which the oil distributor would otherwise have. The gratuity which the practice confers removes the opportunity for competition, because it ties tens of thousands of individual retailers to the oil-distributing corporations which engage them."

The Commission, looking forward, sees in the present highly competitive business of the various wholesalers a seed which will in time produce the fruit condemned in Patterson v. United States, 222 Fed. 599, 138 C. C. A. 123, where the court held:

"For one competitor to exclude all or substantially all other competitors from such opportunity—i. e., drive them from the field of freely offering their goods, so as to have that field to himself—is to monopolize according to the legal and accurate sense of the word."

[3] Applied to the present case, this means and is admitted to mean that since most retailers do a small business they need only one pumping device; wherefore the first wholesaler who furnishes a free pump has monopolized the business of that retailer and so unfairly competed with all other wholesale dealers.

We think this reasoning confounds commerce with convenience, besides introducing into trade an element of unfairness, and indeed dishonesty. There is no contract, agreement, or understanding by which any retailer is prevented from selling any brand of oil, and he can own or lease as many pumps as he likes or can use. It is unfair and dishonest to give out from a pump bearing one brand another maker's oil, and all that secures any one retailer's trade for any one wholesaler is the amount of business the retailer can gather from the community.

It is possible, when any system of distributing an article of prime necessity and enormous consumption is well established, that temptation

[1] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease * * * machinery * * * or other commodities * * * for use * * * on the condition * * * that the lessee * * * shall not use or deal in the goods * * * of a competitor * * * of the lessor, * * * where the effect of such lease * * * may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 38 Stat. 731.

arises for competing distributors to enter into treaties regulating prices, classifying customers, or dividing the area supplied into spheres of influence—one sphere for each distributor.

[4] It may be admitted that one function of the Trade Commission is to discern and suppress such practices in their beginning; but a thing exists from its beginning, and it is not a conclusion of law from any facts here found that a system which at present is keenly competitive, extremely advantageous to the public, and, in the opinion of a majority of the competent witnesses, economical, is at present unfair to any one or unfair because tending to monopoly. A tendency is an inference from proven facts, and an inference from the facts as found by the Commission is a question of law for the court. As matter of law there is at present no violation of the Trade Commission statute; therefore the first of respondent's contentions cannot be sustained.

[5] For substantially the same reason the leases of these petitioners do not violate section 3 of the Clayton Act; i. e., the effect of their leases is not "to substantially lessen competition or tend to create a monopoly in any line of commerce." We note Coco-Cola Co. v. Butler (D. C.) 229 Fed. 224, as containing a valuable commentary on this section of the Clayton Act, and the facts of that case are suggestive of the advantages to the public in being reasonably able to rely upon getting the "gas" he pays for out of any trade-marked pump.

It is, of course, true that if the trade or business under consideration is not interstate commerce the Commission had no jurisdiction. We express no opinion on this point; but because, as matter of law, no unfair method of competition has been shown, and no violation of the Clayton Act, the orders complained of are reversed.

SUPERIOR SKYLIGHT CO., Inc., v. AUGUST KUHNLA, Inc., et al.

(Circuit Court of Appeals, Second Circuit. May 18, 1921.)

No. 228.

1. **Patents ⇐168(2)—Element added to avoid anticipation cannot be dropped to establish infringement.**
   When an applicant for a patent to cover a new combination is compelled, by rejection or submission, to narrow his claim by the introduction of a new element, he cannot, after issue of the patent, broaden his claim by dropping such element.

2. **Patents ⇐328—1,009,502, for skylight, not infringed.**
   The Goldman patent, No. 1,009,502, for a skylight, having openings to open automatically in case of fire, to allow the escape of smoke, *held* not infringed.

3. **Patents ⇐245—Equivalent part must perform the same function in substantially the same manner.**
   Within the rule of equivalents, the thing thought to be the equivalent must be shown to perform the same function and in substantially the same manner as the thing of which it is alleged to be the equivalent.

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

Suit in equity by the Superior Skylight Company, Incorporated, against August Kuhnla, Incorporated, and others. Decree for defendants, and complainant appeals. Affirmed.

For opinion below, see 265 Fed. 282.

Hauff & Warland, of New York City (William E. Warland, of New York City, of counsel), for appellant.

Richard B. Cavanagh, of New York City (J. Granville Meyers, R. B. Cavanagh, and James A. Koehl, all of New York City, of counsel), for appellees.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. Letters patent No. 1,009,502 were issued to Barney Goldman, the assignor of the appellant. The patent is for a skylight. It is intended primarily to be used on theaters and buildings where large audiences congregate. It is so designed as to operate automatically, thereby opening a number of apertures located in the frame of the skylight. In this way the smoke and flames are drawn to the skylight, avoiding the suffocation of the people gathered in the building. The skylight is usually built to comply with the laws of localities as to size.

Claims 1 and 2 of the patent sued on are as follows:

"1. A skylight comprising a frame projecting from the roof of a building and having an opening with an inclined jamb, and provided with an offset at the top of the jamb, a cover pivoted to the lower part of the jamb, means connected to the cover for securing the cover on to the jamb, and means attached to the said connection, for automatically releasing the cover to swing downwardly to its open position.

"2. A skylight comprising a frame projecting from the roof of a building and having an opening with an inclined jamb, and provided with an inclined offset at the top of the jamb, a cover pivoted to the lower part of the jamb, a flexible connection operatively secured to the cover for holding the cover on to the jamb, a fusible link attached to and situated between the end of the connection and the cover, for automatically releasing the cover to swing downwardly to its open position."

The frame of the skylight has a number of apertures, and to each lower portion of the opening is pivoted a cover, which is held closed by means of one or more wire ropes or chains connected to the upper portion of the cover, and the ropes may be operated from a position below the skylight. Each of these ropes has connected thereto a link of fusible metal. When closed, the cover is positioned at an inclined angle; the idea being that when any of the ropes or chains are released, or any of the fuses melt, the cover will, by gravity, fall to an open position.

The appellee the Freel Investing Company is the owner of the Strand Theater, at Fulton street and Rockwell place, Brooklyn, and it is upon this building that the skylight which the appellant claims infringes its patent was used. The appellee August Kuhnla, Incorporated, is the manufacturer of the skylight. The appellee Edward Keough is the manager of the theater. The appellee August Kuhnla, Incorporated,

manufactures under the patent issued to Joseph A. Peterman, No. 1,320,568, granted November 4, 1919, for a sash-operating mechanism. This ventilator is of the large type, with a door opening having vertical jambs; the doors are connected by ordinary strap hinges to the sills of the openings. When closed, the door occupies a vertical position, abutting or striking against the vertical jambs. The doors are simultaneously operated by a series of rods, all connected with a collar on an upright post. It opens very much as an umbrella. The vertical post is of metal, located centrally within the skylight, and upon the post there is a tubular collar. This tubular collar has pivotally connected therewith the inner ends of a series of heavy radiating metal rods, the outer ends of which are pivotally connected with the center or middle portion of the respective doors. The doors are normally held closed in the vertical position when the collar is elevated and held suspended near the top of the center vertical post. There is attached a restraining rope. When this rope is released, as by the melting of a fusible link, the collar automatically, by the weight or thrust, or both, of the rods, starts its downward travel on the post, and the pusher thrust, together with the weight, directs a positive outward pressure against the connecting doors and places them in an open position. When the doors are opened, the collar on the central post rests at the foot of the post.

[1] The defenses interposed are that there is a want of invention, because of the state of the prior art, and that there is no infringement. When application was made by the appellant for a patent originally, five claims were presented. Not any of these claims were limited to a structure wherein the opening was provided with vertical or inclined jambs, and, when the claims were allowed, it was for an inclined jamb. Further, by his second amendment, the applicant limited four of his claims for a frame projecting from the roof of the building. We must therefore consider the patent within the scope of its claim as allowed by the Patent Office. Minerals Separation Co. v. Butte Mining Co., 250 U. S. 336, 39 Sup. Ct. 496, 63 L. Ed. 1019. For when an applicant for a patent to cover a new combination is compelled by rejection or submission to narrow his claim by the introduction of a new element, he cannot, after the issue of the patent, broaden his claim by dropping the element which he was compelled to include in order to secure his patent. Shepard v. Carrigan, 116 U. S. 593, 6 Sup. Ct. 493, 29 L. Ed. 723.

[2] We think that the appellee's structure does not infringe. The president of the appellant corporation, in testifying as to the construction and operation of its skylight, made under the patent in suit, said that on top of the curb on the roof is a frame with a series of openings; each opening has inclined jambs with a roof on, and in that jamb is a door or doors hinged at the bottom of each door. No weights are necessary. He said the opening of the inclined jamb at a 43-degree angle guards against the storm or wind preventing it from opening, and it is for this reason he provides an inclined jamb, as well as an inclined position for the doors. In testifying as to the appellee's skylight, he said that—

"The weight of the center part, as soon as that is released, being itself on a verticle line, she falls down, and that drop from falling, that opens the door; that is, the weight."

The particular skylight which is claimed to infringe, he testified, occupied the vertical position, and further:

"Q. And you found that they were intended to be opened by the weight of those rods plus that runner on that vertical standard? A. That is what I found."

In the patent in suit there are inclined jambs, and the doors are positioned in an inclined position. In the appellee's structure, there are no inclined jambs. The shutters are in a vertical position, and are started by the impulse of the weight of the rods, when the collar supporting them on the vertical post drops. The appellee's device does not have a rope control, as does the appellant's. In the appellant's device, a rope running to each door controls a series of doors, and it is when, by the melting of the fusible link, the ropes are released that the shutters drop of their own weight; this pursuant to gravity alone. The control of the appellee's structure is by rigid rods, and it is impossible to open any shutter independently, without releasing one of the rods by disconnection. It requires the weight of the rods or the thrust of the same to open the door in appellee's structure. The appellant concedes this difference, but it contends that the rigid connecting rods of appellees' structure attain the same function and the same result as the appellant's inclined jamb, and maintains that in this sense they are the equivalent of the inclined jamb. But it is plain that the appellee's connecting rods are not jambs in the ordinary acceptation of that term. They are not side posts or sides of a door or window, as the word "jamb" is defined by the dictionaries:

"A side or verticle piece of any opening or aperture in a wall, such as a door, window, or chimney, which helps to bear the lintel or other member overhead, serving to sustain or discharge the superincumbent weight of the wall." Century Dictionary.

These rods are movable and slidable, and are not stationary, as a jamb is. The rods exerted a driving weight to force the vertical door outward and downward, and the appellant's inclined jambs are stationary, which act as stops to hold the appellant's door tilted outward or overbalanced, so that, when the doors are released, they will, of their own weight and without any action whatever on the part of the inclined jambs, drop down. While it is not necessary, to make out a case of infringement, that the arrangement which infringes performs the same service, still it must produce the same results in substantially the same way. Werner v. King, 96 U. S. 218, 24 L. Ed. 613. Where each element is one of the operated means, the identity depends, not merely upon the function performed, but the manner in which it is performed. U. S. Light & Heat Corp. v. Safety Car H. & L. Co. (C. C. A.) 261 Fed. 915; Imperial Bottle Cap & Mach. Co. v. Crown Cork & Seal Co., 139 Fed. 312, 71 C. C. A. 442.

[3] Within the rule of equivalents, the thing thought to be the equivalent must be shown to perform the same function and to do it in

substantially the same manner as the thing of which it is alleged to be the equivalent. Applying this rule to the appellee's structure and its operation, we think it is clear that there was no infringement.

Decree affirmed.

W. R. GRACE & CO. et al. v. HANSEN.

THE H. C. HANSEN.

(Circuit Court of Appeals, Ninth Circuit. September 7, 1920. On Rehearing, May 16, 1921.)

No. 3413.

1. **Shipping ⇐181—Charter held to require furnishing of deck as well as under-deck cargo during lay days.**
   Where the charter in a separate paragraph authorized loading a deck cargo so as not to endanger the rest of the cargo, and provided for delivery to the ship at a daily rate which would have supplied the ship with both under-deck and deck cargo within the specified lay days, the lay days were given for the loading of the entire cargo, so that demurrage is recoverable after the expiration thereof, though, during that time, the master did not notify the charterer of his intention to load the deck cargo.

2. **Shipping ⇐178—Delay in loading cargo held fault of charterer.**
   Where the charter required the owner to employ charterers' stevedore, and gave the master control only of the stowage, the charterer, not the vessel, is liable for demurrage for delay in loading caused by the stevedore's employment of only one shift.

3. **Shipping ⇐178—Delay of charterer in furnishing cargo held not excepted by strike clause.**
   Where the charterer's mills were closed on account of strikes before the vessel was ready to load, but had resumed operations before that time, and were cutting sufficient lumber to load the vessel, but it was not delivered to the vessel, because binding orders for such delivery had not been given in time, the charterer is not exempted from payment of demurrage for the delay under the clause excepting liability for loss due to strikes.

4. **Shipping ⇐178—Strike clause in charter does not apply to manufacture of cargo.**
   A charter provision exempting delays from strikes connected with the working, delivery, or shipment of the cargo does not except the charterer from liability for delays caused by strikes in the mills manufacturing the lumber for the cargo.

5. **Shipping ⇐175—"Demurrage" in charter held to apply to unexcused delay after lay days.**
   Where the parties to a charter intended that the voyage must be begun at the end of the time required to load the ship, and fixed a demurrage charge against the party responsible for each day's delay, subject to exceptions contained in the contract, demurrage is not to be construed in its strict legal sense, but provides for payment for all detention beyond the time set for the loading not excused under the contract.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Demurrage.]

6. **Shipping ⇐175—Delay to procure notation of demurrage claim does not entitle to further demurrage.**
   The lien and cesser clause of a charter does not preclude the shipowner's right of action in personam against the charterer to enforce his

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

claim for demurrage, so that the ship is not entitled to demurrage for the time during which the master was endeavoring to procure bills of lading with notation of claims for demurrage thereon, especially where he could have instituted proceedings and secured bonds to release from attachment during the time the vessel was detained for repairs after the cargo was loaded.

7. Shipping ⊜=175—Charterer held entitled to demurrage for delay during repairs to windlass.

Where the vessel was detained, after the cargo was loaded, for repairs to the windlass, without which the underwriters would not have allowed the voyage to proceed, the charterer is entitled to the stipulated demurrage during the time of such repairs, which were necessary to make the vessel seaworthy as required by the charter.

8. Shipping ⊜=181—Notice of readiness to load held sufficient.

Where the charter required 72 hours' notice to the charterer of the readiness of the vessel to load, and notice of readiness was given 2 days after the arrival of the ship, and loading commenced 3 days after such notice, the notice was sufficient to start the lay days running from the day loading commenced.

9. Shipping ⊜=180—Charterer entitled to deduct from demurrage for time loading was delayed by ship's fault.

A charterer is entitled to a deduction from the demurrage charged against him for half day's time during which loading was prevented by an accident to the ship's donkey engine.

10. Shipping ⊜=178—Demurrage allowed for day when stevedore decided insufficient quantity was on hand.

Where none of the cargo was loaded on a ship during a certain day because the stevedore decided there was less than a half day's work ready for loading, and that it would not pay to bring his men for such quantity, the ship is entitled to demurrage under the charter for that day's delay.

11. Shipping ⊜=175—Demurrage not allowed for delay in sailing after loading was completed.

A shipowner is not entitled to demurrage for 3 days during which the vessel did not sail after the cargo was loaded, and the demurrage controversy disposed of by the filing of the libel and the furnishing of a release bond.

On Rehearing.

12. Shipping ⊜=175—Charter held to authorize charterers to select size of lumber for cargo.

A charter party for a vessel to carry a cargo of lumber, in which the charterers agreed to furnish the vessel a full cargo of lumber or timber of such lengths and sizes as could be taken from the vessel's hatchways, the vessel to have the privilege of loading a deck load, authorizes the charterers to select the sizes and dimensions of the lumber to be loaded, subject to the limitations with relation to the hatchways of the ship.

13. Shipping ⊜=181—Charter held to allow 10 lay days for loading.

In a charter party requiring the charterer to furnish a full cargo of lumber, which the evidence showed was estimated to be not less than 1½ million feet, and allowing for the loading of the cargo 150,000 feet per working day, the charterer was given 10 lay days for loading the full cargo, but was not required to load the specified quantity of lumber each day.

14. Shipping ⊜=184—Evidence held to sustain findings charterers' stevedore loaded cargo.

On a libel for demurrage, pending the loading of a cargo of lumber, evidence *held* to sustain the finding that the stevedore who loaded the lumber was employed by the charterer, not by the ship, though he testi-

fied he took orders as to the stowage from the master, who was given authority to direct the stowage by the charter party.

15. Shipping ⇐175—Whether charterer or ship employed stevedore held not to affect question of delay.
Where the charter party obliged a charterer to furnish the full cargo of lumber at a specified rate per day, and it failed to do so it is immaterial, in determining the demurrage to which the ship is entitled whether the charterer or the ship employed the stevedore.

16. Shipping ⇐175—Charterer allowed demurrage during time ship waited for settlement of demurrage claim.
Where a ship delayed sailing after she was fully loaded for 4 days, during which time the master was endeavoring to secure a notation of demurrage on the bill of lading, which the charterer refused, and was libeling the cargo to secure the demurrage, which could have been done on the first day, the charterer is entitled to the demurrage specified in charter party for those 4 days.

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

Libel by Capt. I. P. Hansen, on behalf of the owners of the motorship H. C. Hansen, against 1,523,000 feet of lumber loaded on board the motorship H. C. Hansen, of which W. R. Grace & Co. were claimants. Decree allowing libelant demurrage claimed, less a deduction for demurrage during the period the ship was being repaired, and both parties appeal. Decree modified and affirmed.

This is an appeal by Grace & Co., claimants and cross-libelants in the District Court, and a cross-appeal by Hansen, libelant in the lower court, awarding demurrage to both parties. On June 12, 1917, Hansen, owner of the motorship Hansen, then under construction, chartered the ship to Grace & Co., charterers. The material clauses of the charter party are as follows:

"The said party of the first part (owner) * * * does covenant and agree on the freighting chartering of the whole of said vessel unto said party of the second part for a voyage from a mill or loading place on Puget Sound or Gray's Harbor * * * to Calloa, Peru. * * * Lay days to commence as soon as vessel is at loading berth designated by charterers ready to receive cargo; it being distinctly understood that owners are to give charterers at least 72 hours' notice of vessel's readiness to load; otherwise charterers to have 72 hours from receipt of notice before commencement of lay days. Charterers to have the privilege of loading vessel at two mills, the time used in so moving to count as lay days.

"Said vessel shall be kept tight, staunch, strong, and in every way fitted for such a voyage, and receive on board for the aforesaid voyage the merchandise hereinafter mentioned, and no goods or merchandise shall be laden on board otherwise than from said party of the second part or their agents.

"The said party of the second part do engage to furnish the said vessel for the voyage aforesaid a full cargo of sawn lumber and/or timber of such lengths and sizes as can be taken through vessel's hatchway (and bow stern ports, if any). Lengths not shorter than 16 feet except at charterers' option. No lumber to be cut by ship without written authority from the charterers.

"Vessel to have the privilege of loading a deckload not endangering the safety of the cargo, ~~paying the extra insurance on same~~. Cargo on deck to consist of the largest sizes of rough lumber, unless otherwise directed by charterers.

"Said party of the second part shall be allowed for the loading and discharging of said vessel, at the respective ports aforesaid, lay days as follows: 150 M per working lay day for loading, to commence (as per lines 15 to 17)

after the vessel is at loading place satisfactory to charterers, * * * ready to receive cargo; the master having given notice to that effect. For each and every day's detention by the fault of the parties of the second part or agents, they agree to pay to the said party of the first part demurrage at the rate of $500 per day. Should the vessel be detained by the master beyond the time herein specified, demurrage shall be paid to charterers at the same rate and in the same manner. Cargo shall be received and delivered within reach of vessel's tackles where she can safely lie afloat.

"Vessel to furnish within 5 days after arrival at loading place, as ordered, a certificate from a marine surveyor of the San Francisco Board of Underwriters that she is in proper condition for the voyage, and a further certificate in due course that she is properly loaded. Should vessel fail to pass satisfactory survey, and should she be detained more than 10 days for repairs, to enable her to pass such survey, this charter to be void at charterers' option, such option to be declared at the end of said 10 days. Lay days for loading not to commence before Monday, July 16, 1917. * * *

"Cargo to be stowed under the master's supervision and direction; charterers' stevedore to be employed at current rates, if loaded Puget Sound; otherwise ship's stevedore.

"Act of God, perils of the sea, fire, * * * collisions, strandings, and other accidents of navigation, even when occasioned by the negligence, default, or error of judgment of the pilot, master, mariners, or other servants of the ship's owner, civil commotions, floods, frosts, storms, fire, strikes, lockouts, and stoppages (partial or otherwise), or accident at the mill or on railways or docks; or strikes, lockouts or stoppages (partial or otherwise), or any other hindrances or delays of whatsoever nature connected with the working, delivery or shipment of the cargo, or any part thereof, beyond the charterers' or agent's control throughout the charter always excepted.

"Vessel to have a lien on cargo for all freight, dead freight, and demurrage, it being understood that all and any liability of the charterers under this agreement shall cease and determine as soon as cargo is on board; all questions, whether of demurrage or otherwise, to be settled with the consignees, the owners and captain looking to their lien on the cargo for this purpose. * * *"

It was provided in the charter that lay days should not commence before Monday, July 16, 1917, and that unless the ship was at a first loading mill as designated by the charterers on or before sundown on August 30, 1917, charterers should have the right of canceling or maintaining the charter, such option to be exercised within 48 hours after the arrival of the ship at such mill. When the contract was made there was no statement of the tonnage of the ship, and although her exact carrying capacity was not known, the dimensions of the cargo spaces were furnished to Grace & Co., and her capacity, including deck load, could be and was approximated at from 1,300,000 to 1,500,000 feet of lumber. Ross, agent for the owner at the time of the charter, told Grace & Co., that he believed the ship would carry not less than 1,500,000 feet; that she might carry more, but that he would not "guarantee" above a cargo of 1,500,000.

When the ship was completed on August 23, 1917, the master notified the charterers of readiness to begin loading cargo on August 28th. Grace & Co., through their agent, Robinson, advised Hansen to go to the deck of the St. Paul & Tacoma Lumber Company at Tacoma as the first loading berth, and that the second berth would be at the Defiance mill in South Tacoma. The ship reached the first berth on August 27th, and was ready to receive and did receive cargo about 1 p. m. on the 28th. Approximately 342,000 feet of lumber were loaded at the first berth, and the ship went to the Defiance mill on the afternoon of September 1st, where she commenced to take load on September 4th, and continued to take load (except on holidays) until September 12th, at which time her load approximated 626,000 feet in addition to the 342,000 previously taken. Of this quantity some 945,000 feet were loaded in the hold, the remainder on deck. The under deck cargo was not loaded at the average rate of 150,000 per day. On September 13th the ship left the Defiance mill and anchored off the St. Paul mill, and on the 14th of September re-

ceived approximately 85,000 additional feet from a lighter sent out from the Tacoma mill. The ship lay at anchor, and no more cargo was furnished until September 24th, when orders were received from the charterers to proceed again to the Defiance mill, whither the ship went on the 24th and commenced further loading, and continued until about noon of the 27th, receiving 154,000 additional feet. Again the ship was directed to go to the St. Paul mill, and on the 28th loading was there resumed, and continued till in the forenoon of the 29th; some 180,000 additional feet being loaded. From the forenoon of the 29th of September until October 6th, no cargo was furnished, and the ship was idle, but on October 6th 100,000 additional feet were furnished, and on October 8th at about 11:30 a. m. the vessel was fully loaded and about 1 p. m. shifted, preparatory to lashing cargo and going to sea. But in letting go of an anchor the "wildcat" of the windlass broke, and necessary repairs were not completed until October 16th.

Notice of the repairs and of readiness to sail was given to Grace & Co.; the master informing them that he was ready to sign the usual billing for this cargo, with the "usual and proper notation thereon" of demurrage charges claimed by the owners, and also notifying the charterers that, if the ship were detained beyond noon of October 17th, she would be on demurrage at $500 a day as provided in the charter party. Grace & Co. refused to acknowledge any claim of demurrage, declined to accept bills of lading with any notation of the owner's claim, and on October 19th libel was filed. Release bond was given, and after bills of lading were signed and certain preparations were made the ship sailed on October 23d with a full cargo of approximately 1,500,000 feet of lumber. Holidays and Sundays being excluded, the lay days expired at noon September 8th, and Hansen, libelant below, claimed demurrage from September 8th to noon of October 8th at $500 per day. From October 8th to October 17th, when repairs to the windlass were being made, libelant claimed no demurrage, but from October 17th to 19th he claimed demurrage at $500 per day. By the amended cross-libel the charterers claimed demurrage of 44 days at $500 per day, made up as follows: Six days in loading the hold of the ship; 24 days in loading the deck; and 14 days (October 8 to 23) after the ship was fully loaded and before commencement of the voyage.

The decision of the lower court awarded the owner demurrage for 32 days ($16,000), and allowed the charterers 8 days' demurrage ($4,000). This adjudged the owner entitled to $12,000, to which was added interest and costs. Charterers appealed. The cross-appeal of the owner is from that part of the final decree awarding 8 days' demurrage and deducting the amount from the $16,000 awarded him.

The errors assigned by the appellant charterers present questions of construction of the terms of the charter with respect to full cargo, to the obligations pertaining to deck and under-deck cargoes, to the provisions concerning loading, fault of the master, and whether strike conditions prevented the appellant from furnishing deck cargo in a reasonable time.

McClanahan & Derby, of San Francisco, Cal., and Kerr & McCord, of Seattle, Wash., for appellant and cross-appellee.

Bogle, Merritt & Bogle, of Seattle, Wash., for appellee and cross-appellant.

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

HUNT, Circuit Judge (after stating the facts as above). [1] It is argued by appellant that the subjects of deck and under-deck cargoes are found in separate paragraphs, and that appellant's initial obligation extended no further than the furnishing of an under-deck cargo; that by the use of the term "full cargo" in the first paragraph a full cargo under deck was meant, and that under the second paragraph the master

is given an exclusive option to load or not to load a cargo on deck; and that as a matter of law such option relieved Grace & Co. from the duty of providing a deck cargo before the master exercised the privilege of carrying one.

Our construction of the provisions of the charter party is that the charterers were allowed 10 working days within which to furnish the full cargo at the average rate of 150,000 feet per day. If the lay-day period commenced at 1 o'clock of August 28th, and holidays and Sundays are excluded from the lay-day period, the 10 lay days allowed the charterers for loading expired at noon on September 8th. From that time on, days of demurrage would run continuously without deduction, so that, when the last cargo was put upon the ship at noon of October 8th, there had been a detention for 30 days. There arose, then, an obligation on the part of the charterers to pay such demurrage, unless they were excused on account of some exceptive clauses to be found in the charter party. Charterers say that there is such an exceptive clause in that which pertains to strikes, lockouts, or stoppage, partial or otherwise, or any other hindrances or delays, of whatever nature, connected with the working, delivery, or shipment of the cargoes, or any part thereof, beyond the charterers' or agent's control.

The provision of the charter party whereby the owner covenanted and agreed to the freighting and chartering of the "whole of said vessel," and also the provision that the charterers did "engage to furnish the said vessel for the voyage aforesaid a full cargo of sawn lumber," measure the obligation. Although the shipowner never directly notified the charterers of any "option" to carry a deck load, the great weight of the evidence is that all concerned acted upon the assumption that the ship would carry a deck load. The charter was in the main in the usual form used by Grace & Co. with respect to Pacific Coast lumber charters. The ship was a motorboat, but there does not appear to have been anything unusual about the type which would affect her capacity to carry lumber, or her loading capacity generally. There was uncertainty in the minds of the charterers as to the amount of the deck load which the ship would carry, and what the height of her deck load might be; but it was the usual custom for ships in the lumber carrying trade to take deck loads, and we think that the evidence is that when the ship was chartered it was understood that she would carry a deck load. The stipulation in the charter party whereby the ship was to have the privilege of loading a deck load not endangering the safety of her cargo was not based upon a doubt as to the capability of the ship to carry a deck load, but upon how much deck load she would carry without endangering the safety of her cargo. Naturally the ship would carry as much of a deck load as was safe, and the charterers, for their own protection, insisted that the vessel should not carry a deck load so great as to endanger the safety of her cargo.

As further evidence that the charterers were concerned as to the safety of the cargo, there is the provision wherein the vessel is required to furnish a certificate from a marine surveyor of the San Francisco Board of Underwriters that the ship was in proper condition for her voyage and that she was properly loaded. The obligation

of the charterers being to furnish the ship a full cargo, notification by the owner to the charterers that a full and complete cargo would require not less than 1,500,000 feet fixed the obligation on the charterers to furnish such cargo. The stowage of the cargo being under the supervision of the owner, it was immaterial to Grace & Co. where the 1,500,000 feet should be stowed, provided, always, the stowage was such as not to endanger the safety of the cargo. The testimony of Mr. Thompson, of the Douglas Fir Company, was that the charter required full and complete cargo, and that it made no difference how much the vessel would take, and Robinson seems also to have understood the charter party as imposing upon the charterer the obligation to furnish a full and complete cargo.

Appellant's claim for 6 days' demurrage in loading the under-deck cargo rests upon the hypothesis that the obligation of the charterers to furnish a full and complete cargo was of a twofold nature: primarily, to furnish an under-deck cargo; and, secondarily, to furnish a deck cargo—the latter part of the obligation, however, not arising until the owner had exercised his option to carry such deck load. But, as we construe the charter, Grace & Co. being obliged to furnish a full and complete cargo of not less than 1,500,000 feet for loading within the lay days provided in the contract, the rate at which the under-deck cargo was loaded became immaterial. The rate at which the loading would be carried on would not necessarily detain or delay the loading of the ship. The fact is undisputed that the charterers did not furnish a full cargo of 1,500,000 feet, so that the whole of the cargo could have been loaded on board the ship within the period of the lay days provided for in the charter party. Alexander Sons v. Aktieselskabet, 25 Com. Cus. 21. The demurrage clause of the charter party contains a provision for payment of demurrage for each and every day's detention by the fault of the charterers, which means ultimate detention in the vessel's loading beyond the 10 days allowed by the charter for loading. That such is the true construction is confirmed by that clause of the charter party which provides that time used in moving from one loading mill to another should count as lay days. It could hardly be that there was an obligation to load the full 150,000 feet each day, and yet that the time used by the ship in moving from one mill to another should count as lay days.

[2] Nor can we agree with the appellant that the duty of loading the cargo at the charter party rate fell upon the appellee. The language used "allowed" the charterers a prescribed time for loading. The fact proved was that the work of loading was done by stevedores, and not by employés of the loading mills or the crew of the ship. The stowage was under the master's supervision and direction, but the loading was not. It was expressly provided in the charter party that the cargo was to be stowed under the master's supervision and direction, "charterers' stevedore to be employed at current rates." The evidence is that the charterers' stevedores loaded the cargo of lumber here involved as directed by the lumber inspectors of the charterers. The argument that the stevedores were at fault in loading with only one gang, and that the progress in loading was not satisfactory, does not

help the charterers, inasmuch as it was their duty to have provided additional stevedores, or otherwise to have made provision for the expedition of the work of loading. It is also established by the evidence that the work of loading, when first undertaken at the St. Paul and Defiance mills, could not have hastened the final loading of the ship, because the ship and the stevedores were idle and waiting for cargo for some 12 or 13 days after the first cargo had been loaded on the ship.

There does not appear to have been any act of the master in respect to the stowage of the hold that caused the delay in the loading of the ship beyond the 10 lay days. The real reason, as we read the evidence, why the ship did not complete her loading and stowage within the lay day period was the failure of the charterers to furnish the full cargo within the lay day period. The first quantity loaded, approximately 343,000 feet, was loaded in less than 4 days, and the ship shifted to the Defiance mill with 6 lay days remaining. But upon reaching the Defiance mill there were less than 600,000 feet of lumber for the ship. It was then that Capt. Ross was told by the people at the Defiance mill that no further lumber had been ordered for the Hansen. It appears, too, that it was at that time that the agent of the captain of the ship realized that there would be an unreasonable detention. The charterers ought to have had approximately 1,200,000 feet to complete the cargo, whereas they had less than 600,000 feet. Thus a condition arose which made it quite apparent that the ship would be idle for some time. All the cargo on board at the Defiance mill, and also all cargo cut while the vessel was lying at the Defiance mill, was loaded and stowed by September 15th. Under no circumstances could there have been a delay of the ship by failure to load at the rate of 150,000 per day, for the ship was detained until September 24th, and it appears that she could not have been loaded prior to that date. A surveyor employed by Grace & Co., who was on the ship when she loaded the latter part of her cargo, testified that the effect of a failure to load the initial cargo at the rate of 150,000 feet per day would be to give appellant that much more time to have placed their order for the balance of the cargo and get it out that much sooner. Jenneson, Taylor Co. v. Secretary of State for India, 86 L. J. K. B. 283, [1916] 2 K. B. 702, 22 Com. Cus. 1.

We conclude that compliance with the charter provision to load within 10 days was impossible by reason of the failure of Grace & Co. to furnish the cargo for loading within that period of time, and that there is no substantial merit in the contention that there should be a separation of lay days for loading as between under-deck and on-deck cargo.

[3] We come, now, to the claim of Grace & Co. that it was prevented from furnishing full cargo to the ship by reason of strike conditions existing at the loading mills. Again we find the argument of the appellant advancing the contention that there was the initial obligation to furnish the full under-deck cargo, and that, if the owner elected to carry an on-deck cargo, then it became the duty of the charterers to furnish such on-deck cargo. Proceeding along these lines, the charterers urge that they complied with the initial obligation to fur-

nish an under-deck cargo, which was ready at the time the vessel went on berth, but that the ship or master did not elect to carry on-deck cargo until after the entire under-deck cargo had been completely loaded, at which time the loading mills were involved in strikes, and that when the master exercised the "option" to carry on-deck cargo he knew of such strike conditions, and knew that delay would ensue, and that therefore he exercised the option with the liability for all risk of detention of the ship in her loading in connection with the furnishing of the on-deck cargo. But, going back to the provision of the contract under which the charterers obligated themselves to furnish the vessel a complete cargo, and to our view of the charter party, the covenant to furnish full cargo is not divisible; hence delay in furnishing cargo would not be excused, except upon some ground expressed in the provisions of the contract.

The question then arises: Were the charterers prevented from furnishing the cargo as called for by the charter party solely by reason of causes beyond their control and within the exceptive clauses of the charter party? It is shown that there were labor troubles at the Defiance mill and at the St. Paul mill; that a number of other mills closed down; that conferences were had between the officers of the Defiance Company and the men; and that because of coercion by outside influences many men quit work. On the other hand, before the Hansen went on berth in August, 1917, it was given out by the officers of the West Coast Lumbermen's Association, of which the St. Paul mill was a member, that the mill had resumed work, and by September 6th, while the Hansen was still on berth, Allen, secretary and manager of the association, stated to the press representatives that the St. Paul mill was operating with a full crew. There was a reduction in operation, but written mill reports disclosed that there was a total cut of 600,000 feet for the week ending August 18th, that rail orders were accepted for that week for 11 cars, that local orders were accepted for 50,000 feet, and that in filling local orders 45,000 feet were shipped; that for the week ending August 26th 600,000 feet of lumber were cut; that there were rail and local orders aggregating very large quantities, and 75,000 were shipped; that for the week ending September 1st 600,000 feet were cut, rail orders were accepted for 125 10 cars shipped, 81,000 feet shipped locally; that for the week ending September 8th the mill cut 600,000 feet, for the week ending September 15th, 897,000 feet, and for the week ending September 22d, 1,900,000 feet. At the Defiance mill reports showed that for the week ending August 25th there was a cut of 681,937 feet, and that for the time between August 27th to September 1st the Defiance mill cut 614,511 feet, and from September 1st to September 12th cut 840,399 feet, and from September 12th to 21st cut 766,896 feet. These figures, together with others which need not be given, are strong evidence that when the ship went on berth August 28th strike conditions did not impede operations sufficiently to prevent the mills from furnishing the Hansen the cargo called for by the charter party.

[4] Furthermore the strike conditions were confined to the mill employés, or those who were exclusively working in the manufacture of

the lumber, and who did not in any way engage in transporting the lumber to the loading port, or did actual work in loading the lumber. There can be no extension of the scope of the exemption clause, so as to include the labor of manufacturing the cargo. Construction in accordance with the general rule would be that, when the charterer makes a contract for the use of a ship, the presumption is that he has a cargo in existence with relation to which the contract is made. It is not a part of the contract that the provisions shall pertain to procurement of the cargo. Carver on Carriage by the Sea, §§ 252–257a; Scrutton on Charter Parties, art. 42; Tons of Nitrate v. McLeod, 61 Fed. 849, 10 C. C. A. 115. See, also, Grant v. Coverdale, L. R. 9 App. Cas. 470; The India, 49 Fed. 76, 1 C. C. A. 174; McLeod's Case, supra; Gardinier v. McFarlane, 20 Sess. Cas. 414; Sorenson v. Keyser, 52 Fed. 163, 2 C. C. A. 650; Arden S. S. Co. v. Weir, 10 App. M. C. (N. S.) 135.

One of the leading cases cited by the appellant is Dampstibsselskalut Danmark v. Paulsen, [1913] Sess. Cas., supra, where the exemption clause of the charter party is much like that under consideration. While there is language in the opinion to uphold appellant's contention, the decision itself was upon the ground that the charterer failed to place timely and binding orders for his cargo to be delivered to the chartered ship within the loading period and provided in the charter party, and that therefore the charterer could not fall back on the exemption clause to defend against the shipowner's claim for demurrage. The court did not reverse the decision in the Gardinier Case, supra, where it had been held that an exemption clause quite like that before us only goes to cover causes which conduce to the failure of the charterer's obligations under the contract and do not cover causes which delay the procuring of the cargo.

In the present instance the use of the word "working" in the exceptive clause, which often appears in colliery charter parties, may call for broader application than if there were no such word; still we do not believe that it means the producing and manufacturing of the cargo, and unless the language makes it plain that the parties intended that the shipowner would assume the risk of delay in the supplying of logs to the mills and the manufacturing of logs into lumber, no such construction should be adopted. Carver on Carriage by Sea, 258a; Grant v. Coverdale, supra.

There is some evidence that appellant failed to exercise due caution in placing binding orders under which the loading mills would have been obliged to furnish the cargo for loading the Hansen within the lay-day period. The testimony shows that there was some expectation of danger of a shutdown, and that if certain orders for lumber had been placed 30 days before the labor troubles occurred orders could have been completely filled. There was an actual shutdown of the St. Paul mill from July 26th to August 13th, at which time the mill reopened with a small force and gradually increased its efficiency. A shutdown at the Defiance mill was from July 26th to August 20th, when operations were resumed and approximately 75 per cent. efficiency

was attained. It is not necessary to enter into a detailed statement of the number of feet cut for export lumber out of the total cuts, but we gather from the statements in evidence that there was a lack of due diligence on the part of the appellant to secure lumber for the Hansen after the ship went on berth up to the time her lay days expired, and that there was also lack of due diligence used to furnish the ship with lumber after the expiration of the lay days when the ship was on demurrage.

[5] As to the extent and scope of the demurrage provision of the charter party, our opinion is that all detention beyond the time set for loading and not excused under the provision of the contract should be paid for at the rate agreed upon between the parties. The word "demurrage" is not to be construed as having been used in its strict legal sense, where, as here, the parties intended to agree that the voyage must be begun at the end of the time required to load the ship, and for each and every subsequent detention day the sum of $500 was fixed, subject to exceptions in the contract. This seems to have been the construction put upon the contract by the parties themselves, for both claim $500 demurrage per diem for failure in initiating the voyage after the vessel was completely loaded. The owner is asking for $1,000 for the 2 days between October 17th and 19th, while the charterers claim $7,000 for 14 days between October 8th and 23d. It would seem as if the parties had understood that, if time common to both were used without sufficient excuse by one, compensation must be awarded to the other. Inverkip S. S. Co. v. Bung, 22 Com. Cas. 200.

[6] The contention of the appellee is that the award to the owner of demurrage for the two days (October 17th to 19th) was caused by the refusal of the charterers either to pay the owner's claim for demurrage or to issue bills of lading with notations thereon that the owner claimed demurrage during such period. The detention of the ship does not appear to have been justified upon the ground that the master had a right to detain the ship in order to effect the payment of a demurrage claim. He could have promptly exercised a lien against the cargo, and such course would have been followed, doubtless, by the immediate release of attachment by the giving of a bond, and, had such course been pursued on October 9th, the voyage could have been commenced after the ship's repairs were made. But it appears that when the loading was completed, and on October 9th, Grace & Co., presented to the master bills of lading which the master, as already said, refused to sign. In these bills of lading there was a provision that "negligence clause and all other conditions as per charter party dated Seattle, June 12, 1917." The proper construction of the lien and cesser clause of the charter is shown by the decision of this court in Elvers v. Grace & Co., 244 Fed. 705, 157 C. C. A. 153. There the lien and cesser clause was the same as in the case before us, and the ruling of the court was, as applied to the case under consideration, that when the Hansen was loaded the owner, because it was at least doubtful whether his lien on the cargo was preserved against the consignee, had a right of action in personam against Grace & Co. for the loading demurrage, and such right was enforceable without the need

of detention of the vessel. The master of the Hansen, therefore, had a remedy, and we do not think that detention was justifiable after the ship was fully loaded and ready to sail on October 17th.

[7] The master makes no claim for the 8 days used in making repairs to the wildcat. Appellant contends that this detention was for the purpose of making the ship seaworthy for the voyage, and that therefore such detention was not caused by the charterers. The contract required that the ship "shall be kept tight, staunch, strong, and every way fitted for such voyage." The breaking of the wildcat obviously made the ship unfit for the voyage, and, as such condition existed before the voyage was commenced, it would seem that for detention by the master the agreed demurrage should be paid to the charterers. Carver on Carriage by Sea, p. 834. The importance of having the windlass in fit condition is emphasized by the witnesses and the evidence that the underwriters would not have allowed the ship to proceed on the voyage with a broken windlass. The 10 days allowed for repairing the windlass is apart from the demurrage clause, and is in the warranty that the vessel, having been declared fit and a certificate of fitness having been issued, shall be kept fit. The breaking of the windlass was not an accident of navigation, but was apparently due to a defect for which claim was made against the company which built the ship. Bowring v. Thebaud, 56 Fed. 520, 5 C. C. A. 640; The Maumee (D. C.) 260 Fed. 862; Carver on Carriage by the Sea, §§ 21, 144; S. S. Wellesley Co. v. Hooper, 185 Fed. 733, 108 C. C. A. 71; Gilchrist Transportation Co. v. Boston Insurance Co., 223 Fed. 716, 139 C. C. A. 246.

[8] Appellant's point that the notice of readiness to load given by the ship was not sufficient is without substantial merit. It appears that on August 25th direct notice was given of the readiness of the ship, that the ship arrived on August 23d, that thereafter instructions were awaited from the charterers, and that subsequently loading commenced by the delivery of lumber at the ship's tackle on August 28th.

[9] Appellant asks a deduction for a half day on September 11th, because of a breakdown of the donkey engine of the ship. According to the log, no loading was done in the forenoon of Tuesday, the 11th "on account of damaged donkey boiler; 12:30 p. m. began loading again and took in 39,122 feet." The breakdown did not occur during the lay days, but it is quite evident that the reason that there was no loading in the forenoon of that day was because of the damaged donkey boiler, and under the contract we think there should be a deduction of $250 for that half day.

[10] Appellant also contends that there should be a deduction for the failure of the ship to load on September 25th. The evidence is that the ship reached the Defiance mill at 3 p. m. September 24th. On the 25th the stevedore decided that there was not enough lumber on hand to start to load and that it would be better to avoid the expense of bringing his men down from the city and wait until he got at least a half day's work to start in on. Inasmuch as the fault appears to have been on the part of the charterers' stevedores, we do not think the allowance should be made.

[11] As already stated, the ship was fully loaded on October 8th, but did not commence her agreed voyage until October 23d. From the 8th to the 17th, repairs necessary to prepare the ship for the voyage, as we have shown, were the cause of detention, but for those 8 days no claim is made by the appellee. We have also held that appellee should not be allowed demurrage for the 2 days from October 17th to 19th. Nor should the appellee be allowed for detention of the ship from the 19th to the 23d (3 days); the detention seems to have been unnecessary. The demurrage controversy was for the time being disposed of on the 19th by the filing of a libel and the furnishing of a release bond; for detention after that date the master cannot claim.

Our conclusion is that the decree of the District Court should be modified, so as to allow in favor of appellant, not only the deductions made by the District Court, but in addition thereto $1,000, or $500 per day for the 2 days from October 17th to 19th, and also $500 per day for the 3 days from October 19th to 23d, and $250 for the half day as heretofore indicated. This would reduce the amount allowed to libelant to the sum of $9,250, which sum should bear interest from October 8, 1917, and costs should be taxed as per stipulation on file, dated November 22, 1919.

As so modified, the decree will be affirmed.

On Rehearing.

PER CURIAM. After careful consideration of the several matters concerning which the court desired a rehearing, we think that, except as hereinafter noticed, the opinion filed sufficiently covers the points urged by the appellees. In contending that they should be allowed 6 days' demurrage in the loading of the vessel's hold, appellants revert to the question of the initial obligation of the charterer, and to where the fault was for a delay of 6 days in loading the hold.

[12] But, as already decided, our construction of the charter party is that the charterer was obligated to furnish a full cargo of sawn lumber or timber, and we believe the charterers could select the sizes and dimensions of the lumber subject to limitations made with relation to the hatchways of the ship. The stowage was to be under the master's supervision subject also to limitations as to sizes of rough lumber. We cannot find that there was all the uncertainty as to the vessel's carrying capacity which counsel urge existed, for the evidence is that it was understood that a full cargo was wanted and that such a cargo would not be less than 1,500,000 feet. This estimate was evidently understood by the agent of Grace & Co. who evidently knew that in the estimate a deck load was included.

[13] It is but reiteration to say that when the parties agreed that the charterer should be allowed for the loading of the cargo "150 M per working day," provision was made for fixing the definite number of lay days, but there was no creation of obligation that 150,000 feet of lumber must be loaded each and every day. As bearing upon the customary method of fixing lay-day periods in charters for lumber we cite: Bailey v. Manufacturers' Lbr. Co. (D. C.) 224 Fed. 806; Wallace v. Cargo of Pine Boards (D. C.) 224 Fed. 993; The Olaf (D. C.) 248 Fed.

807. Ten days for loading the entire cargo was allowed to the charterer, and we adhere to the opinion that the charterer did not furnish the full cargo or load it within the 10 days.

[14] Appellants say that the court erred in finding that the charterer's stevedores loaded the cargo. Our statement to that effect was warranted, we think, by testimony of witness Anderson, the foreman and representative of the Puget Sound Stevedore Company, who negotiated with the captain and owner of the ship concerning the stevedore contract, and from whose testimony we quote:

"Q. Now, who gave you your orders as to what lumber to take aboard and where to stow it? A. I got my orders from Grace's representatives. Q. Did they give you orders in what order to take it aboard? A. They would show me lumber, where it was. Q. But, I mean, from whom did you get your orders as to the order of stowage? A. Well, that was part of the contract for me to stow the ship. Q. And did you take the particular lumber on hand at the St. Paul mill, which you considered proper for stowage in the hold first, did you select that lumber? A. Well, as stevedores, we do have the choice of selecting the lumber, as a rule."

[15] The fact that employment of the stevedores was by the ship was not necessarily in conflict with the provision of the charter party, for the status of the stevedores employed was that they were charterer's stevedores. However, the point does not seem to us to be vital for no matter what view should prevail the obligation of the charterer was to load within the lay days at the rate specified. Bailey v. Mfg. Lbr. Co. (D. C.) 224 Fed. 806.

[16] Inasmuch as we have decided that there should be a deduction from the award to libelant for the 2 days from October 17th to 19th, there should be an addition of the allowance for the 2 days to the claim of the appellant under its cross-libel; and we think appellant is entitled to demurrage for 4 days, namely, October 19th, 20th, 21st, and 22d, and not 3 as was directed in the decision filed.

The decision filed will therefore be modified to conform to these allowances, and, as so modified, will stand reaffirmed. Costs to be taxed as per stipulation on file.

KIERNAN v. LAKE CHAMPLAIN TRANSP. CO. (two cases). FORSYTH v. SAME (two cases). COSTELLO v. SAME.

(Circuit Court of Appeals, Second Circuit. May 11, 1921.)

Nos. 217–221.

1. **Towage ⟸15(2)—Where proper care would ordinarily prevent injury to tow, tug has burden of proof.**
   If, without fault on the part of the tow, a misfortune occurs under circumstances in which, if proper care is exercised in performing a similar service, such misfortune does not ordinarily occur, it is sufficient to impose on the tug the burden of proving that due care was exercised.

2. **Towage ⟸11(7)—Tug liable for tow striking bridge piers.**
   A tug which undertook to pass through a bridge draw at night, when there was a variable and gusty wind, with a tow of 18 boats, 900 to 1,000

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

feet long, and the last half of the tow light, *held* liable for injury to some of the rear boats by striking the bridge piers.

3. **Towage ⇐11(7)—Tug liable for tow striking pier.**

A tug with a long tow of boats, many of them light, which in passing through a channel 700 feet wide between breakwater and piers, in squally weather, kept close to the ends of the piers for its own convenience, *held* liable for injury to one of the boats by striking a pier.

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

Suits in admiralty by John Kiernan against the Lake Champlain Transportation Company. From the decree, both parties appeal. Affirmed.

Suits by Ellen A. Forsyth, by John Forsyth, and by Thomas Costello against the same respondent, in which libelants appeal. Affirmed in part, and reversed in part.

All the libelants are owners of boats of the kind used in navigating the canalized waters of the upper Hudson, Lake Champlain, and the Richelieu river; all complain of injuries received while in tow of tugs owned by the respondent; and all the injured boats were of the usual canal boat size—i. e., about 17½ feet beam and 96 to 98 feet long.

The matters to be considered may conveniently be described as accidents occurring at (1) Ticonderoga; (2) Burlington; (3) Mechanicville; (4) La Colle. In respect of the Ticonderoga, Burlington, and La Colle accidents, the lower court dismissed the libels, and gave to libelants half damages for injuries received at Mechanicville, whereupon libelants appealed.

Foley & Martin, of New York City (James A. Martin and George V. A. McCloskey, both of New York City, of counsel), for libelants.

O. A. Dennis, of Whitehall, for respondent.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). The claim arising at Ticonderoga is as follows: The boats Burchard, Baudet, and Kitty Forsyth were in midsummer weather taken in tow by respondent's tug at Whitehall, N. Y., bound for St. Johns, Canada. The channel for most of the distance from Whitehall to Ticonderoga is narrow and tortuous, but on reaching Montcalm, something less than two miles from Ticonderoga Bridge, the channel of 12 feet or upward is 800 yards wide, and at this point there is a landing. The Ticonderoga railroad bridge has a draw with an opening of 300 feet, and through this the tow containing the boats enumerated was required to pass shortly before midnight.

This tow contained 18 boats in 9 tiers; 7 were loaded and 11 light; the latter were astern. The Burchard, Baudet, and Kitty Forsyth were the starboard boats in the last three tiers. There is evidence that on nearing Montcalm the weather was such that the tug master considered the propriety of stopping at that landing. The wind had been blowing hard from the west, but somewhat to the southward of Montcalm the wind changed to the eastward of south, and then blew against the starboard side of the tow as it approached Ticonderoga draw. He therefore concluded to go ahead. After the tug got into

the draw it is said that the wind suddenly shifted to the westward and blew with such force as to drive the three boats enumerated against the spring piles or their timbering marking the east side of the draw.

The length of this tow from the stern of the tug to that of the aftermost boat was at least 900 and probably more than 1,000 feet. It is well known that light boats respond to the action of the wind far more quickly than do loaded ones; therefore the tail of this tow was peculiarly liable to be driven by sudden gusts, which, according to all the testimony, are to be expected in such a region as the lower end of Lake Champlain, consisting of narrow waters hemmed in by high hills intersected by narrow valleys, through which the wind blows as through a funnel.

There was no helper tug, and such tugs are not said to be customary on Lake Champlain. Indeed, there were but two tugs on the whole lake during the season when this accident occurred. But it was perfectly possible to divide the tow and take it through in parts, if danger was to be anticipated. The evidence, however, makes plain the fact that the tug master expected that the wind would hold from the southeast, or thereabouts, long enough for him to get through the draw; wherefore he deliberately took a tow less than 40 feet wide through a 300-foot draw close to the eastern side. Consequently, when a gust of wind accompanied by heavy rain struck the tow from the westward, this accident happened.

[1] We cannot agree with the lower court that such navigation exhibits that degree of care which those in tow are entitled to receive from their tug. As we said in The Mason, 142 Fed. 913, 74 C. C. A. 83, if without fault on the part of the tow a misfortune occurs under circumstances in which, if proper care is exercised in performing a similar service, such misfortune does not ordinarily occur, it suffices to impose upon the tug the burden of proving that due care was exercised.

[2] This burden has not been borne, for, laying aside the use of helper tugs, it was known that the change of wind that did occur was probable, and it was certain that when it occurred the tow would be on the east side of the draw and would be thrown against the spring piling. Libelants are entitled to recover in respect of the damage at the Ticonderoga bridge.

[3] Upon the same voyage that we have been considering the same tug and tow arrived at Burlington, Vt., where it intended to pick up and add to the tow some other boats. The tug, therefore, passed through Burlington harbor, an artificial refuge formed by a breakwater some 700 or 800 feet from the Vermont shore.

We find that, for the purpose of conveniently picking up these boats, the tug passed close to the pier line, and while so doing a westerly squall struck the tow and swept the Baudet against a pierhead, doing further damage. We think the evidence clear that the weather on entering Burlington harbor was and had been such as to render squalls of exactly the kind causing this injury likely to arise, and can therefore see no excuse for scraping along the Burlington piers for the tug's

own convenience, instead of choosing the middle of what is practically a passage at least 700 feet wide, for the intention was to enter from the south end of the harbor and pass out to the north.

For these reasons we cannot agree with the disposition of the lower court of this claim, and hold the Baudet entitled to recover for the Burlington damage.

The Mechanicville episode is as follows: The boat Burchard had just passed through a lock of the Champlain Barge Canal at or near Mechanicville. She was in tow of respondent's steam tug, and was to pass through or under the westerly span of the railroad bridge below the lock. Substantially in line with the lock is the dam of the Hudson river, over which water was flowing, and on the bank of the river are mills discharging the spent water from their wheels into the river. Consequently the surface of the river is troubled with cross-currents, and it is peculiarly necessary for navigators to pay attention to their steering.

The lower court found that in this rather troublesome situation the the barge master did not attempt to steer, and the tug permitted her line to fall slack. Therefore he awarded but half damages, and we are not disposed to disturb this result.

The La Colle injury is this: The boat Gold Dust on a warm July afternoon was the port boat in the tenth tier of a tow of 32 boats, made up in 16 tiers, all bound north down the Richelieu river in tow of one of respondent's tugs. The Gold Dust struck the center pier of the railroad bridge at La Colle when passing through a draw 90 feet wide. The cause of injury, as alleged by respondent, was a sudden gust of wind accompanied by rain.

We think the evidence discloses that there was something of a wind, and it was sudden, but do not believe that it amounted to a storm, or was sufficient to injure a boat in good condition. The evidence satisfies us that the Gold Dust on some previous occasion had her side stove in, that it had been insufficiently, and indeed improperly, repaired, and she hit, or rather rubbed, against the abutment of the bridge in a manner which should not have injured any boat in good condition. The more the wind is minimized (and libelant's witnesses almost cause it to vanish), the more obvious is this explanation of injury. For these reasons we agree, in respect of the La Colle damage, with the result reached below.

As these cases were substantially tried, appealed, and argued before us together, the results are such that there will be no costs in this court, other than the disbursements attendant upon preparing and printing the record in respect of the Ticonderoga and Burlington injuries. These disbursements libelants will recover. The causes are severally remanded, with directions to proceed in accordance with the views hereinabove expressed.

WARNER-QUINLAN CO. v. UNITED STATES.

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

No. 2655.

1. Navigable waters ⇐14(3)—**Proof supervisor had prescribed limits within which dumping of refuse was prohibited is essential.**
It is essential to conviction under Act June 29, 1888, c. 496, § 1 (Comp. St. § 9933), for discharging refuse in the harbor of New York or its adjacent or tributary waters, within limits which shall be prescribed by the supervisor of the harbor, that the evidence establish that the supervisor had prescribed such limits.

2. Navigable waters ⇐14(3)—**Purpose of statute against dumping in harbor is to prohibit obstruction and injury.**
The purpose of Act June 29, 1888, c. 496, § 1 (Comp. St. § 9933), prohibiting the discharge of refuse, ashes, mud, dredgings, acid, or any other matter in the harbor of New York or its adjacent or tributary waters, was to prevent the discharge therein of any matter which would tend to obstruct navigation or would injure boats in the harbor.

3. Navigable waters ⇐14(3)—**Only matter of kind similar to enumerated articles is within prohibition against dumping.**
Act June 29, 1888, c. 496, § 1 (Comp. St. § 9933), prohibiting the dumping of numerous specified articles, or any other matter of any kind in the harbor of New York, applies, under the maxim of ejusdem generis, only to matter of the same general class as the articles mentioned, and since the mentioned articles are those which obstruct navigation or injure vessels, only articles having the same effect are within the prohibition.

4. Navigable waters ⇐14(3)—**Evidence held to show matter dumped into harbor was "sludge," which obstructed and injured navigation.**
Evidence that the operator of an asphalt plant was discharging into Arthur Kill and into the harbor of New York matter described by the witnesses as fuel matter, sludge, oil, and tar, which sometimes became solid and settled as a sediment, *held* to show that defendant was discharging into the harbor sludge, contrary to Act June 29, 1888, c. 496, § 1 (Comp. St. § 9933), since "sludge" is defined as refuse from the refining of petroleum; muddy or pasty refuse of various kinds; sediment.

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

The Warner-Quinlan Company was convicted of discharging refuse into New York Harbor, and it brings error. Affirmed.

Frederick M. P. Pearse, of Newark, N. J., for plaintiff in error.

John Ridley, of Jersey City, N. J., for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

DAVIS, Circuit Judge. The Warner-Quinlan Company, a corporation of New Jersey, was indicted under the Act of Congress of June 29, 1888, c. 496, § 1, 25 Stat. 209 (section 9933, United States Compiled Statutes), which provides that:

"The placing, discharging, or depositing, by any process or in any manner, of refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid or any other matter of any kind, other than that flowing from streets, sewers, and passing therefrom in a liquid state, in the tidal waters of the harbor of New York, or its adjacent or tributary waters, or in those of Long Island Sound, within

the limits which shall be prescribed by the supervisor of the harbor, is hereby strictly forbidden, and every such act is made a misdemeanor," etc.

The indictment charges:

"That on or about the 24th day of August, 1920, and some time prior thereto and up to the present time, the Warner-Quinlan Company did discharge a large quantity of tar and asphalt in the tidal waters of the harbor of New York and its adjacent tributary waters, * * * as prescribed by the supervisor of the harbor."

The defendant company is engaged in operating a large asphalt plant at Tremley Point, in Union county, N. J., from which, the evidence tends to show, certain matter was discharged into the water of the harbor of New York adjacent to the plant of the defendant company through a ditch and a pipe running from the plant. There was evidence also tending to show that oil seeped through the marsh on which the plant was located, and that oil reached the waters of the harbor because of a defective oil separator tank.

In order to sustain the conviction, it is necessary that the evidence show, first, that the supervisor, in pursuance of the statute, had prescribed limits in the tidal waters of the harbor of. New York or its adjacent or tributary waters; and, second, that the defendant had, at or within the time or times specified in the indictment, placed, discharged, or deposited by some process or in some manner some of the forbidden matter within those prescribed limits.

[1] The defendant contended that it had not been sufficiently established by the evidence that the supervisor had prescribed the limits in the tidal waters of the harbor of New York, or those adjacent or tributary thereto, into which the statute forbade that any of the matter mentioned should be placed, discharged, or deposited by any process or in any manner. It is necessary that the supervisor prescribe the limits, for any and all of the matter mentioned may enter any of the waters, except within the limits thus prescribed. These limits should plainly appear, so that any person proposing to deposit any prohibited material at any particular place might know whether such deposit is forbidden and criminal. United States v. The Sadie (D. C.) 41 Fed. 823. But the defendant, well knowing the facts and that they could easily be established on a retrial, if need be, expressed a desire to have the case considered on its merits, and commendably withdrew that contention, as well as the assignment of error based upon amendment to the indictment at the trial.

[2] The second and only other question is whether or not the matter which came from the defendant's plant and entered the waters of the harbor are among those forbidden to be placed therein. The defendant properly contends that the purpose of the statute is to prevent discharging or depositing matter into the harbor which will obstruct or injure it. The intention of Congress in passing the act is clearly expressed in the title, which is:

"An act to prevent obstructive and injurious deposits within the harbor and adjacent waters of New York City," etc.

Deposits which do not obstruct or injuriously affect the harbor are not prohibited by the act. The G. L. Garlic (D. C.) 45 Fed. 380. It being admitted that the place where the matter entered the water of the harbor was a place where matter obstructive or injurious to the harbor could not be placed, discharged, or deposited under the act, the only question is whether or not the matter entering the waters of the harbor from the defendant's plant, through the ditch, pipe, or "by any process or in any manner," was obstructive or injurious to the harbor.

[3] The statute enumerates the specific materials which, in the opinion of Congress, would ordinarily be deposited into the waters and would obstruct and injure the harbor, but made sure that it should not be obstructed or injured because of the failure to mention all the materials that might possibly be placed or deposited in the prescribed limits, and so Congress added the words, "or any other matter of any kind." This means, applying the maxim of ejusdem generis, matter of the same general class as before mentioned. The materials mentioned, except acid, are mostly solids, and the injury which they would do the harbor would be to obstruct it. While obstruction is the principal injury Congress had in mind, it was not the only one; for "acid" would not obstruct, but would corrode and be detrimental to boats, wharves, etc., and would thus be injurious to the harbor as such. Owners and captains of boats would not care to enter harbors whose waters contained acids which were injurious to boats.

[4] There came from the plant of the defendant a material described by the witnesses as "fuel matter," "sludge," "black oil," and "oil and tar." Edwin H. Kinner said:

"On the northwest side of the plant there was a stream of this fuel matter coming through a ditch and into the Kills."

The matter came from the defendant's plant, into the waters of the Arthur Kill, and into the waters of the harbor of New York. John T. O'Mara said: "I found oil flowing through this creek, to the Kills, continually." He further said, in describing matter that came from defendant's plant: "Sometimes it gets solid. It is 2 inches thick on the dock." "Sludge" is specifically mentioned in the act, and is defined by the Standard Dictionary as:

"Refuse, acid, or alkali from the refining of petroleum; muddy or pasty refuse of various kinds; slime of ores; the plate covering an opening in a boiler for removal of sediment; also, the sediment."

This matter which came from the defendant's plant sometimes became solid and settled as a sediment. If it continued to be discharged or placed in the waters of the harbor without restriction, it would in time obstruct and injure the harbor. Masters of boats would naturally and ordinarily object to entering waters covered with oil and tar. These would surely prove injurious to the harbor, if not actually obstructive. We think the evidence establishes that the matter coming from the defendant's plant would be both obstructive and injurious to the harbor, and included in that general class of matter forbidden

to be placed, discharged, or deposited by any process or in any manner in the tidal waters of the harbor of New York.

The judgment of the District Court will therefore be affirmed.

GOULED v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. April 20, 1921.)

No. 142.

1. **Criminal law ⟸1134(10)—Ruling on motion in arrest of judgment is not reviewable.**
   The ruling on a motion in arrest of judgment, even if exception is taken thereto, is not reviewable on writ of error, any more than the ruling on the motion for new trial.
2. **Criminal law ⟸1090(5)—Defect in indictment not cured by verdict can be reviewed without bill of exceptions.**
   Where the assigned defect in the indictment is not one which could be cured by the verdict, it can be reviewed on writ of error on the judgment roll, without bill of exceptions.
3. **Post office ⟸35—Use of mail to advance scheme to defraud United States is punishable.**
   The use of the mails for the purpose of executing a scheme or artifice to defraud the United States is punishable, under Criminal Code, § 215 (Comp. St. § 10385).
4. **Conspiracy ⟸43(10)—Indictment held to allege conspiracy, and not merely procuring an acceptance of bribe.**
   An indictment charging that one of the defendants agreed with another, who was an officer authorized to make contracts on behalf of the United States, to procure funds from manufacturers desiring to sell to the United States, and to divide with the defendant officer and other officers, who made contracts with the contributing manufacturers, alleges a true agreement or conspiracy to defraud the United States, within Criminal Code, § 37 (Comp. St. § 10201), and not merely an acceptance by the officer of bribes procured by the other defendant.
5. **Conspiracy ⟸33—Need not contemplate any pecuniary loss to the United States.**
   It is not essential to a conspiracy to defraud the United States that the agreement alleged contemplated any pecuniary loss on the part of the government.

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

Felix Gouled was convicted of using the mails to defraud and of a conspiracy to defraud the United States, and he brings error. Reversed, and new trial order, in conformity to answers of Supreme Court to certified questions, which can be found in 255 U. S. ——, 41 Sup. Ct. 261, 65 L. Ed. ——.

See, also, 253 Fed. 239, 242, 770; 264 Fed. 839.

Martin W. Littleton and John D. Lindsay, both of New York City, for plaintiff in error.

Francis G. Caffey, U. S. Atty., of New York City, and Joseph A. Berdeau, Sp. Asst. U. S. Atty., of Brooklyn, N. Y.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge. This writ having come on for argument, we certified to the Supreme Court six questions suggested by the record. They have been specifically answered by the opinion of that court filed February 28, 1921 (255 U. S. —, 41 Sup. Ct. 261, 65 L. Ed. —), and the points suggested are also covered in the opinion in Amos v. United States (255 U. S. —, 41 Sup. Ct. 266, 65 L. Ed. —), filed the same day. The facts are so fully set forth in the higher court's opinion that they need not be here repeated, and obviously the answers by the Supreme Court require reversal and a new trial.

Other matters, however, have been urged at bar unrelated to the certified questions. The only one now requiring comment is an attack upon the sufficiency of the indictment.

[1] The brief raises the point on exception to the court's refusal to grant motion in arrest of judgment. Generally speaking such practice is erroneous, for, even when a bill of exceptions is settled in respect of such refusal, the motion is of no more effect than motion for a new trial, and neither can be reviewed here. Street Railroad v. Hart, 114 U. S. 654, 661, 5 Sup. Ct. 1127, 29 L. Ed. 226; Andrews v. United States, 224 Fed. 418, 139 C. C. A. 646.

[2] But where the indictment defect assigned is one not to be cured by verdict, no bill of exceptions is required; we can and must consider the point on the judgment roll.

The facts charged in the indictment are that one Vaughan was in 1918 a captain in the Quartermaster's Department of the United States army, and that as such official it was his duty to receive and consider bids for the manufacture of clothing and equipment for the army and to award contracts for the manufacture thereof. Thereupon Gouled and Vaughan (and others unknown to the grand jurors) formed the plan of letting Gouled represent to certain named persons and corporations, collectively called "manufacturers," that he (Gouled) could through influence procure government contracts for such of the manufacturers as chose to pay him a fee or commission based upon the amount or value of the contract so obtained and awarded. The moneys thus to be realized by Gouled were to be delivered to Vaughan and divided—

"among divers officers of the United States * * * with the intent to influence the decision and action of [Vaughan] and each of said divers officers on questions * * * before [Vaughan] or them in his or their official capacity, viz. the consideration and acceptance of bids and the letting and award of contracts for the manufacturers of garments for the United States army."

Gouled was tried on two counts. In the first the allegations above summarized are substantially said to be a "scheme and artifice to defraud" the United States, and it is charged that for the purpose of executing said scheme, etc., Gouled placed a certain letter in the post office establishment; wherefore the count rests on Criminal Code, § 215 (Comp. St. § 10385). In the second count the fact allegations above summarized are alleged as a conspiracy on the part of Vaughan and Gouled and others "to defraud the United States." Overt acts

are duly alleged, and this count rested on Criminal Code, § 37 (Comp. St. § 10201).

[3] As to the count under section 215, it seems enough to point out that the language of the statutes is that whoever devises "any scheme or artifice to defraud," and "for the purpose of executing such scheme or artifice, or attempting so to do," uses the United States mail in the manner specified, is guilty. It is no longer necessary to go over the history of this act, or to point out how it has grown from the original (so-called) "green-goods statute" to its present form. This has been often done (e. g., Scheinberg v. United States, 213 Fed. 757, 130 C. C. A. 271, Ann. Cas. 1914D, 1258). As it now stands, any kind or species of scheme or artifice to defraud is punishable in the national courts, if and whenever for the purpose of executing that scheme the postal establishment is used in the statutory manner and form. Under such a statute no reason can exist why a scheme or artifice to defraud the United States (such as this plainly was) should not be punishable thereunder when—and perhaps especially when—the United States mail is used in the prosecution of a scheme to defraud the United States. As for authority the count may rest upon United States v. Aczel (D. C.) 219 Fed. 917, which we do not think is overruled or affected by United States v. Bathgate, 246 U. S. 220, 38 Sup. Ct. 269, 62 L. Ed. 676, or United States v. Gradwell, 243 U. S. 476, 37 Sup. Ct. 407, 61 L. Ed. 857.

[4] In respect of the count resting on section 37, the objections made are thus summarized: If everything in the count be taken as true, nothing more is alleged than that Vaughan accepted bribes, while Gouled procured them for him. This is not an accurate summary of the count; it alleges a true agreement, plan, or conspiracy to bring about a course of business by which Gouled was to milk the manufacturers for a corruption fund, of which the distribution reached far beyond Gouled and Vaughan. Nothing could more truly describe (in the language of section 37) an agreement to defraud the United States.

[5] It is perfectly settled that such agreement to defraud need not contemplate any pecuniary loss on the part of the government of which Hamburg, etc., Co. v. United States, 250 Fed. 747, 764, 163 C. C. A. 79, is an extreme example. This count in the indictment is well justified by Crawford v. United States, 212 U. S. 183, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392.

For these reasons, we perceive no legal objection to a retrial under the same counts.

Judgment reversed, and new trial ordered.

WALLIS, Immigration Com'r, v. UNITED STATES ex rel. MANNARA et al.

(Circuit Court of Appeals, Second Circuit. May 11, 1921.)

No. 207.

1. **Aliens ⟸49—Court cannot relieve immigrant from deportation on giving bond against becoming a public charge.**
   A court is without authority to discharge an immigrant, refused admission and held for deportation on the ground that he is likely to become a public charge, on his furnishing a bond conditioned that he will not become such charge.
2. **Aliens ⟸54—Order of deportation not reviewable if supported by any evidence.**
   A court in a habeas corpus proceeding can review the decision of immigration officers, made after a fair hearing, excluding an immigrant on the ground that because of his physical and financial condition he is likely to become a public charge, only for lack of any evidence to support it.
3. **Aliens ⟸49—"Person likely to become public charge" defined.**
   A "person likely to become a public charge" is one whom it may be necessary to support at public expense by reason of poverty, insanity and poverty, disease and poverty, or idiocy and poverty.

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

Habeas corpus by Salvatore Mannara and Rosaria Mannara against Frederick A. Wallis, Commissioner of Immigration. From a decree granting the writ, defendant appeals. Reversed.

Francis G. Caffey, U. S. Atty., of New York City (Keith Lorenz, Asst. U. S. Atty., of New York City, of counsel), for appellant.

Myron Krieger, of New York City, for appellees.

Before ROGERS, HOUGH and MANTON, Circuit Judges.

MANTON, Circuit Judge. The appellees sued out a writ of habeas corpus, asking a review of an order of deportation made by the Commissioner of Immigration and subsequently approved on appeal by the Secretary of Labor. Both appellees, subjects of the kingdom of Italy, arrived in the United States on the steamship Madonna on September 7, 1920. Salvatore Mannara was 54 years of age and Rosaria Mannara was his daughter. They were accompanied by a son and brother, Antonio. While at Ellis Island, Salvatore and Rosaria were examined by the medical examiner and were found physically defective. The medical certificate in the case of Salvatore specifically specified senility, which may affect ability to earn a living, and in the case of Rosaria, grave valvular disease, chronic and cardiac, which may affect ability to earn a living.

On September 8, 1920, Salvatore was given a hearing and testified that, in addition to the son and daughter accompanying him, he had a wife and three children in Italy; that he and his son were laborers, and his daughter was a dressmaker. He stated he had $100 and was coming to his two brothers. Both brothers testified to the same effect, and said they were fully able to support Salvatore and his two children, and declared their intention so to do. The Board of Special Inquiry

excluded Salvatore and his two children, and advised them of their right to appeal from its decision to the Secretary of Labor in Washington for a review of the case. Their finding is found in the following language:

"It is the unanimous opinion of the Board that the aliens are likely to become a public charge, for the following, among other, reasons: They arrive here with a small amount of money, insufficient to provide for their necessary wants any reasonable length of time; they have no one in the United States who could be held legally liable for their maintenance; the father is 54 years of age, certified for senility, and would not be capable of continued self-support; we further find that the certified condition of the father and daughter is of such a nature as will affect their ability to earn a living."

The order of deportation was approved by the Acting Secretary of Labor "after carefully considering the evidence presented in the record," and deportation was directed.

[1, 2] The order below directed the discharge. The decision on the writ provided:

"Relators released upon giving a bond for $1,000 for each relator; condition, none will become a public charge."

We know of no provision of law which warrants a release upon bond. If the appellees were entitled to enter the country, and therefore to their discharge, they were entitled to enter free from the condition of a bond. Immigration Act 1917, § 3, provides (39 Stat. 874 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼b]):

"Sec. 3. That the following classes of aliens shall be excluded from admission into the United States: * * * Persons not comprehended within any of the foregoing excluded classes who are found to be and are certified by the examining surgeon as being mentally or physically defective, such physical defect being of a nature which may affect the ability of such alien to earn a living * * * persons likely to become a public charge * * *"

There is a finding by the Board of Special Inquiry, which is approved by the Department of Labor, certifying to a physical condition of both of the relators, which may affect their ability to earn a livelihood. There is evidence to support this finding that the relators were likely to become public charges. The court's jurisdiction, when the remedy of a writ of habeas corpus is invoked in immigration cases, is to inquire whether the ground of exclusion given by the administrative authorities is without any evidence to support it. Unless there is no evidence at all proving or tending to prove that an alien is within one of the excluded classes, the decision of the immigration authorities is conclusive upon the court, even though the evidence to the contrary be very strong. In Low Wah Suey v. Backus, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165, the court said:

"A series of decisions in this court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings, it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation, or that there was a manifest abuse of the discretion committed to them by the statute. In other cases, the order of the executive officers within the authority of the statute is final."

[3] A person likely to become a public charge is one whom it may be necessary to support at public expense by reason of poverty, insanity and poverty, disease and poverty, idiocy and poverty. Ex parte Mitchell (D. C.) 256 Fed. 229. We think that the finding by the administrative authorities, showing a physical defect of a nature that may affect the ability of the relator and appellee to earn a living, is sufficient ground for exclusion. His physical condition, together with his financial condition, having but $100 with him, justified the conclusion of the administrative authorities in finding that he and his children were aliens likely to become public charges. Howe v. United States, 247 Fed. 292, 159 C. C. A. 386.

The order sustaining the writ is reversed, with directions to dismiss the writ, and that the appellees be remanded to the custody of the appellant, to be deported to the country from whence they came in conformity with the law.

CARR v. NORTHERN PAC. RY. CO.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1921.)

No. 3587.

Master and servant ⊂=92(1)—Employés' association, conducting hospitals, held not employer's agent, so as to charge employer with negligence.

Where employés of a railway company formed a beneficial association, which built and equipped hospitals, the administration of which was in the hands of persons elected by the employés, a small percentage of each employé's salary being collected by the railway company and turned over to the association, the association was not the railway company's agent in treating members, and the company was not liable for negligence in such treatment, though it contributed $50,000 a year towards the success of the hospitals, and its treasurer and comptroller were required to be the treasurer and comptroller of the association, and persons not members, injured on the road, were sometimes treated at the hospitals at the company's expense.

In Error to the District Court of the United States for the Southern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Action by James E. Carr against the Northern Pacific Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Chas. W. Johnson, of Pasco, Wash., for plaintiff in error.

E. J. Cannon and Francis J. McKevitt, both of Spokane, Wash., for defendant in error.

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

HUNT, Circuit Judge. Carr, a conductor for the Northern Pacific Railway Company, brought action against the Railway Company to recover for personal injuries alleged to have been suffered by reason of an operation for appendicitis performed by the chief surgeon of the

Tacoma Hospital of the Northern Pacific Beneficial Association. When he became sick, Carr went voluntarily to the hospital of the Northern Pacific Beneficial Association. The result of the operation was unsatisfactory, and he charged that the surgeon who operated was negligent, and that the attendants furnished by the defendant were negligent in not doing certain things which they should have done.

The defendant denied negligence, and pleaded that the employés of the Railway Company organized themselves together for mutual benefit and advantage, in an association called the Northern Pacific Beneficial Association, and that the association conducted hospitals in states through which the Northern Pacific Railway operated, and employed physicians and nurses and hospital attendants; that to obtain funds with which to operate the hospitals, and pay the doctors and employés, it was agreed between the railway employés and the Northern Pacific Railway Company that a certain sum of money should be deducted each month from the salary of each employé, to be turned over by the Railway Company to the Northern Pacific Beneficial Association. Defendant denied that it had ever maintained hospitals, or employed physicians or surgeons, or made any profit out of the hospitals. At the close of all the evidence, on motion of the Railway Company, the court directed a verdict for the defendant. This action is assigned as error.

The evidence was: That many years ago the employés of the Northern Pacific Railway Company formed the association referred to, and that each employé, when he entered the service of the company, agreed to become a member of the association, and that a small percentage of his salary should be collected each month by the Railway Company to be turned over to the association; that the funds deducted from the salaries were turned over to the association, which built and equipped hospitals; that surgeons were employed by the association, and the surgeons appointed the nurses and internes. The Railway Company had no part in the ownership of the hospitals, and the administration of the institutions was in the hands of persons elected by the employés, each branch of employés having a representative. The persons so elected constitute a board, and the board selected the officers of the association. The Railway Company keeps none of the money collected, makes no charge for collection, and contributes $50,000 per annum toward the success of the hospitals.

We are of opinion that the District Court was right in ruling that no liability could attach to the Railway Company. The employés furnish the money with which the hospitals are carried on, and through officers selected by the employés the association controls its hospitals. It is what its name implies—a mutual beneficial association organized and conducted for the benefit of the members, who are employés of the Railway Company, and, though recognized and aided by the Railway Company, the company is not responsible for the selection of the officers of the association, does not control its management, makes no profit out of it, and does not administer its affairs. It is true that under the membership rules the treasurer and comptroller of the Railway Company shall be the treasurer and comptroller, respectively, of the

association; but it is expressly provided that such officers shall deposit, hold, and distribute funds, and audit accounts, under the direction of the board of managers of the association. The association cannot be said to be the Railway Company, nor even the agent of the company in furnishing medical treatment to the members.

It is urged that in some instances persons not members are taken to the hospitals, and by agents of the company are treated. Taking this to be true, we do not think it affects the case under consideration, especially as it is in evidence that if one is injured on the road, and it happens that he is taken to the association hospital, the association renders its bill to the Railway Company, and that company pays it.

In general accord with our view that the doctrine of respondeat superior is not applicable are the cases of Union Pac. R. Co. v. Artist, 60 Fed. 365, 9 C. C. A. 14, 23 L. R. A. 581, and Powers v. Mass. Homeopathic Hospital, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372.

The judgment is affirmed.

THE HOWELL.

(Circuit Court of Appeals, Second Circuit. April 6, 1921.)

No. 133.

1. **Shipping ⊂=84(1)—Injured stevedore cannot recover on rights of seaman.**
A stevedore, not being a member of the crew, cannot recover for personal injuries on the basis of a seaman's rights or contract, but must recover, if at all, on principles of negligence.

2. **Shipping ⊂=86(2)—Stevedore held entitled to recover for master's negligence in fastening shackle to fall.**
On libel for injuries to a stevedore, resulting from the fall of a shackle bolt, evidence *held* to show that the accident was caused by the master's negligence in failing to fasten the nut on the bolt sufficiently tight when he attached the shackle to the fall of the ship's tackle.

3. **Master and servant ⊂=200—Stevedore not fellow servant of captain.**
The stevedore, who was not a member of the crew of a lighter, but was employed to unload her and paid by the hour, is not a fellow servant of the captain, and can recover for injuries caused by the captain's negligence.

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

Libel by Michael McCole against the lighter Howell, of which the Chelsea Lighterage Company was claimant. From a decree dismissing the libel (257 Fed. 578), the libelant appeals. Reversed and remanded, with directions to enter a decree for libelant.

See, also, McCole v. Chelsea Lighterage Co. (C. C. A.) 262 Fed. 1018.

Libelant was one of a gang of longshoremen unloading cargo from the lighter in the harbor of New York. He is a resident of New York; was not a member of the crew but employed at hourly wages, apparently by the master of the

lighter. This action in rem was brought to recover for personal injuries received by libelant while on the lighter's deck under circumstances set forth in the opinion.

The court below (257 Fed. 578) held that McCole's only remedy was that provided by the Workmen's Compensation Law of New York, and therefore dismissed the libel. This court certified the question to the Supreme Court, but before the case was reached on the calendar the question certified was answered by Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 Sup. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145 (U. S. S. C., May 17, 1920), whereupon the matter was returned to this court and is now to be decided on the merits.

Robert Stewart, of New York City, for appellant.

Walter L. Glenney, of New York City, for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). The only point decided below having been settled by the Knickerbocker Case, supra, appellant is entitled to a reversal, and on this new trial a decision unaffected by the Compensation Law of this state (Consol. Laws, c. 67).

McCole and his mates were unloading cargo with the usual boom, fall, and engine-driven winch. The lighter captain fastened to a link at or near the end of the fall a shackle, and of course, in order to do this, took the pin out of the shackle, reinserted it, and testifies that he set the nut on the pin as tight as he could with hand strength. He did not do this in order to put any weight on the shackle, but to make weight at the end of the fall, so that it would "overhaul the drum."

The fall thus rigged was used for some time, when the bolt or pin fell out of the shackle when the boom was elevated, and, falling to the deck, hit the libelant on his head, cutting the scalp, and causing the loss of a tooth. He suffered a good deal of pain, but has in our opinion completely recovered.

[1] Libelant not being a member of the crew, no question of seaman's right or contracts arises, under The Osceola, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760. He must recover on principles of negligence.

[2] One of two things is certainly true—either the shackle was defective in respect of pin or nut, or both, or the master failed to tighten the nut on the pin when he fixed the shackle to the fall. If so ordinary a piece of apparatus as a shackle was defective—i. e., so loose in its fastening that it could not be set taut—the vessel is plainly liable; but there is no evidence to show that there was any such defect existing. On the other hand, the shackle remained aloft, the pin was seen to be in good condition, but the nut was never found.

We infer that the master did not properly and sufficiently tighten the nut before putting the shackle into service. This has raised the fellow servant question, a doctrine which has certainly "come to be applied to a considerable extent in the admiralty." (Per Holmes, J., dissenting, in the Knickerbocker Case, supra. And, for this circuit, see

The Gladestry, 128 Fed. 591, 63 C. C. A. 198, approved in Standard Oil v. Anderson, 212 U. S. 215, 29 Sup. Ct. 252, 53 L. Ed. 480. For a summary of cases with a dissent from the prevailing view, see 18 Harv. L. Rev. 294.)

[3] But this case is unaffected by that question; for, libelant not being a member of the crew, he was plainly not a fellow servant of the captain. It follows that libelant is entitled to recovery, and he is awarded $750, with the costs of this appeal and the costs of the court below.

The decree appealed from is reversed, and the case remanded, with directions to enter a decree in conformity with this opinion.

SCHEY v. GIOVANNA.

(Circuit Court of Appeals, Second Circuit. May 18, 1921.)

No. 232.

Patents ⇐326(2)—Infringement after decree and injunction punishable as contempt.

A change on an infringing device by a defendant after decree and injunction against him *held* merely colorable, and his use or sale of the changed device punishable as a contempt.

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

Suit in equity by Max Schey against George Giovanna. From an order finding him in contempt, defendant appeals. Affirmed.

Giovanna had been sued in ordinary form as an infringer of United States Patent No. 902,724, and final decree had passed against him, pursuant to which injunction issued restraining him, his "servants and agents," from "directly or indirectly making or causing to be made, using or causing to be used, or vending to others to be used, or contributing to the making, using, or vending of any apparatus" covered by the claims of said patent. The contempt found consisted in selling alleged infringing articles and making such sales in the name of a relative bearing the same name as himself.

Henry J. Lucke, of New York City, for appellant.

O. Ellery Edwards, Jr., of New York City, for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge. The patent for infringement of which Giovanna had been condemned covers his own invention, and is 902,724, for an apparatus for broiling meats and the like. He is said to have infringed claims 1, 2, 3, and 6.

The device which ordinarily embodies the patent is called a rotisserie, and Giovanna, before the suit resulting in the injunction aforesaid, had assigned to plaintiff both the patent and the good will of a business which included or consisted in the sale of rotisseries and parts thereof. For the purposes of this case, and without making any holding on the subject, we shall assume that such a defendant stands in no other rela-

tion to such a patent injunction as this, than does any infringing stranger.

We see no reason to depart from the rule laid down in Frank F. Smith, etc., Co. v. Yates, 244 Fed. 793, 157 C. C. A. 241, to the effect that the question of infringement by a device, which has been modified after decree and injunction, will not be tried on a motion to punish for contempt, if the change so made is substantial, but it may be so dealt with where the change is colorable only.

Infringement after final decree and in violation of injunction is just as much infringement as is the same act committed before suit brought; all infringers are tort-feasors, and a plurality of infringers are joint tort-feasors, and are also liable severally. Featherstone v. Ormonde, etc., Co. (C. C.) 53 Fed. 110. The court below has found in substance that appellant merely used the name of his relative as a cover for his own transactions, and we see no reason to disagree with that finding. While, therefore, he would be liable jointly with his relative of the same name, if he knowingly assisted in that relative's infringement, this case does not require any consideration of the question as to how far this particular Giovanna acted as a mere servant, without intent or knowledge of personal wrongdoing.

The substance of the patent invention is the provision in a roasting or broiling device of a plurality of spits, each provided with a sprocket wheel capable of meshing with some form of endless driving device, to the end that all the spits may be simultaneously driven by one actuating power. The novelty and utility of the patented machine arose from the ready and independent detachability of any one spit without disturbing the continued rotation of the others. It is not necessary to quote at length the claims declared valid and infringed by appellant; it suffices to say that all but claim 6 do not specify the "driving means" further than by the use of that phrase. The sixth claim is limited to an endless driving chain meshing with the sprocket wheel on each spit. There was nothing new about this; the inventive thought lies in the ready detachability of any one of a plurality of spits without interfering with the continued rotation of the others.

We are satisfied with the court below that appellant, in selling rotisseries after injunction, has made no change in the patented device, except by the substitution of either a worm or a spur gear device for the chain drive specified in claim 6 and shown in the drawings attached to the specification. Such substitution plainly does not affect claims 1, 2, and 3; and when (in a rotisserie) a spur or worm device is substituted for a chain drive, the attempted evasion is within the narrowest range of mechanical equivalence.

Consequently appellant's evasion is merely colorable, was properly punished in contempt proceedings, and the order appealed from is affirmed, with costs.

WHITE et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 11, 1921.)

No. 206.

Larceny ⊜32(2)—Receiving stolen goods ⊜7(5)—Indictment for larceny of goods in interstate commerce held sufficient, although not alleging ownership.

An indictment under Act Feb. 13, 1913, § 1 (Comp. St. § 8603), for stealing goods which were part of an interstate shipment, and for having goods so stolen in possession, *held* sufficient, where it described the goods, alleged that they were in interstate transit, and gave the name of the consignee and the locality of the offense, though not alleging the ownership of the goods.

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

Criminal prosecution by the United States against Patrick White and William Smith. Judgment of conviction, and defendants bring error. Affirmed.

The indictment was in two counts under the Act of February 13, 1913 (37 Stat. 670 [Comp. St. § 8603]), declaring that whoever shall "steal or unlawfully take, carry away, or conceal * * * from any railroad car, station house * * * [or] depot * * * with intent to convert to his own use any goods or chattels * * * which are a part of or which constitute, an interstate or foreign shipment of freight or express, or shall * * * have in his possession any such goods or chattels, knowing the same to have been stolen," shall be fined or imprisoned or both.

The first count was for stealing, and the second for unlawfully having in possession, certain goods "stolen from a freight car in the New York Central Railroad yards, foot of Ninety-Eighth street and Hudson river, New York, N. Y., while moving in interstate commerce from Penacook, N. H., to New York, N. Y., consigned to E. H. Van Ingen, Twenty-First street and Fifth avenue, New York, N. Y."

Defendants below, having been convicted on both counts, took this writ.

Frederick J. Groehl, of New York City (Elijah N. Zoline, 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.

HOUGH, Circuit Judge (after stating the facts as above). No bill of exceptions having been settled, we have nothing before us but the judgment roll, and the only point urged for reversal is that no count in the indictment states an offense against the United States. The substance of argument is that the act under which this indictment was found "extends the crime of larceny to interstate shipments"; wherefore it is urged that no indictment can be good that does not respond to the common-law tests for a good count in larceny.

One of such tests is said to be that the name of the owner of the stolen goods must be given, if it be not alleged that the true name of

the actual owner or bailee was to the grand jurors unknown. For this proposition some support is thought to be found in Thompson v. United States, 256 Fed. 616, 167 C. C. A. 646, of which case it is enough to note that the indictment there considered was under Criminal Code, § 47 (Comp. St. § 10214), which punishes (inter alia) stealing "property of the United States." It was therefore held that allegation and proof were necessary that that which was stolen did belong to the United States.

The act of Congress on which this indictment is based does much more than extend the crime of larceny to interstate or foreign shipments. If that were all the act attempted, it would be wholly unnecessary; for no one can doubt that the crimes of larceny, robbery, or the like can as well be performed upon goods traveling from one state to another as upon those in their owner's warehouse, or on such owner's person, and such crimes could be and have been punished under state laws.

The essential object of this statute is to create, define, and punish the offense of abstracting or unlawfully having in possession goods while in interstate or foreign transit, and thereby interfering with interstate or foreign commerce. Under such a statute both counts of this indictment are sufficient, in that they describe the goods, specifically allege that they were in interstate transit, and give the name of the consignee and the locality of the offense.

Kasle v. United States, 233 Fed. 878, 147 C. C. A. 552, and Bloch v. United States, 261 Fed. 321, are sufficient authority for the indictment at bar.

Judgment affirmed.

MISSOURI PAC. R. CO. v. REA-PATTERSON MILLING CO.

(Circuit Court of Appeals, Eighth Circuit. May 14, 1921.)

No. 5666.

1. **Carriers ⇐189—Combination of lowest intermediate rates applicable where interstate through rate not published.**
   Where an interstate carrier has not published a through rate, a combination of the lowest intermediate rates applicable to the shipment is to be applied.

2. **Carriers ⇐189—Higher of two intermediate rates taken in computing through rate on interstate shipment.**
   In making up the through rate on such a shipment, where it appears that one of the connecting carriers had published a rate from point A to point B on its line, for shipments originating in A, and a higher rate on commodities moving into point A destined for point B, the higher rate must be taken in making up the combination.

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

Action by the Missouri Pacific Railroad Company against the Rea-Patterson Milling Company. Judgment for defendant, and plaintiff brings error. Reversed.

James M. Chaney, of St. Louis, Mo. (Henry G. Herbel, of St. Louis, Mo., and W. P. Waggener, of Atchison, Kan., on the brief), for plaintiff in error.

W. E. Ziegler and A. M. Etchen, both of Coffeyville, Kan., for defendant in error.

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

LEWIS, District Judge. The Missouri Pacific Railroad Company received from defendant in error at Coffeyville, Kansas, a carload of flour for shipment to Smithland, Texas. The car went to destination over the Missouri Pacific, Kansas City Southern, and Black Bayou Railroads. There was disagreement as to the amount to be charged by the carrier. The shipper paid $166.89; the carrier claimed $207.74, and brought this action to recover the difference. When the trial came on a stipulation settled all material facts not admitted in the pleadings, and the court determined the resultant issue of law in favor of the defendant shipper.

[1, 2] There was no through rate, and it is agreed that the proper charge was to be made up by a combination of the lowest intermediate rates applicable to the shipment. The Kansas City Southern hauled the car into, through and to a point beyond Texarkana, and a correct determination of the issue turns solely on the inquiry as to what rate between that station and destination should be applied in making up the combination.

The stipulation of facts recites:

"That the Kansas City Southern tariff published a rate of eight cents per one hundred pounds on such commodities from Texarkana, Arkansas, to Smithland, Texas, which tariff further provides:

"'Rates named herein apply only on traffic ..... Texarkana, Ark.-Tex. (proper) .....'

"For such commodities moving into Texarkana from other points, including Coffeyville, and from thence to Smithland, Texas, the tariff of the Kansas City Southern provided a rate of eighteen cents."

It was agreed in the stipulation that if the eighteen cent rate was applicable to the shipment the plaintiff was entitled to judgment for $40.85, and if the lower rate was applicable nothing further was due.

We do not doubt that the eight cent rate applied only to shipments originating at Texarkana, and that the eighteen cent rate applied to through shipments, such as this. We cannot consider the question as to whether the eighteen cent rate was unreasonable. T. & P. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; T. & P. Ry. Co. v. American T. & T. Co., 234 U. S. 138, 34 Sup. Ct. 885, 58 L. Ed. 1255. The judgment is reversed.

O'BRIEN v. LASHAR et al.

SAME v. ANDERSON et al.

(Circuit Court of Appeals, Second Circuit. March 24, 1921.)

No. 226.

1. **Attorney and client ⇐86—Attorney has authority to stipulate for extension of time within which other party must plead.**
   A stipulation extending the time within which the defendants may file motions to dismiss, or answers or other pleadings, was within the authority of attorneys for plaintiff, and is binding upon plaintiff.
2. **Equity ⇐419—Court has inherent power to set aside decrees pro confesso.**
   Even if the entry of a decree pro confesso was not erroneous, the trial court had inherent power to set it aside.
3. **Courts ⇐354—Rule prescribing conditions for relief against default decree only applies after final decree.**
   Equity rule 17 (198 Fed. xxiii, 115 C. C. A. xxiii), which makes it a condition of relief against default decree that defendant file his answer within such time as the court shall direct, applies to a cause which, after decree pro confesso, has been proceeded in ex parte to final decree, and has no application to a cause in which the court set aside the decree pro confesso before the final decree.

In Equity. Separate suits by James J. O'Brien against Walter B. Lashar and others and against Percy P. Anderson and others. From a decree dismissing the bills, with leave to amend, plaintiff appeals. On motion to strike out parts of the record. Motion denied.

See, also, 266 Fed. 215; 273 Fed. 521.

James J. O'Brien, in pro. per.

Arthur M. Marsh, of Bridgeport, Conn., for appellees Lashar and others.

William H. O'Hara, of Bridgeport, Conn., for appellee Fairfield Park Companies.

Before WARD, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. December 29, 1919, decrees pro confesso were entered in these causes under equity rule 16 (198 Fed. xxiii, 115 C. C. A. xxiii). The plaintiff's theory is that, after the decrees pro confesso, the defendants were out of court, and all papers thereafter filed by them were nullities, as were all orders of the court entered upon them.

[1] The earliest period within which any defendant was required to answer was December 12th, on which day the plaintiff's attorneys extended the time of all the defendants to file "motions to dismiss or answer or other pleadings as they and each of them may see fit," on or before December 26th, as of December 12th. December 26th the defendants did file motions to dismiss the bills.

The plaintiff repudiated this stipulation, dismissed his attorneys and appeared in propria persona. But this stipulation was entirely within the authority of his attorneys when made and he was bound by it. 6

C. J. 643. Therefore decrees pro confesso should not have been entered.

[2] Even if this were not so, it was within the inherent power of the court to set aside the decrees pro confesso and January 10, 1920, the court very properly did so, giving the defendants leave to plead or to make any motion before January 26th. January 20th the defendants refiled their motions to dismiss the bills.

[3] Equity rule 17 (198 Fed. xxiii, 115 C. C. A. xxiii), on which the plaintiff relies, makes it a condition of relief that the defendant shall "file his answer within such time as the court shall direct." But this rule applies to a cause which after decree pro confesso has been proceeded in ex parte to final decree. This cause was not proceeded in ex parte, nor any final decree entered, so that rule 17 is wholly inapplicable.

November 1st, the court dismissed both bills, giving the plaintiff 15 days within which to amend. Instead of availing himself of this privilege, he took these appeals.

Motion denied.

O'BRIEN v. LASHAR et al.
SAME v. ANDERSON et al.

(Circuit Court of Appeals, Second Circuit. March 24, 1921.)

No. 226.

Appearance ⇐10—Participation by attorney in proceedings to entry of decree is general appearance.

Where defendants' attorneys first appeared specially to enter a plea to the jurisdiction, and did not subsequently enter a formal general appearance, their participation in the suits to the entry of the final decrees dismissing the bills constituted a general appearance.

In Equity. Separate suits by James J. O'Brien against Walter B. Lashar and others and against Percy P. Anderson and others. From a decree dismissing the bills, with leave to amend, plaintiff appeals. On motion to strike defendants' brief from the files. Motion denied.

James J. O'Brien, in pro. per.

Arthur M. Marsh, of Bridgeport, Conn., for appellees Lashar and others.

William H. O'Hara, of Bridgeport, Conn., for appellee Fairfield Park Companies.

Before WARD, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. December 12, 1919, the defendants' attorneys appeared specially to enter a plea to the jurisdiction. They never subsequently entered a formal general appearance, but they took part in the suits from that date down to the entry of final decrees dismissing the bills November 1, 1920. This constituted a general appearance. 4 C. J. 1333.

Motion denied.

DURYEA MFG. CO. v. AGRIPPA MFG. CORPORATION et al.

(Circuit Court of Appeals, Third Circuit. June 13, 1921.)

No. 2666.

Patents ⊂=328—933,011, for belting, void for anticipation.

The Wooster patent, No. 933,011, for belting, of fabric saturated with asphaltum, *held* void for anticipation.

Appeal from the District Court of the United States for the District of New Jersey; Joseph L. Bodine, Judge.

Suit in Equity by the Duryea Manufacturing Company against the Agrippa Manufacturing Corporation and others. Decree for defendants, and complainant appeals. Affirmed.

For opinion below, see 270 Fed. 224.

Russell M. Everett, of Newark, N. J. (Harry B. Rook, of Newark, N. J., of counsel), for appellant.

Benjamin P. De Witt, of New York City (Mock & Blum, of New York City, of counsel), for appellees.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

PER CURIAM. This case concerns the validity and infringement of patent No. 933,011, granted August 31, 1909, to Philip L. Wooster, for belting. Its single claim is:

"As an article of manufacture, belting consisting of an absorbent woven fabric body portion which has been saturated with a solution of asphaltum and dried."

Full proofs were taken and the case heard by Judge Bodine, who subsequently rendered the following opinion: [Published in 270 Fed. 224.]

From a decree in accord therewith an appeal was taken to this court. We have heard able and exhaustive arguments of the respective counsel, but we all find no reason to differ from the conclusion reached by the trial judge. His opinion aptly sets forth all that need be said, and, as we agree therewith, we adopt it as fittingly setting forth the conclusions we likewise reach.

The decree below is affirmed.

MURRAY v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. April 27, 1921.)

No. 223.

Criminal law ⊂=1023(6)—Order for removal of defendants to another district not appealable.

An order for the removal of defendants to another district for trial, under Rev. St. § 1014 (Comp. St. § 1674), if regarded as a step in the cause, is interlocutory, and not appealable, under Judicial Code, § 128 (Comp. St. § 1120), and, if regarded as an independent proceeding, the remedy is by habeas corpus, and not by appeal.

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

Criminal proceeding by the United States against John Murray, alias Michigan Shorty, and others. An order for defendants' removal to another district for trial was made, and they bring error. Appeal dismissed.

See, also, 271 Fed. 534.

Robert M. Moore, of Malone, N. Y., for plaintiffs in error.

Leroy W. Ross, U. S. Atty., of Brooklyn, N. Y. (Henry J. Walsh, Asst. U. S. Atty., of Brooklyn, N. Y., of counsel), for the United States.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. This is an appeal from an order of Judge Garvin, under section 1014, U. S. Revised Statutes (Comp. St. § 1674), removing the defendants to the Eastern district of North Carolina for trial under an indictment charging them with conspiring to commit an offense against the United States.

If the order is to be regarded as a step in the cause, it is interlocutory, and therefore not appealable, under section 128 of the Judicial Code (Comp. St. § 1120). Coastwise Lumber & Supply Co. v. United States, 259 Fed. 847, 170 C. C. A. 647. If it is to be regarded as an independent proceeding, the only relief is, and by long-established practice has been, by writ of habeas corpus. This is concededly the first proceeding by appeal of which there is any knowledge.

Appeal dismissed.

ALLEMANNI et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. April 13, 1921.)

No. 172.

Criminal law ⟸1090(19)—Stipulation that transcript of record is true does not bring up exceptions.

A stipulation by counsel that the transcript of record had been agreed on as true does not bring before the appellate court any exception taken at the trial, where no bill of exceptions was ever signed by the judge.

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

Cesare Allemanni and another were convicted of crime, and they bring error. Affirmed.

Austin & Abruzzo, of Brooklyn, N. Y., for plaintiff in error Fantini.

Cæsar B. F. Barra, of New York City, for plaintiff in error Allemanni.

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

Before WARD, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. May 18, 1920, these defendants were found guilty by the jury and no bill of exceptions was ever signed by the judge. December 3, 1920, counsel for the parties stipulated that the transcript of record had been agreed upon as true. This brought before us no exception taken at the trial as to which error was assigned. Still we have examined the assignments and think none involves reversible error.

The judgment is affirmed.

WASHINGTON WATER POWER CO. v. KOOTENAI COUNTY et al.

(Circuit Court of Appeals, Ninth Circuit. May 9, 1921.)

No. 3546.

On petition for modification of opinion. Opinion modified.

For former opinion, see 270 Fed. 369.

PER CURIAM. In the opinion filed we assume that tender made by the appellant was sufficient in amount to cover the taxes which should have been paid by the appellant, if the board of equalization had proceded consistently with relation to the valuation put upon other like property, and that therefore no penalty was recoverable, notwithstanding our opinion that under the statutes of Idaho one liable to pay taxes, and who makes a tender of an amount insufficient to cover the amount of the taxes lawfully assessed, is liable for all penalties and interest upon any sum found to be due. We adhere to that view of the law, and, in addition to citations already made, refer to Power et al. v. Detroit, 139 Mich. 30, 102 N. W. 288, 5 Ann. Cas. 645, Spencer v. Babylon R. Co., 250 Fed. 24, 162 C. C. A. 196, and Rixey's Executors v. Commonwealth, 125 Va. 337, 99 S. E. 573, 101 S. E. 404. But we were mistaken in assuming it to be inapplicable to the facts. The tender made was on the basis of 55 per cent. of an actual valuation claimed by appellant in a sum much less than was the actual value of the property ($3,620,500) of appellant as determined by our decision. The tender, therefore, was substantially less than it should have been, and appellant made itself liable for penalties and interest upon the sum ascertained to be legally due.

This order of modification is to be construed with the opinion already filed.

GRAY v. TANTLEFF et al.

In re DICKER.

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

Bankruptcy ⇐303(3)—Evidence held to establish voidable preference.

Evidence *held* to sustain the claim of a trustee that payments made to a creditor within four months constituted a voidable preference, and were not made in payment for present or future purchases.

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

At Law. Action by James Gray, trustee in bankruptcy of Louis Dicker, against Hyman Tantleff and Max Borok. Judgment for plaintiff.

Leon Dashew, of New York City, for plaintiff.
Adolph Waxenbaum, of New York City, for defendants.

CHATFIELD, District Judge. In this action the trustee in bankruptcy has brought suit to recover the payment of $200 cash and a note of a third party for $500, upon which $150 has been paid into court, according to the terms of payment. The money and note were given by the bankrupt to the defendants in payment for meats furnished to the bankrupt prior to the filing of the petition, at the time when he was conducting a retail butcher shop. The petition was filed April 8, 1920, the $200 cash was paid March 4, 1920, and the note, which is dated February 6, 1920, was delivered at or about the time of its making, if the testimony for the defendants is to be believed. The defendants contend that these payments were for present purchases of meat, and that the defendants had no reasonable ground to believe either that the bankrupt was insolvent or that they were securing a preference.

If the note or the money was turned over as a present consideration for meat then purchased and delivered, or if future credit was secured by reason of that payment, there would be no unlawful preference, unless good faith was lacking on the part of the creditor, even though he had reason to know that the bankrupt was in perilous financial condition. Section 60 (c), Bankruptcy Law (Comp. St. § 9644).

As to the $200, the testimony appears to show that meat, for at least that amount, was soon after delivered, and the bankrupt's assets increased to that extent. But the demand that something must be paid on account shows knowledge on the part of the defendants that the bankrupt's credit was impaired, and any payment recoverable as a preference could be attacked, unless bankruptcy were held off for at least four months.

As a matter of fact the bankrupt was hopelessly insolvent all the time. No single purchase totaling $500 was made around the time when the $500 note is alleged to have been delivered. The evidence shows that this note was not entered in the books until a short time before bankruptcy. Suit was brought against the bankrupt in the Municipal Court for the total bill, without deducting any credit for the $500 note. When judgment was entered in that action, the attention of the creditor had been called to the existence of this note, and then the amount was corrected on the bill. It would appear that this note was credited subsequently as a definite preferential payment, and the books made to correspond with what would have been shown, if the note had been delivered at the time it was made, as a basis for future credit.

All of the elements of a preference being present, and the testimony upon which the claim of preference is based not having been successfully contradicted or explained by the defendants, it will be held that

the trustee is entitled to recover the note, and the proceeds thereof in so far as the note has been paid.

The plaintiff may have judgment accordingly, with costs.

GRAY v. BRESLOF et al.

In re DICKER.

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

Bankruptcy ⇐186(2)—Bona fide purchaser of chattels from preferential transferee acquires good title.

Where the stock in trade of a bankrupt was collusively sold under a chattel mortgage, which was preferential and invalid under the Bankruptcy Law, to a representative of the mortgagee, who resold it to a bona fide purchaser for value, the latter *held* to have acquired a good title; but the seller and mortgagee *held* liable to the bankrupt's trustee for the amount received therefor.

In Equity. Suit by James Gray, trustee in bankruptcy of Louis Dicker, against William Breslof, Benjamin Kellman, David Kellman, and Louis Dicker. Dismissed as to defendant Breslof, and decree for complainant against the other defendants.

Leon Dashew, of New York City, for plaintiff.

William W. Butcher, of Brooklyn, N. Y., for defendant Breslof.

CHATFIELD, District Judge. The bankrupt, Louis Dicker, maintained a butcher shop close to the residence of the defendant Breslof, whose father had been in business at the same place for some time. Young Breslof had been in the navy, and his father, according to the testimony, was looking for a chance to establish him in business. David Kellman, one of the other defendants, purchased the stock, fixtures, horse, and wagon of Dicker, from the purchaser at an auction sale held under such circumstances as to arouse suspicion, inasmuch as Benjamin Kellman had a chattel mortgage, unenforceable in bankruptcy, having been given for a pre-existing debt and not having been promptly recorded.

The Kellmans defend their title by an attempt to prove that physical possession was taken under the chattel mortgage and a sale had prior to the filing of the petition. Breslof, at his father's instigation, became the purchaser. Having no experience in the meat business, he hired the bankrupt as his clerk, and, according to the evidence, he has gone ahead, conducting the business on his own account and in such a way that the trustee's charge of collusion, or that Breslof is but a tool or dummy for Dicker, has not been substantiated. Breslof paid an actual cash consideration for his purchase, and this consideration was received by the Kellmans, who would seem to have been acting either in collusion with the bankrupt or in fraud of creditors.

If a chattel mortgage is valid, then actual possession under the chattel mortgage and a completed or perfected sale by the mortgagee,

with observance of the statutory requirements, is not the obtaining of a lien by judicial process within four months, such that the sale can be set aside. The lien in such a case is created by the chattel mortgage, and the chattel mortgagee is in the eyes of the law the owner of the equity with a right to possession. But where the chattel mortgage is invalid, as in this case, an attempt to dispose of the property by means thereof is a preferential and fraudulent transfer, and can be set aside by a trustee.

The next step, namely, the contention of the trustee that a bona fide purchaser for value cannot get good title from a person in possession of title by a preferential transfer, is fallacious. An assignee of a mortgage takes subject to equities, but a purchaser by a bona fide sale for value will obtain a good and valid title to chattels. Proceeds of the sale to Breslof are directly traced into the hands of the creditor obtaining the preferential transfer, namely, in this instance, one of the Kellmans. The trustee, therefore, is entitled only to a decree against the Kellmans and the bankrupt, setting aside the transfer and directing the return of the amount received as a preference, but the action against Breslof must be dismissed.

JENKINS PETROLEUM PROCESS CO. v. SINCLAIR REFINING CO.

(District Court, D. Maine. May 28, 1921.)

No. 816.

Equity ⇐223—Bill not subject to demurrer, because containing statements of evidence and unnecessary matter.

A bill alleging defendant had acquired a patent, which he was bound to assign to plaintiff, which contained a plain statement of the grounds of jurisdiction and of the ultimate facts for relief, *held* good on demurrer, though containing some statements of evidence and unnecessary matter of inducement, under the practice to overrule a demurrer, unless founded on an absolutely clear proposition, and that, taking the allegations to be true, the bill must be dismissed at the hearing.

In Equity. Bill by the Jenkins Petroleum Process Company against the Sinclair Refining Company. On motion to strike portions of the bill and to dismiss the bill. Denied.

Parkinson & Lane, of Chicago, Ill., and Philip G. Clifford, of Portland, Me., for complainant.

R. T. Osborn, W. Clyde Jones, Keene H. Addington, and J. B. Macauley, all of Chicago, Ill., and Verrill, Hale, Booth & Ives, of Portland, Me., for defendant.

HALE, District Judge. In the bill of complaint the plaintiff alleges ownership by it of certain patented processes and apparatus described therein. It alleges, as inducement, certain dealings with the defendant which show that prior to October 2, 1916, one Jenkins and his associates had certain confidential relations with it, and that the letter of the above date constituted an agreement; that the plaintiff performed its part of the terms and conditions of its agreement; that, taking advantage of the information and suggestions given to the defendant by

Jenkins and his associates, the defendant has acquired a patent which is annexed and made a part of the bill; that, under the terms of the agreement between the parties, the defendant is bound to assign this patent; that the discoveries and inventions which the defendant claims to own, in addition to the patent, are either discoveries and inventions belonging to the plaintiff or improvements and modifications thereof, devised through the use of the apparatus delivered to it under the terms of the agreement; and that they were devised by means of the information given to the defendant by the plaintiff under the terms of the agreement. The bill asks for a discovery of certain matters claimed to be essential in the cause. I have given only a brief summary of the story which the bill tells.

The motion seeks to strike out portions of the bill on the ground that they are immaterial, irrelevant, and impertinent. It is directed, also, to a dismissal of the bill for the reason that no facts are stated sufficient to warrant the court in granting relief; that the alleged agreement lacks consideration; that it lacks mutuality; that it shows the plaintiff to have a plain, adequate, and complete remedy at law.

Upon examination of the portions of the bill to which my attention is directed, I am not satisfied that they are either impertinent, irrelevant, or immaterial. Many of them are matters of inducement; some of them might be stricken out without, perhaps, affecting the rights of the parties; but, on the whole, I think none of them are open to the attacks made by the motion.

In the matter of the dismissal of the bill, I find, upon careful examination, that the attacks made upon it by the motion cannot be sustained. The bill seems to me to comply substantially with the rule that a bill should contain a short and plain statement of the grounds upon which the court's jurisdiction depends, and should contain, also, a short and simple statement of the ultimate facts upon which the plaintiff asks relief omitting any mere statements of evidence. Some statements of evidence are found in the bill, and some matters of inducement which are not, perhaps, necessary for a complete understanding of the case; but I think the bill is not open to the attacks contained in the motion.

In Ralston Steel Car Co. v. National Dump Car Co. (D. C.) 222 Fed. 590, following the decisions of the Supreme Court of the United States, this court held that, under our practice, the federal courts are inclined to allow a case in equity, involving important matters, to proceed to answer and proofs where a doubtful question is raised by the pleadings, and that it has been the practice to overrule a demurrer, unless it is founded upon an absolutely clear proposition; that, taking the allegations to be true, the bill must be dismissed at the hearing. Kansas v. Colorado, 185 U. S. 125, 144, 22 Sup. Ct. 552, 46 L. Ed. 838; Story's Equity Pleadings, p. 379; Daniell's Chancery, p. 542.

In the case before me it is not necessary for me to discuss the various allegations of the bill of complaint, or the elaborate argument of the learned counsel in support of the motion. The bill presents, with

sufficient clearness, important questions of fact and many matters somewhat intricate. I think the case should go to answer and proofs.

The motion to strike out is denied; the motion to dismiss is denied. The matter of costs will be passed upon at the final disposition of the case.

FIRST NAT. BANK OF CHICAGO v. ROGERS, BROWN & CO.

(District Court, W. D. Washington, N. D. June 6, 1921.)
No. 195-E.

Carriers ⇐83—Telegram held not authority to carrier to deliver.

Where the receiver of a corporation, which purchased oil of the shipper, who had consigned the same to his own order, with directions to notify a soap company on delivery of the oil, wired the soap company that he was doing all possible to locate documents in order to stop demurrage, and suggested that the soap company establish bond to produce documents and unload the car, such telegram was not authority to the carrier to deliver the oil to the soap company without bond, and, having done so, the receiver may recover from the carrier.

In Equity. Suit by the First National Bank of Chicago against Rogers, Brown & Co., a corporation, in which a receiver was appointed. In the matter of the claim of the receiver against the Chicago, Milwaukee & St. Paul Railway Company. Demurrer to answer of Railway Company sustained.

Frank S. Bayley, of Seattle, Wash. (R. E. Capers, of Seattle, Wash., of counsel), for petitioner.

F. M. Dudley, A. J. Laughon, and Geo. W. Korte, all of Seattle, Wash., for Chicago, M. & St. P. Ry. Co.

NETERER, District Judge. Claim is made by the receiver of Rogers, Brown & Co. against Chicago, Milwaukee & St. Paul Railway Company for $9,251.75 damages claimed for wrongful conversion of a car of soya bean oil, K. T. X. No. 561. The oil was purchased by Rogers, Brown & Co. of the Koster Company, who had shipped the oil to its own order to Winnipeg over the named railway, with instructions to notify "Royal Crown Soap, Limited," under an "order bill of lading." Rogers, Brown & Co. purchased the oil, and the bill of lading was indorsed to it, and in due course came into the possession of the receiver. It is alleged that the railroad company delivered the oil without the surrender of the bill of lading to a person other than the receiver, or his order, and refuses to deliver the oil to the receiver after demand made. The railway admits the delivery to it, and by it to Royal Crown Soap, Limited, of the oil, and alleges as an affirmative defense that upon arrival of the oil at destination the railway notified the Royal Crown Soap, Limited, and requested disposition of the car and the production and surrender of the bill of lading. Koster & Co. in turn were notified, who advised that Rogers, Brown & Co. had purchased the draft and bill of lading and was the owner who had been

requested to forward the documents. Thereafter the receiver sent the following wire to the Royal Crown Soap, Limited, at Winnipeg:

"Reference K. T. X. 561. Are doing all possible locate documents in order stop demurrage suggest you establish bond to produce documents and unload car."

It is then alleged that the soap company advised the railway company of the telegram, and the company, "acting and relying upon such telegraphic instructions, permitted the Royal Crown Soap Company, Limited, to unload the car and released the same."

A demurrer is filed to this affirmative answer, upon the ground that it does not state any defense. The railway company predicates its answer upon the decision of the Supreme Court in Pere Marquette R. Co. v. French & Co., 254 U. S. 538, 41 Sup. Ct. 195, 65 L. Ed. ——, decided by the Supreme Court January 17, 1921.

I think this case is clearly distinguished from the Marquette Case, in that in the Marquette Case the bill of lading was in the possession of the person notified and to whom delivery was made, while in the instant case the possession at all times was in the receiver. The telegram can in no sense be construed into an order to deliver. It was merely a suggestion as to how the possession of the oil might be obtained before the receiver was able to locate the necessary documents. There clearly is no suggestion in the telegram which in any sense changed the status of right or obligation resting in the several parties. The loss was occasioned, therefore, not by anything the receiver did or omitted to do, but rather because the railway company delivered the car without the surrender of the bill of lading, or in lieu of the bill of lading a bond holding the railway company harmless, if the bill of lading is not produced. Such was not the fact in the Marquette Case, where the bill of lading was obtained by the deliveree wrongfully from the bank, and the railway company could not be held for a loss based upon wrong to which the railway company was not a party. Such is not the fact in the instant case. A clear statement of the law, which was approved by the Supreme Court is set out in First Nat. Bank v. O. & W. R. R., 25 Idaho, 58, 136 Pac. 798. A reading of the Marquette Case, I think, is clearly in harmony with the contention of the receiver based upon the facts.

The demurrer is therefore sustained.

BALTIMORE TALKING BOARD CO., Inc., v. MILES, Collector of Internal Revenue.

(District Court, D. Maryland. June 1, 1921.)

No. 954.

1. **Internal revenue ⇐11—Ouija board is taxable as a "game."**
Ouija boards are games, or implements with which games are played, within the sense of that word as used in Revenue Act 1919, § 900, subsec. 5 (Comp. St. Ann. Supp. 1919, § 6309¼a), imposing a 10 per cent. tax on games and sporting goods.

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

2. **Internal revenue ⇐11—Small ouija boards held not exempt as games for children.**
Small ouija boards, sold to merchants for distribution as advertisements, are not the sort of thing which would interest many children, and are not exempt from the internal revenue tax as children's toys or games, especially where the picture on the envelope in which the boards were distributed showed that those who were to use them were for the most part adults.

At Law. Action by the Baltimore Talking Board Company, Incorporated, against Joshua W. Miles, Collector of International Revenue. Judgment for defendant.

Fisher and Fisher, of Baltimore, Md., for plaintiff.
Robert R. Carman, of Baltimore, Md., for defendant.

ROSE, District Judge. The plaintiff in this case is seeking to recover the sum of $202.81 paid under protest as a tax of 10 per cent. upon gross sales of $2,028.10 of various sizes of ouija boards. The tax was levied under provisions of subsection 5 of section 900 of the Act of February 24, 1919 (40 Stat. 1122 [Comp. St. Ann. Supp. 1919, § 6309¼a]). This section was devoted to imposing excise taxes upon various things which had so much in common that Congress probably thought them to be articles of luxury or amusement rather than of necessity. Other subsections dealt with automobiles, motorcycles, pianos, talking machines, chewing gum, cameras, candy, firearms and armament, hunting and bowie knives, electric fans, thermos bottles, cigar or cigarette holders and pipes, some sorts of automatic slot device machines, liveries, hunting and shooting garments, riding habits, fur garments, yachts and motorboats, and toilet soaps. The subsection in question reads:

"Tennis rackets, nets, racket covers and presses, skates, snow-shoes, skis, toboggans, canoe paddles and cushions, polo mallets, baseball bats, gloves, masks, protectors, shoes and uniforms, football helmets, harness and goals, basket ball goals and uniforms, golf bags and clubs, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, chess and checker boards and pieces, dice, game and parts of games (except playing cards and children's toys and games), and all similar articles commonly or commercially known as sporting goods, 10 per centum."

[1] The plaintiff says that its ouija boards are not games, nor are they among the things which are commonly or commercially known as sporting goods. Much legal and lexicographical learning and industry has been exhibited in gathering together all the definitions of games heretofore given. I have no ambition to add to their number, but I am persuaded that ouija boards are games, or, more accurately, implements with which games are played, within the sense of the word as used in the statute in question. One of these boards is a thing which one or more people employ for their amusement or sport, and with which they think they are playing at a game. The use of it is all the more interesting, in that it gives results which the players may not always suppose to be foretellable. In this respect it resembles various games of solitaire, the telling of fortunes by cards, etc. It is quite clearly among the general class of things which Congress intended to tax, and it is sufficiently identified by the words it used.

[2] There is a subordinate question raised. The plaintiff says that the larger part of its sales were of small-sized boards, sold by it at a low price to merchants, who distributed them as advertisements. It claims that in any event they are not taxable, because they are children's toys or games, and as such are excepted by the act itself. It may be that there are some who think that those who use ouija boards are childish enough. That is a matter of opinion upon which courts need not take sides. They are not the sort of thing which would interest many who are children in years. The picture on the envelope in which the plaintiff distributes these diminutive boards show that those who are supposed to use them are, for the most part, adults.

It follows that the tax was properly collected, and the defendant is entitled to a verdict.

UNITED STATES v. AMSTER et al.

(District Court, E. D. New York. April 20, 1921.)

1. Conspiracy ⟸43(5)—Averment of overt acts cannot aid statement of offense.

The statement of overt acts in the indictment cannot be used to supply deficiencies in a charge of conspiracy, but the charging portion of the indictment must state all the necessary elements of the offense.

2. Conspiracy ⟸43(10)—Indictment for conspiracy to defraud the United States held sufficient.

An indictment charging a conspiracy to collusively submit false and fraudulent bids for tea offered for sale by the Surplus Property Division of the Army *held* sufficient as charging a conspiracy to defraud the United States.

Criminal prosecution by the United States against Isidor Amster and others. On demurrer to indictment. Overruled.

Leroy W. Ross, U. S. Atty., and Henry J. Walsh, Asst. U. S. Atty., both of Brooklyn, N. Y.

Hirson & Bertini, of New York City (Max M. Hirson, of New York City, of counsel), for defendant Amster.

CHATFIELD, District Judge. Upon arraignment of the three defendants, one (Isidor Amster) has demurred to the indictment on the ground that it does not sufficiently charge the crime of conspiracy to defraud the United States.

[1] The language of the indictment does not directly, and step by step, detail the entire chain of circumstances, so as to lead up to a plain statement of the conclusion which would define in general terms the precise fraud which the defendants are said to have planned by their conspiracy. The statement of overt acts cannot be used to supply deficiencies in the charge of conspiracy. Hyde v. United States, 225 U. S. 347 at page 359, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614. The charging portion of the indictment must define all the necessary elements of the conspiracy, and also all the necessary elements of the acts which are alleged to constitute either an offense under the laws of the United States or a fraud upon the United States. But the defendant cannot, by misinterpreting or assuming according to his own ideas the crime or fraud charged, present successfully a demurrer upon the theory that the indictment fails to set forth all the elements which he thinks are necessary to support the charge which he has in mind.

[2] The present indictment alleges that the defendants planned to defraud the United States, by collusively presenting three false or fraudulent bids, the highest of which was below market price, and at which price the defendant Nullet agreed to let the defendant Amster, who has demurred, have 50,000 pounds of tea from that offered for sale by the Surplus Property Division of the United States Army.

This is not a charge of conspiracy to commit an offense against the United States, although the presentation of false bids may have constituted an offense against the United States, as to which a conspiracy might also have been charged. Nor is this an indictment for defrauding the United States by failure on the part of Nullet to do his duty by personally carrying out the transaction, and thus consummating a sale at a price at which the United States suffered an actual loss. In fact, there is no allegation as to whether the conspiracy was discovered and frustrated, or whether it was consummated. The criminal element lay in the plot to present three false bids, under the guise of honest competition, coupled with the agreement of the person in charge of the bids to keep silent as to the falsity or fraudulent character of the bids themselves.

A conspiracy to defraud does not necessarily mean that the fraud must deprive the government of cash. Hyde v. United States, supra. It is evident that if three honest bidders had put in bids at the prices named, and if the officers in charge had deemed it wise to accept these bids, the government might have realized no more than it would under this fraudulent scheme; but if the charge relates to a material matter, and if the government is to be deprived of some right which is given to it under the laws, and particularly if the right presumably will cause the government monetary loss as well, then the gov-

ernment is being defrauded, and such an act can be charged as the object of a conspiracy, whether or not it might also be indictable as an offense.

Demurrer overruled.

REYNOLDS v. UNITED STATES.

(District Court, E. D. Pennsylvania. June 8, 1921.)

No. 6768.

Courts ⇐280—Question of jurisdiction not determinable on demurrer.

Allegations of the statement of claim in an action against the United States *held* insufficient to enable the court to determine on demurrer whether or not the suit was one "to recover fees, salary or compensation for official services" of an officer of the United States, and therefore not within the jurisdiction of the court, under Judicial Code, § 24, subd. 20 (Comp. St. § 991, subd. 20).

At Law. Action by Earl F. Reynolds against the United States. On demurrer to the statement of claim. Overruled.

Evan B. Lewis, of Philadelphia, Pa., for plaintiff.
Charles D. McAvoy, of Philadelphia, Pa., for the United States.

DICKINSON, District Judge. The main question raised is one of jurisdiction. The jurisdiction is dependent upon the finding of a fact. The turning fact is whether the claim of the plaintiff is "to recover fees, salary or compensation for official services" as an officer of the United States. It is, of course, true that, when the facts are once established, the question resolves itself into one of law, to wit, whether the plaintiff is an officer within the meaning of the act of Congress. This is a question which confronts the plaintiff and must be met. Counsel for the United States are to be commended for seeking to meet this feature at the threshold of the case. The question before us in consequence resolves itself into the very narrow one of whether this finding can now be made.

The case of United States v. Germaine, 99 U. S. 508, 25 L. Ed. 482, is authority for the recognition, in criminal statutes at least, of a distinction between employees and officers. United States v. Mouat, 124 U. S. 303, 8 Sup. Ct. 505, 31 L. Ed. 463, recognizes the same distinction between a paymaster's clerk and an officer of the navy in the application of those terms in a claim for mileage compensation. In the case of Hendee, 124 U. S. 309, 8 Sup. Ct. 507, 31 L. Ed. 465, a paymaster's clerk was held to be an officer of the navy in the application of those terms to a claim for longevity pay. In United States v. Hartwell, 73 U. S. (6 Wall.) 385, 18 L. Ed. 830, in the application of a penal statute, a clerk in the office of the Assistant Treasurer of the United States was held to be an officer within the meaning of the statute then under consideration.

It is thus made clear that the word "officer" may be used by Congress in entirely different senses, and may mean one thing in one statute

and have a wholly different meaning in another. It is also clear that, even after the meaning of this statute is found, whether a particular litigant is within the statute can be determined only after an inquiry into the facts of his individual status.

The statement of claim carefully avoids, so far as possible, the averment of any facts from which a finding could be made from the statement of claim alone. The plaintiff is averred to have been "employed" —not to have held an office; the defendant calls him an officer. We do not rule that, by stating the facts as they have been stated, the plaintiff cannot be found to be an officer within the meaning of the act of Congress with which we are now concerned. We rule only that the facts upon which any ruling made must be based do not appear with sufficient certainty to justify summary judgment in favor of the defendant.

The facts probably are that the plaintiff performed services in a position to which he was appointed by the Secretary of war by authority of an act of Congress conferring the power to make such appointments. If the plaintiff is willing to meet now on his own statement of the facts the question which at the trial he must meet, leave is granted him to amend his statement of claim, so as to present the facts fully, and the defendant may then meet it by a motion to dismiss for want of jurisdiction.

The demurrer filed is formally overruled.

UNITED STATES v. BOSTOW et al.

(District Court, S. D. Alabama. June 14, 1921.)

No. 4891.

1. **Criminal law ⟸100(3)—Pending prosecution in state court for liquor law violation does not affect federal court's jurisdiction of prosecution for National Prohibition Act violation.**
   That accused has been indicted in the state court under a state statute for the same transaction for which he is indicted in the federal court under the National Prohibition Act does not prevent the federal court from proceeding to try accused under the indictment in that court.

2. **Criminal law ⟸201—Prior conviction or acquittal in state court for liquor law violation no bar to prosecution in federal court under National Prohibition Act; "offense;" "same offense."**
   A prior conviction or acquittal in the state court for violation of the state prohibition act constitutes no bar to a prosecution in the federal court under an indictment found in that court under the National Prohibition Act for the same transaction on which the prosecution or prosecutions were had in the state court; for in Const. U. S. Amend. 5, forbidding twice putting in jeopardy for the "same offense," the quoted words do not mean the same act or transaction, as the "offense" is not the act or transaction alone, but the act or transaction considered in the light of the legislative provisions and prohibitions.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Offense; Same Offense.]

Nat Bostow and two others were separately indicted for violation of the National Prohibition Act. On demurrers to pleas in bar. Sustained.

Alex. D. Pitts, U. S. Atty., of Selma, Ala., and J. O. Middleton, Asst. U. S. Atty., of Mobile, Ala.

F. S. Stone, of Bay Minette, Ala., and Robert H. & R. M. Smith and Webb, McAlpine & Grove, all of Mobile, Ala., for defendant.

ERVIN, District Judge. These cases directly present the issue as to whether a prior conviction or acquittal in the state court of Alabama for violation of the state prohibition act constitutes a bar to the prosecution in this court under an indictment here found for the same transaction on which the prosecutions were had in the state court.

[1] There was one case, however, Nat Bostow, which presented a somewhat different proposition, and in which it was contended that, because the defendant had been indicted in the circuit court of Mobile county by the state court under a state statute for the same transaction for which he is indicted in this court under the National Prohibition Act (Act Oct. 28, 1919, c. 85, 40 Stat. 305), this court cannot now proceed to try the defendant under the indictment here found. It is urged upon me that, where a state court has entered upon the prosecution of a criminal case or a civil case, whichever court first acquires jurisdiction will be permitted to proceed to the final hearing without being interfered with by another. Harkrader v. Wadley, 172 U. S. 148, 19 Sup. Ct. 119, 43 L. Ed. 399, and Buck v. Colbath, 3 Wall. 334, 18 L. Ed. 257, are cited to this proposition.

In the Harkrader Case the proceedings in the state court, where Wadley had been indicted, was sought to be enjoined, because there was already pending on the equity side of the federal court a proceeding to hold Wadley liable to indemnify the plaintiffs by reason of losses occasioned by his misconduct as an officer of the bank. It was then objected that, because the testimony given by Wadley in the federal case was used as a basis for his prosecution in the state court, he could not be there prosecuted. The Supreme Court (172 U. S. on page 167, 19 Sup. Ct. 127 [43 L. Ed. 399]), in discussing this question, says:

"The fallacy in the argument of the appellee in the present case is in the assumption that the *same right* was involved in the criminal case in the state court and in the equity case pending in the federal court. But it is obvious that the civil liability of Wadley to indemnify the plaintiffs in the equity suits, by reason of losses occasioned by his misconduct as an officer of the bank, is another and very different question from his criminal liability to the commonwealth of Virginia for embezzlement of funds of the bank."

On the following page (172 U. S. 168, 19 Sup. Ct. 127 [43 L. Ed. 399]) it says:

"Embezzlement by an officer of a bank organized under a state statute is not an offense which can be inquired into or punished by a federal court. Such an offense is against the authority and laws of the state. The judicial power granted to their courts by the Constitution of the United States does not cover such a case. The Circuit Court of the United States for the Western district of Virginia could not, in the first instance, have taken jurisdiction of the offense charged in the indictment; nor can it, by a bill in equity, withdraw the case from the state court, or suspend or stay its proceedings."

It is manifest in this case that the indictment in the state court which is pleaded here is based upon an offense of violating a state statute, and this court would have no power to try the defendant so charged in that indictment. It is also manifest that the indictment in this court, being based upon the National Prohibition Act, charges no offense on which this defendant could be prosecuted and convicted in the state court, because no offense against the state laws is charged in the federal indictment, and no offense against the federal laws is charged in the state indictment.

This being true, it seems manifest to me that, as the Supreme Court said in the Harkrader Case, the *same right* is not involved in the two prosecutions, the one in the state court, and the other in the federal court. Where the same right is not involved, the fact that the case is pending in the state court is no reason why the federal court should not proceed with the indictment regularly found in this court. No case has been called to my attention in which it has been held that the fact of a prosecution in a state court under a state statute was any reason why the same party should not be prosecuted in the federal court under a federal statute, and it is manifest that the distinction drawn by the court in the Harkrader Case is applicable to the case here.

In the case of Buck v. Colbath, 3 Wall. (70 U. S.) 345, 18 L. Ed. 257, the Supreme Court, commenting upon the proposition that the court first obtaining jurisdiction of the case has a right to decide every issue arising in the trial of the case, calls attention to some of the limitations of that rule, saying:

"It is scarcely necessary to observe that the rule thus announced is one which has often been held by this and other courts, and which is essential to the correct administration of justice in all countries where there is more than one court having jurisdiction of the same matters. At the same time, it is to be remarked that it is confined in this operation to the parties before the court, or who may, if they wish to do so, come before the court, and have a hearing on the issue so to be decided."

Now, if it is true that a state court, having first indicted a party for a transaction which is a violation of its prohibition statute, acquires exclusive jurisdiction of this offense, and that the same party cannot be subsequently indicted and prosecuted for the same transaction, which also violated the federal prohibition statute, then it must also be true that the federal government should have a right to be heard in the prosecution in the state case, and that the state should be heard in the federal court on the prosecution of the defendant there. The Supreme Court says, in discussing this proposition:

"At the same time it is to be remarked that it is confined in its operation to the parties before the court, or who may, if they wish to do so, come before the court and have a hearing on the issue so to be decided."

It is manifest that the federal government cannot appear in the prosecution before the state court, for it has no standing there, no federal statute being involved, and it is also manifest that the state has no right to appear in the federal court, because no state statute is involved. To hold otherwise must necessarily be to hold that, if one was prosecuted and convicted in the federal court for a transaction which vio-

lated the federal statute, and the same transaction also violated the state statute, the federal government, having prosecuted and convicted the defendant, should have the right to say that he should not be further prosecuted and put in jeopardy in any other court, and it should have and exercise the power to enjoin the state court from the prosecution of this man who has already been punished for the same act which was a violation of the federal statute. To state the proposition is to answer it. The whole question grows out of an incorrect analysis of the question.

[2] Coming, now, to consider the question of the former conviction or acquittal in the state courts, I know of no decision by any authoritative tribunal. There are two cases submitted to me—the one, U. S. v. Peterson et al. (D. C.) 268 Fed. 864, where it is held that the proceedings in a state court are a complete bar to subsequent prosecutions in the federal court for the same transaction. U. S. v. Holt (D. C.) 270 Fed. 639, is a case where the same question was presented, and the contrary conclusion reached by Judge Woodrough, in an opinion in which I fully concur, not only in the legal proposition decided, but in the practice to be followed, where it is shown that the accused has already been punished in the state courts.

In addition to the views so well expressed by Judge Woodrough, and what has been said heretofore in this opinion, it occurs to me that something further might be said as to the meaning of the Fifth Amendment of the Constitution of the United States:

"Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

What meaning shall be given the words "the same offense"? How shall they be construed? If the Congress can pass legislation to enforce the Prohibition Amendment, and the states may also do so, it is manifest that such legislative acts will differ—that different laws will be provided for the enforcement of the amendment, and different punishments will be imposed. It is also manifest that often the same act or transaction will violate both the federal and state provisions, so the question arises: Where the same act violates both statutes, has there been only one or more offenses committed? It will be conceded that the offender cannot be tried in the federal court for violation of the state statute, nor in the state court for the violation of the federal statute; so it appears that the offense is not the act or transaction alone, but that the act or transaction must be considered in the light of the legislative provisions and prohibitions.

In the absence of such legislative prohibitions, the act or transaction committed would not be an offense. It is not the prohibited act, but the terms of the statute, which declares and defines the offense. It seems to me, therefore, that as each legislative entity, whether state or federal, declares its own offense, this cannot be the same offense as that provided by the other, though the same act or transaction may violate each of them, but that there are as many offenses as the legislative provisions may declare.

The demurrers to the pleas will be sustained.

THE BEAVERTON.

THE DAISAI MARU.

(District Court, S. D. New York. July 28, 1919.)

1. **International law ⇐10—Vessel under charter to foreign government not immune from arrest.**
   The fact that when a libel in rem was filed against a vessel she was under charter to a foreign government, but not in its possession, *held* not to render her immune from arrest.
2. **Collision ⇐71(2)—Anchored vessel not in fault for collision with moving vessel.**
   A vessel properly anchored on anchorage grounds in the daytime in calm weather *held* not in fault for not taking measures to prevent a collision with a moving vessel in charge of four tugs until it became clear that the other vessel was not under control and that there was danger of collision.
3. **Collision ⇐71(1)—Tugs maneuvering ship exonerated from fault.**
   Four tugs, engaged in moving a steamship on anchorage grounds under direction of her pilot, *held* not chargeable with contributory fault for collision with an anchored vessel, where the fault of the ship, through her pilot, in attempting the maneuver she did, in view of the state of the tide, was clear.
4. **Collision ⇐62—Tugs not jointly liable, where acting under direction of ship.**
   The rule that tugs engaged in moving a ship may be chargeable with fault for a collision, where they join in a maneuver which they know to be improper, applies when the tugs are jointly co-operating and sharing in the general direction of the maneuver, or by mutual agreement delegate their common duties to one, but does not apply where they are all operating under the orders of the ship, without assuming any responsibility for the means or the result.

In Admiralty. Suit for collision by the Canada Steamship Lines, Limited, as owner of the Steamship Beaverton, against the steamship Daisai Maru, with others impleaded. Decree against the Daisai Maru.

Barry, Wainwright, Thacher & Symmers, of New York City, for libelant.

Hunt, Hill & Betts, of New York City, for the Daisai Maru.

Burlingham, Veeder, Masten & Fearey, of New York City, for underwriters of the hull.

Herbert Green, of New York City, for steam tug John Nichols.

Foley & Martin, of New York City, for steam tugs N. B. Starbuck and Edith.

Harrington, Bigham & Englar, of New York City, for steam tug A. W. Smith.

LEARNED HAND, District Judge. [1] I have delayed the decision in this case for five months, hoping that the Supreme Court, in The Gleneden, 254 U. S. 522, 41 Sup. Ct. 185, 65 L. Ed. ——, would settle the question of the Daisai Maru's immunity from arrest on December 22, 1917. That is the critical date, because the libel was then filed, and it is clear from the stipulation that the libelant held off the

arrest at the request of the proctors for the Daisai Maru. At that time she was merely under charter to the French republic, not in its possession nor owned by it, though both facts changed within a few days. However, the Circuit Court of Appeals on May 14, 1919, in The Carlo Poma, 259 Fed. 369, 170 C. C. A. 345, decided that the test of immunity was the possession of the foreign sovereign, not its ownership. A fortiori the relation of charterer will not give immunity. It is true that, strictly speaking, the decision in The Carlo Poma, supra, was only that, when both ownership and possession co-existed, the ship was immune; it was not necessary to say that possession was the test. However, the opinion is a distinct declaration of the law by a tribunal whose word is authoritative upon me, and it seems to me undesirable any longer to delay decision, since upon an appeal my error, if any, may be corrected, if the Supreme Court shall have decided that the test is whether the ship is engaged upon a venture of a foreign sovereign which will be impeded or frustrated by arrest.

I proceed, therefore, to the merits. That the Daisai Maru is prima facie at fault is of course accepted by all sides; she was a moving vessel in collision with an anchored. The only questions open are, first, whether the Beaverton was also at fault; second, whether the tugs share the blame with the Daisai Maru; third, whether the towing company is also liable, if the tugs be liable.

[2] The Beaverton's supposed fault consists of no more than failing to observe in season the approach of the Daisai Maru and to veer chain. Kennedy was at the forecastle head of the Beaverton, at work coiling ropes, etc. While he was in no sense an anchor watch, it was not as though no one had been on deck. He could and did see the approach of the Daisai Maru, and did not suppose, at first, as no one did, that she would endanger the Beaverton. Normally she would not, and certainly she should not, have done so. It was only when she was about a length or more away that he observed that she was not under control. I am not disposed to scrutinize too nicely his conduct, and to treat the case as though he was bound to keep a sharp lookout. The Beaverton was at anchor on an anchorage ground where she had the right to be; the weather was fair and calm and reasonably clear; the Daisai Maru was scarcely under way and in charge of four tugs, an unusual number under the circumstances.

The suggestion that such a situation demands anything in the nature of continuous observation appears to me extreme. Lind v. Penn. R. R., 139 Fed. 233, 71 C. C. A. 359. An anchor watch is not an absolute necessity in broad daylight and fair, calm weather. Wells v. Armstrong (D. C.) 29 Fed. 216; The Rockaway (D. C.) 19 Fed. 449. Kennedy's presence at the forecastle head, his observation of the Daisai Maru out of the tail of his eye, were quite all that was to be expected. Had he ever given up his work and kept his gaze fixed on her, it is doubtful whether he would have found occasion for action sooner than he did. I will assume that he might, for it would in my judgment make no difference. He was not bound to take such action towards a vessel which threatened so little danger.

As soon as he did observe that she was not under control, he did all

that he could, by calling his chief officer, who at once gave orders to veer chain. It is clear that these orders were carried out with all proper expedition. Whether the chain in fact paid out at once is a matter of some doubt; but it is immaterial, because, if it did not, it was because the Beaverton was at the moment riding forward on her chain through some trick of the tide, which I own seems to me questionable, but which nevertheless may have happened. In any aspect, I cannot see how the Beaverton, an anchored vessel, in apparent safety, with every means to be avoided, can be charged with joint fault in what certainly was a strangely unjustified collision. I hold her, therefore, free from fault.

[3] There remains, therefore, the apportionment of fault between the Daisai Maru and her tugs, which were the only wills that set her in motion. Feldhusen was the Daisai Maru's pilot, regularly employed by the ship as such, for whose faults, under the rule ever since The China, 7 Wall. 53, 19 L. Ed. 67, she was absolutely responsible. I shall therefore speak of him as though for the time he were the ship itself. He was a young man of some two years' experience as a qualified pilot, who impressed me on the stand as straightforward and reasonably intelligent, but without great force of character. When he arrived at Brady's dock, he found that three tugs had been ordered, to which later a fourth was added. The ship was not under steam—except for her winches, etc.—and it was necessary to rely wholly on the tugs. His purpose was only to move her out to the anchorage grounds, to a safe berth outside the Beaverton. South of the last, and about a length or two away, say 600 feet, lay the Chippana, and north of her another unknown vessel, about the same distance astern. Except for the Java which was docking at the north side of Brady's dock when the Daisai Maru emerged, there was no other shipping in the vicinity. It was Feldhusen's purpose to take the Daisai Maru between the Beaverton and the Chippana, in doing which he necessarily reckoned on the absence of any current, for the space was not great.

I think that he had to choose between three alternatives, although the testimony is in some conflict: First, to do as he planned; second, to go across the bows of the Chippana, the safest way; and, third, to go astern of the Beaverton, which would have been possible, had he waited till the Java had docked, or at least so it seems. All three of the anchored vessels were about 1,000 feet off the pier end, and he had therefore ample room to turn the Daisai Maru. I find that he did not disclose to any of the tugs just which course he was going to take, though he did say that he was going to take her out to a berth on the anchorage.

The disposition of the tugs was as follows: The Nichols, which was the most powerful, was on his port bow; the Starbuck, the next most powerful, on a hawser leading the Smith on the starboard bow and the Edith on the starboard quarter. There is some controversy as to whether Feldhusen ordered the Edith to where she actually went, or alongside the Nichols, on the port bow. Her actual order came from Wray, the Nichols' master, who says he got it from Feldhusen, which Feldhusen denies. It seems to be more probable that Wray did not undertake to place the Edith on his own responsibility than that Feld-

husen should now have forgotten what he told Wray. Therefore I find that the Daisai Maru has not proved that Wray gave an unauthorized order to the Edith. I also find that the Nichols had out only one line. Much the most reliable evidence is to that effect, and it is extremely unlikely that, knowing, as he did, that he might be expected to hold up the Daisai Maru, he should have had two. The issue is perhaps immaterial, in view of the admitted fact that the Nichols later was angling at least four points on the Daisai Maru, and must therefore have thrown off any towing line, if she started with one.

The start was made at about 11 a. m., at what Feldhusen supposed was slack water, but what later proved to be a substantial set of the flood. This in my judgment was the first and much the most serious fault, and it seems to me without excuse. High water that day at Governors Island was at 11:24, and at Bay Ridge, 15 minutes earlier. At Brady's dock it was about 11:10, and Feldhusen was right, therefore, in choosing his time, if he meant only to get high water. Unfortunately the surface currents remain flood for a long time after the ebb has set below the surface. At the locus in quo the tide tables show that in mid-channel the surface flood runs for well over an hour after high water. The Daisai Maru was subject to a substantial flood on the surface, probably quite a knot in speed, and diminishing to slack, or perhaps the turn of the ebb, some 15 feet below. It was this surface current which in fact made the passage between the Beaverton and the Chippana hazardous, must too hazardous for prudent seamanship.

Moreover, Feldhusen was chargeable with knowledge of these conditions. I do not forget that the tide tables speak only of mid-channel, and that conditions on the anchorage grounds may be different. The position of the Beaverton, 1,000 feet off Brady's dock, was slightly less than one-half way to mid-channel, and certainly it would have been grossly careless, if the surface flood was running over a knot in mid-channel, to assume that there was none halfway inshore. I need cite no authorities to show that a licensed pilot is charged with knowledge of exactly such conditions as these. By his own admission it was negligent to try the maneuver which he did, unless at slackwater, and he stands, therefore, in my judgment, clearly at fault.

Did any of the tugs share that fault? I may dismiss any claim against the Starbuck, the Smith, or the Edith, without much discussion. The Edith, I have found, took her position at Feldhusen's direction, through Wray, and she got no orders, except to push the stern upstream, which certainly indicates that some flood was thought possible. It would have tended to keep the Daisai Maru head to the tide. Those orders Feldhusen says he did not give; in fact, they came from Wray. But I hardly can think he initiated them. At least I cannot say that she is shown at fault. The Smith merely followed Feldhusen's directions, and he has admitted she was not at fault. There is some question about the orders given the Starbuck. Both her master and Feldhusen agree that she was at one time directed to stop; but they differ as to when it was. Her master says she was given more than one order to stop, and she probably did stop more than once. It is certain that she was told to pull for the Chippana, and this she did.

While I agree that there is some confusion in the several versions, and that it is strange to suppose that she was given any orders to stop after the Daisai Maru's stern cleared the pier end, still I cannot find any clear evidence that she was at fault, and I must accept in any case Feldhusen's exoneration of her after the collision.

There remains only the Nichols, which is sought to be charged on two grounds: First, that she did not push at right angles; second, that Wray associated himself in a maneuver which he knew to be improperly planned. The Anthracite, 168 Fed. 693, 94 C. C. A. 179; The Procida (D. C.) 243 Fed. 251. It is pretty clear that, when the bow of the Daisai Maru emerged from the dock the Nichols fastened herself alongside. It is also clear that later she was doing her best to nose the Daisai Maru up against the flood, which was unexpectedly found to be carrying her upstream. I find that the Nichols was dilatory in executing her orders, and the only question is whether she should have angled more against the ship. It must be confessed that the immense weight of the testimony is that she never got perpendicular, as she should have been, and as Wray says she was. In the face of their testimony, and in consideration of the inevitable bias of Wray, the single witness, I find she did not come to right angles with the Daisai Maru. I find she did not cast off sooner than she ought for her own safety; but the fact remains that she was not using her own strength to the most advantage.

Shall she be held responsible for that? The case is not one in which some statutory or other sailing rule has been violated, and in which the burden rests upon the vessel so at fault to clear herself by showing that no damage resulted. I think the burden remained upon the Daisai Maru to show that the Nichols, failing to push at right angles, contributed to the collision. The facts are somewhat uncertain, but I cannot say that the result of her change in position would have avoided the collision. Wray is concededly a master of large experience and competence; he knew, after the flotilla was out, what the conditions were which he had to meet, and he undoubtedly meant to do the best he could. The other witnesses, who say that the Nichols was never at an angle of more than 45 degrees, are not to be taken literally. Some of them are biased, as, for example, Feldhusen and perhaps Barlow, who was an officer of the Daisai Maru, and possibly some of the Japanese crew. Just what the Nichols' angle was to the ship I cannot say, except that she was not pushing straight against her.

It is obviously impossible to ascertain what was the differential of power between what she should have done and what she did do, or what the effect would have been, had she been straight. That the Daisai Maru would have cleared the Beaverton, or even that the force of the blow would have been less, seems to me unlikely. Consider the situation. The time would in any case have come when the Nichols must cast off, unless she could have pushed the Daisai Maru far enough below the bows of the Beaverton to leave room for herself to pass safely. If not, she was bound to back off, on which the Daisai Maru would have drifted down on the Beaverton's bows, with a momentum increased by her increased speed. I have no reason to suppose that the

change of an angle would have pushed the Daisai Maru 100 feet below the Beaverton's bows. So much space was necessary, and more, for the Nichols is 96 feet over all, and some allowance must have been made to clear the Beaverton's chain. I would say that the Nichols safely required 150 feet. It seems to me that in the face of the obvious fault of the Daisai Maru, which I can fairly call gross, I ought not to hold the tug for this collision, upon what after all must be admitted to be a speculative inference.

[4] There remains the alleged fault of Wray in becoming a party to a maneuver which he knew to be improper. The Anthracite, supra, asserts this rule in the case of two co-operating tugs, and I applied it in The Procida, a case not yet passed upon in the Circuit Court of Appeals. It applies, in my judgment, when the tugs are jointly co-operating, sharing in the general direction of the maneuver, or by mutual agreement delegating their common duties to one of their number. It does not apply when they are all operating under the orders of the ship, and not among them, either jointly or severally, assuming any responsibility for the means or the result. Here the pilot was the ship; the tugs had nothing to do with their own orders or disposition; they were entitled, and indeed bound, to do what the ship directed.

Furthermore, Wray says, and it is not contradicted, that he did not know what course Feldhusen proposed to take until they had left the dock, when certainly it was too late to change. I do not see how he could have known. It will be urged that he said that the disposition of the tug was wrong in either of the two courses open to Feldhusen; that is, whether the ship was to cross between the Beaverton and the Chippana, or whether she was to head into the tide. That, perhaps, is the fair purport of his opinion, though it is by no means clear. He was opinionated, conceited, and garrulous, and was anxious to show his superiority to the young pilot who had suffered his first mischance. The counsel, properly enough playing upon his failing, led him into a general condemnation of the disposition of the tugs from any point of view.

The consequence of their position would be that no tug can safely accept orders from a ship before she learns exactly what is the proposed maneuver and assents to the methods by which it is proposed to carry it out. I cannot see that this is in any sense involved in the rule of The Anthracite and The Procida; but, if it be, I can only say that the rule is not to be followed with consistency. Such a rule would be totally impracticable in practice. Ships are not to be required to take their tugs into preliminary council of deliberation. Moreover, it is to be remembered that, if this be true, all tugs are liable, for each master is chargeable with knowledge of the proper way to discharge his duties. That conclusion appears to me a reductio ad absurdum.

The sole cause of the collision appears to me to be the mistake of Feldhusen, as he in substance admitted shortly after its occurrence.

The usual interlocutory decree against the Daisai Maru will pass.

ARONSTAM v. JAMES et al.

(District Court, E. D. New York. February 12, 1921. On Motion for Reargument, March 22, 1921.)

No. 658.

1. **Parties ⇐40(2)—Stranger must have legitimate and proper interest in fund or property in question to intervene.**
Even in equity there is a fundamental rule that, before a stranger to a suit can be permitted to intervene, it must appear that he has a legitimate or proper interest in the fund or property in question, which he ought to be allowed to protect in that proceeding.

2. **War ⇐12—Citizens of France could not intervene to protect judgment against person having property in hands of Alien Property Custodian.**
A citizen of France could not intervene in a suit brought under Act Cong. Oct. 6, 1917, known as the Trading with the Enemy Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½a et seq.), to enforce a judgment against the owner of property in the hands of the Alien Property Custodian, even though he presented equities, the republic of France not having extended reciprocal rights to citizens of the United States, in view of section 9, as amended, subds. (e) and (f); and even after France extended reciprocal rights, intervention could not be successful, unless the debt arose with reference to the money held by the Alien Property Custodian which claim must be filed with him after notice of claim had been made in accordance with subdivision (a).

In Equity. Suit by Charles S. Aronstam against Elizabeth Pratt de Gasquet James and others, in which Pauline Andre de la Mettrie and others petition to intervene. Petition denied.

Pitkin & Rosensohn, of New York City, for plaintiff.
Frederick Geller, of New York City, for defendant James.
Leroy W. Ross, of Brooklyn, N. Y., for Alien Property Custodian.
J. Noble Hayes, of New York City, for petitioning creditors.

THOMAS, District Judge. After a motion to intervene had been granted by the court, without opinion, further affidavits were filed respecting the merits of the motion, and a written request was filed, asking for the opening of the order granted. Informally this request was granted, so that the matter is now before the court as though a motion to reargue had been granted, and the question is presented de novo, and arguments fully had respecting the merits of the motion to intervene.

This suit was brought under an act of Congress approved October 6, 1917, known as "Trading with the Enemy Act," to recover from Elizabeth Pratt de Gasquet James a debt alleged to be due the plaintiff out of property and money of the defendant James now in the custody of the Alien Property Custodian. The plaintiff is an attorney at law, a resident of Brooklyn, N. Y., and the defendant Madame James resides in Austria, and is an alien enemy as defined in the statute known as the "Trading with the Enemy Act."

From the pleadings in the case it appears that upwards of $12,000 belonging to Madame James came into the possession of the Alien

Property Custodian, and that he is now holding said property under the authority of the act of Congress, and that said funds are deposited in the Treasury of the United States in accordance with the provisions of section 12 of the act. It further appears that the plaintiff rendered professional services to Madame James at her request, and disbursed certain moneys extending over a period of three years, which services the plaintiff alleges were of the value of $12,000, and the amount of the disbursements was $1,911.38. A long bill of particulars accompanies the complaint, the details of which are, so far as this question is concerned, unimportant. It further appears that $2,564.97 has been paid, and that there was due $11,346.41, with interest from December 7, 1917.

On March 8, 1919, the plaintiff filed a verified notice of claim with the Alien Property Custodian, as required by section 1 of the act and on the form required by the Alien Property Custodian. Subsequent to this suit, and as the result of negotiations between the plaintiff, his counsel, and the attorneys representing Madame James, the claim of the plaintiff was compromised, and the defendant on July 6, 1920, confessed judgment in the sum of $5,000, without interest, which amount was accepted by the plaintiff in full, and a decree entered thereon for the sum of $5,000.

At this point, and on October 4, 1920, Pauline Andre de la Mettrie, George Pratt de Gasquet James, Madame Victoire Louise de Gasquet James, children of Madame James, the defendant, and all citizens of France, filed their petition to show cause why they should not be granted leave to intervene in this action as parties defendant, to protect or enforce certain judgments each had recovered against the defendant James. On December 20, 1920, acting through Coudert Bros., her counsel, Madame Victoire Louise de Gasquet James withdrew from the litigation, thus leaving the two first-mentioned children still insisting upon their rights to intervene.

From their petition it appears that, after considerable litigation to determine the amount due them from their mother, the defendant Madame James, "a final decree of the Surrogate's Court was duly made and entered on November 3, 1917, in accordance with the decision and order of the Court of Appeals, * * * making the amount payable to the several respective parties as their shares as follows: * * * George Pratt de Gasquet James, $65,133.25; Pauline Andre de la Mettrie, $65,133.25—and awarding judgment against the said Elizabeth Pratt de Gasquet James accordingly," and that no part of said judgment, which was for the restoration of the property of the estate of the petitioners' father, has ever been paid.

It is to enforce and collect this judgment that the petitioners desire to intervene and to prevent a subsequent judgment creditor from receiving priority of payment. It is conceded that the petitioners are citizens of France, and that the republic of France does not extend reciprocal rights to citizens of the United States. The answer to the right of the petitioners to intervene is dependent upon the provisions of section 9 of the act as amended, subdivisions (e) and (f), 41 Stat. 978, and not under the rules provided in equity.

Under subdivision (a) of section 9 of the act it appears that the plaintiff has fully performed all the requirements of the law in order to give him a standing in the federal court for the purpose of enforcing his claim. Subdivisions (e) and (f) provide as follows:

(e) "No money or other property shall be returned nor any debt allowed under this section to any person who is a citizen or subject of any nation which was associated with the United States in the prosecution of the war, unless such nation in like case extends reciprocal rights to citizens of the United States; nor in any event shall a debt be allowed under this section unless it was owing to and owned by the claimant prior to October 6, 1917, and as to claimants other than citizens of the United States unless it arose with reference to the money or other property held by the Alien Property Custodian or Treasurer of the United States thereunder."

(f) "Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court."

From these sections of the act it is apparent that out of a fund in the hands of the Alien Property Custodian taken from an alien enemy:

(1) No debt can be allowed to a citizen of France, unless France in like case extends reciprocal rights to citizens of the United States.

(2) No debt can be allowed to a citizen of France, unless it arose with reference to the money held by the Alien Property Custodian.

(3) The claim must be filed with the Alien Property Custodian after notice of claim has been made and filed in accordance with the provisions of subdivision (a) of the act.

(4) Except in the manner prescribed by the statute, the money in the hands of the Alien Property Custodian "shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court."

From this it is very clear, even if the petition to intervene were granted, that under the conceded facts of the case the court would be without jurisdiction and powerless to enforce a decree issued in favor of the petitioners. We are, by the statute, foreclosed from discussing the equities of the case which have been urged at the argument. The question of whether an earlier judgment creditor will be prevented from securing priority over a later judgment creditor, even though the claim does present certain equities, cannot be said, in view of the express provisions of the statute, to be material.

[1, 2] The petitioners rely upon equity to enforce their right to intervene, and the discretion of the court is invoked in aid of the motion when courts of equity generally grant such motions where the necessary showing is made. But even in equity it is a fundamental rule that, before a stranger to a suit can be permitted to intervene in a suit between other parties, it must appear that he has a legitimate and proper interest in the fund or property in question, which he ought to be allowed to protect in that proceeding. A stranger who has no interest that could prevail over the right of the actual parties cannot intervene. In other words, even in equity, if the petitioners cannot enforce their claim in these proceedings, because of the provisions of the statute under which the suit was brought, they cannot be permitted to intervene. Upon any one of the conditions stated above, and

which are expressly imposed under the statute in clear and commanding language, the petition must be denied.

Recognizing the importance to the petitioners of this ruling, a very careful examination has been made of the many claims of the petitioners and the voluminous affidavits filed in support thereof. If it were not for the sections of the statute quoted supra, and if this were an ordinary action brought to recover a judgment out of a fund in the hands of a depository, the petition would be granted in accordance with the accepted practice in equity in such cases. And it was under an apprehension that such was the case that the motion was formerly granted, due regard for the provisions of the Trading with the Enemy Act not having been fully had by the court, or brought to its attention on argument when the former decision was made. Inasmuch as we are dealing with conditions created by the World War, when all equities were swept aside, and the Congress, in its wisdom, passed laws to meet such an exigency, it follows that the strict terms and provisions of the Trading with the Enemy Act must be followed.

As it is conceded that France extends no "reciprocal rights to the citizens of the United States" and that the petitioners are citizens of France, they could not prevail in the enforcement of their judgment against the fund in the hands of the Alien Property Custodian, even though their petition was granted. That being true, even equity rules would not allow them to intervene. Furthermore, under section 9, subd. (e), of the act, the court would be without jurisdiction to enforce their claims, even though the petition were granted.

For these reasons, the original order granting the petition must be reversed, and the petition to intervene denied; and it is so ordered.

Decree accordingly.

On Motion for Reargument.

GARVIN, District Judge. This is an application for leave to reargue a motion for permission to intervene in this action, which was denied by Judge Thomas on February 12, 1921. The relief sought includes the opening of a judgment entered herein on or about February 14, 1921, in the event that leave to intervene is given. The application is made to me because of the request of Judge Thomas that any such motion be made before one of the judges of this district, and the parties have stipulated in open court that I consider the matter as though his decision had been my own.

The facts are set forth fully in the opinion filed when the motion was denied, by which George Pratt de Gasquet James and Pauline Andre de la Mettrie were refused leave to intervene on the following grounds:

(1) Because they are citizens of France, and the French republic does not extend reciprocal rights to citizens of the United States.

(2) Because of provisions of the Trading with the Enemy Act (under which the suit at bar was brought), section 9 of which reads in part as follows:

(e) "No money or other property shall be returned nor any debt allowed under this section to any person who is a citizen or subject of any nation

which was associated with the United States in the prosecution of the war, unless such nation in like case extends reciprocal rights to citizens of the United States; nor in any event shall a debt be allowed under this section unless it was owing to and owned by the claimant prior to October 6, 1917, and as to claimants other than citizens of the United States unless it arose with reference to the money or other property held by the Alien Property Custodian or Treasurer of the United States hereunder."

(f) "Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court."

The opinion, supra, says:

"From these sections of the act it is apparent that out of a fund in the hands of the Alien Property Custodian taken from an alien enemy:

"(1) No debt can be allowed to a citizen of France unless France in like case extends reciprocal rights to citizens of the United States.

"(2) No debt can be allowed to a citizen of France unless it arose with reference to the money held by the Alien Property Custodian.

"(3) The claim must be filed with the Alien Property Custodian after notice of claim has been made and filed in accordance with the provisions of subdivision (a) of the act.

"(4) Except in the manner prescribed by the statute, the money in the hands of the Alien Property Custodian 'shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.'

"From this it is very clear, even if the petition to intervene were granted, that under the conceded facts of the case, the court would be without jurisdiction and powerless to enforce a decree issued in favor of the petitioners. We are, by the statute, foreclosed from discussing the equities of the case which have been urged at the argument. The question of whether an earlier judgment creditor will be prevented from securing priority over a later judgment creditor, even though the claim does present certain equities, cannot be said, in view of the express provisions of the statute, to be material.

"The petitioners rely upon equity to enforce their right to intervene, and the discretion of the court is invoked in aid of the motion when courts of equity generally grant such motions where the necessary showing is made. But even in equity it is a fundamental rule that, before a stranger to a suit can be permitted to intervene in a suit between other parties, it must appear that he has a legitimate and proper interest in the fund or property in question, which he ought to be allowed to protect in that proceeding. A stranger who has no interest that could prevail over the right of the actual parties cannot intervene. In other words, even in equity, if the petitioners cannot enforce their claim in these proceedings, because of the provisions of the statute under which the suit was brought, they cannot be permitted to intervene."

But it is now urged by the petitioners that some time since the French government granted reciprocal rights to American citizens in France. This appears to be true, and if that question alone were involved the petitioners might well have the relief they seek. But the other reasons advanced by the court for its conclusion, when the motion was denied, are persuasive, and in addition it should be noted that the act provides that a resident of France may not implead the Custodian in any court other than the Supreme Court of the District of Columbia (section 9 [as amended June 5, 1920]). To allow the intervention would make the intervener a plaintiff in the suit. The court has no power to indirectly nullify a clear requirement of the act.

After a very careful reading of the papers submitted on this appli-

cation, including the elaborate and learned brief of counsel for the petitioners, my conclusion that the relief sought should not be granted remains unaffected. The motion is denied, and, in view of the request of counsel for petitioners, the order will be settled on three days' notice.

AMERICAN HOMINY CO. v. MILLIKIN NAT. BANK.

(District Court, S. D. Illinois, S. D. April 17, 1920.)

No. 15783.

1. **Bills and notes ⊜6—Draft to fictitious payee payable to bearer.**
Under Negotiable Instrument Law Ill. § 9, par. 3, a draft drawn to a payee known by the drawer to be fictitious is payable to bearer.

2. **Principal and agent ⊜119(1)—Principal has burden of proving limitation on authority of agent.**
Where an agency to deal with the particular subject of the inquiry is admitted, and a special limitation is relied on to avoid liability for certain acts of the agent, the burden is on the party alleging the special limitation to prove it.

3. **Bills and notes ⊜296—Drawee paying draft not "holder in due course" as respects right to rely on implied warranties.**
Negotiable Instrument Law Ill. §§ 65, 66, providing that indorsers warrant the genuineness and validity of the instrument to all subsequent holders in due course, do not apply to the drawee of a draft, to whom it is presented for payment, who does not become by payment a "holder in due course."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Holder in Due Course.]

4. **Bills and notes ⊜434—Drawee, paying drafts fraudulently drawn by its agent, cannot recover from innocent holder.**
Plaintiff conducted a grain elevator, which for 10 years was in charge of an agent authorized to buy grain and pay for the same by drafts on plaintiff, each drawn on a form stating the amount and price of the grain for which it was given. During three years, besides drafts legitimately drawn, the agent from time to time made drafts in due form, in all 129, drawn to fictitious payees, whose names he indorsed thereon, in many cases with his own indorsement also. These drafts he negotiated and appropriated the proceeds to his own use, and they eventually came in due course of business to defendant bank for collection, and were by it presented to and paid by plaintiff. *Held*, that defendant was chargeable with no negligence which rendered it liable to plaintiff for the amounts so received but that the latter was not only estopped by its negligence in permitting the business of its agent to go on so long without checking, which would have disclosed the fraud, but also by paying the drafts recognized their validity as between it and defendant.

At Law. Action by the American Hominy Company against the Millikin National Bank. Judgment for defendant.

The American Hominy Company, plaintiff, is a corporation organized under the laws of the state of New Jersey, with its head office at Indianapolis, Ind. The defendant is a banking association organized under the National Banking Act (13 Stat. 99), and is located at the city of Decatur, Ill. For 10 years prior to the commencement of this suit, plaintiff owned and operated a grain elevator at Garber, Ford county, Ill., and during the same time plaintiff maintained a branch office at Decatur, doing business under the name of

Suffern-Hunt Mills, Branch American Hominy Company, and owned and operated several other grain elevators in Central Illinois. During all that time one John C. Meyer was the local managing agent of the elevator and business of buying and shipping grain at Garber, and was authorized to buy grain and pay for the same with drafts drawn by him upon the plaintiff in the following printed blank form, which were furnished Meyer in book form by plaintiff; each blank being numbered consecutively:

"Suffern-Hunt Mills, No. .....
"Branch American Hominy Co.
"White Corn products. Garber Ill., ..., 191—.
"Pay to the order of ..... $....., ... dollars, for ..... bushels ..... at .....
"To Suffern-Hunt Mills, Decatur, Illinois. ....., "Agent."

During a portion of the period mentioned, beginning on June 8, 1914, up to and inclusive of the 5th of June, 1917, among others, Meyer issued the 129 drafts sued upon in this case. Each one was signed by John C. Meyer on the line above the word "Agent." None of the drafts mentioned was ever delivered to or indorsed by the payee named, and it was never intended by John C. Meyer that any such payee should have any interest in or to any of the drafts, or any part thereof, nor that any payee in any of them should have any notice or knowledge of the making, issuing, or negotiation of the said drafts, and, in fact, none of the payees named in any of them had any interest in them or the proceeds thereof.

After the drafts were drawn, and before negotiation, the name of the payee in each was written across the back by John C. Meyer, without any authority from the named payee. In some instances Meyer wrote his own name under the purported indorsements of the payee. Afterwards the drafts were negotiated by Meyer without the actual knowledge of plaintiff or defendant that the respective payees had not received nor indorsed said drafts, and in the regular course of business they were received by defendant, and by it presented to plaintiff for payment and paid. Plaintiff first obtained actual knowledge of the writing of payees' names by Meyer upon the back of the drafts in June, 1917, and gave notice to defendant that it had discovered that the names of the payees on many of such drafts had been forged, and that the proceeds thereof were not received by the payee, nor used for the payment of grain, but were misappropriated. A list of the drafts was inclosed, and defendant was notified that the plaintiff would hold it responsible for the wrongful collection of the drafts, and demanded repayment of the amount collected upon them. Afterwards, November 7, 1917, a formal tender of the drafts in question was made to the defendant.

The drafts in question were usually negotiated by Meyer at the banks at Gibson City, and reached defendant through correspondents either in Chicago or Bloomington. A number of drafts were negotiated by Meyer through one G. G. Eddy, engaged in the speculative grain business at Paxton, and some through Bennett & Co., Board of Trade operators in Chicago. As the drafts reached defendant in the regular course of business, each would be presented to the plaintiff for payment at its branch office in Decatur. The officers of plaintiff would take each draft, check it up with the daily report of Meyer, make such other investigation as they cared to make, and then issue plaintiff's check in payment thereof.

During the period covered by the transactions involved in this case, a representative of the plaintiff called several times at the elevator at Garber to discuss repairs, etc. It was reported to the officers of plaintiff at Decatur that Meyer was speculating on the Board of Trade. The company's cashier asked him about it, and was informed by Meyer that he had had a few trades, but that they were then all closed. Also that in several instances Meyer had offered to pay farmers in excess of the market price for their grain, if they would wait some time after delivery for their pay; that he was storing grain in the elevator in violation of the regulations of Illinois. It was known to the officers of the plaintiff that Meyer was conducting a small general store on his own behalf, in addition to the grain-buying business,

and he was notified by the company that, if he was cashing customers' drafts in his store, he issue his own checks for the balances. At no time during the period involved in this case was the amount of grain in the elevator checked up to see if the proper amount was there, nor was any particular draft checked up with the scales record to see whether or not the amount of grain purporting to have been paid for by it was received by Meyer.

The last draft sued upon was issued June 5, 1917; W. E. Lipe was named as payee, for $2,337.60, and purported to have been issued in payment "for 1612 8/8 bu. white corn at 1.45 bu." The draft was indorsed "W. E. Lipe," and beneath the indorsement was the notation in ink, "Dep to credit of John C. Meyer WAD," evidently the notation of the bank at Gibson City that the amount of the draft had been deposited to the credit of Meyer.

George B. Gillespie, of Springfield, Ill., and Vail, Pogue & Allen, of Decatur, Ill., for plaintiff.

Le Forgee, Black & Samuels, of Decatur, Ill., and Barry & Morrissey, of Bloomington, Ill., for defendant.

FITZHENRY, District Judge (after stating the facts as above). It is not contended, in this case, that Meyer did not have authority to draw drafts in exactly the same form as the drafts sued upon. In fact, it is a fair inference that during the period covered by the fraudulent transactions involved here, June, 1914, to June, 1917, Meyer drew hundreds of drafts in identically the same form, so clearly so that plaintiff accepted and paid the bad ones with the good, throughout the entire three-year period. The series of frauds finally being discovered and the extent of them ascertained, suit was brought against defendant, the presenting holder, to recover the moneys of which plaintiff had been defrauded by its agent.

[1] Much depends upon the legal effect of the acts or omissions of the several parties involved. Upon inquiry it has been established, and has been so stipulated, that Meyer, the drawer and maker of the several drafts in question, made each of the fraudulent drafts payable to the order of a person known to him to be fictitious or nonexistent, or of a living person not intended to have any interest in them. Each draft was drawn, negotiated, and paid in Illinois. So the legal effect of what Meyer did was, and must be so held, to make them and each of them payable to bearer. Illinois Negotiable Instrument Law, c. 98, § 9, par. 3 (4 J. & A. Ill. Stat. Ann. par. 7648); Bartlett v. First National Bank, 247 Ill. 490, 93 N. E. 337; American Hominy Co. v. National Bank of Decatur, 215 Ill. App. 464; United States v. Chase National Bank, 250 Fed. 105, 162 C. C. A. 277; United States v. Chase National Bank (D. C.) 241 Fed. 535. The Illinois statute, prescribing when an instrument shall be payable to bearer, uses the words, "known by the drawer or maker to be fictitious," etc.; the Uniform Negotiable Instruments Law, in force in New York and many other states, uses the language, "and such fact was known to the person making it so payable." Uniform Negotiable Instrument Law N. Y. § 9, par. 3. The writers of the negotiable instruments statutes undoubtedly sought to avoid the controversy that had developed in England over the meaning of the corresponding provision in the English Bills of Ex-

change Act (Act of 1882, § 7, subd. 3), where this language was used:

"Where the payee is a fictitious or nonexisting person, the bill may be treated as payable to bearer."

It was contended in England:

"The word 'fictitious' must in each case be interpreted with due regard to the person against whom the bill is sought to be enforced. If the obligations of the acceptor are in question the acceptor is the person against whom the bill is to be so treated, fictitious must mean fictitious as regards the acceptor, and to his knowledge." Vagliano Bros. v. Bank of England, L. R. 23 Q. B. Div. 243.

In a case arising in Illinois, prior to the enactment of the Negotiable Instrument Law, the Illinois Supreme Court followed the holding in the Vagliano Case, supra, and applied it. First Nat. Bank v. Northwestern Bank, 152 Ill. 296–309, 38 N. E. 739, 26 L. R. A. 289, 43 Am. St. Rep. 247. However, after the decision in the Vagliano Case, supra, that case was appealed to the House of Lords, and the holding of the lower court upon this question and the judgment were reversed. Bank of England v. Vagliano Bros., L. R. [1891] App. Cas. 107; while the holding of the Supreme Court of Illinois has been superseded by the enactment of the statute and reversed in principle by a later decision, Bartlett v. First National Bank, 247 Ill. 490, 93 N. E. 337.

The latter decision is sustained by the great weight of authority. United States v. Chase Nat. Bank, 250 Fed. 105, 162 C. C. A. 277 (C. C. A. 2d Cir.); Snyder v. Corn Exchange Nat. Bank, 221 Pa. 599, 70 Atl. 876, 128 Am. St. Rep. 780; Bank of England v. Vagliano Bros., L. R. [1891] App. Cas. 107; Trust Co. of America v. Hamilton Bank, 127 App. Div. 515, 112 N. Y. Supp. 84; Phillips v. Mercantile Nat. Bank, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596; Clutton v. Attenborough & Son, L. R. [1897] App. Cas. 90; Coggill v. American Exchange Nat. Bank, 1 N. Y. 113, 49 Am. Dec. 310; Phillips v. Thurn, 18 C. B. (18 J. Scott, N. S.) 694; Kohn v. Watkins, 26 Kan. 691, 40 Am. Rep. 336; Ort. v. Fowler, 31 Kan. 478, 2 Pac. 580, 47 Am. Rep. 501; Lane v. Krekle, 22 Iowa, 399; Farnsworth v. Drake, 11 Ind. 101; Blodgett v. Jackson, 40 N. H. 21; In re Assignment of Pendleton Hardware Co., 24 Or. 330, 33 Pac. 544.

[2] It is contended very ably by counsel for the plaintiff that Meyer, the agent and drawer of the drafts in question, had no authority to draw bearer paper; that if the drafts were payable to bearer, having exceeded his authority as agent, that therefore his acts were void. If there was any limitation upon the power of Meyer as agent for the plaintiff at Garber, Ill., none is shown by the evidence in this case, and plaintiff is bound by the rule that, where an agency to deal with the particular subject of the inquiry is admitted, and a special limitation is relied upon to avoid liability for certain acts of the agent, the burden is on the party alleging the special limitation to prove it. J. L. Mott Iron Works v. Metropolitan Bank, 78 Wash. 294, 139 Pac. 36; Brett v. Bassett, 63 Iowa, 340, 19 N. W. 210; Lowry v. Atlantic Coast Line R. Co., 92 S. C. 33, 75 S. E. 278; Wedge Mines Co. v. Denver Nat.

Bank, 19 Colo. App. 182, 73 Pac. 873. Also the rule that whoever asserts a negative fact to shield himself from liability must establish the truth of the allegation, unless the means of proving the fact are peculiarly within the knowledge of the opposite party. Great Western R. R. Co. v. Bacon, 30 Ill. 347, 83 Am. Dec. 199; Abhau v. Grassie, 262 Ill. 636, 104 N. E. 1020, Ann. Cas. 1915B, 414; Harper v. Fay Livery Co., 264 Ill. 459, 106 N. E. 273.

For ten years prior to the commencement of this suit, Meyer, plaintiff's agent, was authorized to make successive purchases of grain in the locality of his agency, from those who desired to sell, and must be held to have been a general agent. Butler v. Mapes, 76 U. S. (9 Wall.) 766, 19 L. Ed. 822; Mechim, § 6; 2 Kent, 620; United States Life Ins. Co. v. Advance Co., 80 Ill. 549. If an agent acts within the apparent scope of his authority, his principal is bound. Hodges v. Bankers' Surety Co., 152 Ill. App. 372–385.

But plaintiff also contends:

"The drafts were in the semblance of plaintiff's drafts. If they were in fact Meyer's own drafts, then so far as plaintiff is concerned the drafts were all forgeries; that is, the drawers' names were forged. Having paid the drafts, plaintiff cannot urge they are forged. But what is the result? Although the forger of a bill of exchange may intend the payee therein to be fictitious, the payment of such bill by the drawee converts such bill as between all parties thereto into a real bill of the drawer whose name was forged (plaintiff); and since it is the intent of the drawer (plaintiff) only which can make a payee fictitious, the forger's (Meyer's) intent under such circumstances must be disregarded, and the bill deemed as between all parties payable to a real and not a fictitious payee."

To concede the contention of plaintiff in this case, that the drawer's name in each instance was forged, is to bring the case clearly within the case of Price v. Neal, 3 Burrows, 1354 (decided in 1762). That case involved two forged bills of exchange which had been paid by the drawee. Upon discovery of the forgery, the drawee brought an action against the presenting holder, to recover the money so paid. Both parties being admitted to be equally innocent, it was held that the drawee could not recover. Lord Mansfield said:

"Here was no fraud, no wrong. It was incumbent upon plaintiff to be satisfied 'that the bill drawn upon him was the drawer's hand' before he accepted or paid it; but it was not incumbent upon the defendant to inquire into it. Here was notice given by the defendant to the plaintiff of a bill drawn upon him; and he sends his servant to pay it and take it up. The other bill he actually accepts, after which acceptance the defendant innocently and bona fide discounts it. The plaintiff lies by for a considerable time after he had paid these bills; and then when he found out 'that they were forged' the forger comes to be hanged. He made no objection to them at the time of paying them. Whatever negligence there was was on his side."

The principle established in Price v. Neal, supra, has never been departed from by the courts of England, or the federal courts, and by but very few of the state courts. In United States v. Chase National Bank (D. C.) 241 Fed. 535, District Judge Learned Hand said:

"Any holder or the drawer might fill a genuine bill with the names of distinguished persons, and forge their indorsements, without affecting his rights or the drawee's obligation, because the drawee looks only to the drawer, and

to the title of the holder from the person to whom or for whom the drawer actually first delivered the bill. The actual holder may pass his actual title by any name that he has been called in the bill, and he may add any indorsements to real persons whom he chooses, if he avoids delivery to them."

It might as effectively be contended that a recovery should be permitted plaintiff for the reason that it had not authorized its agent to commit forgery.

"It may be quite true that the cashier was not the agent of the bank to commit a forgery, or any other fraud of such a nature; but he was authorized to draw or check upon the bank's funds. If he abused his authority and robbed his bank, it must suffer the loss." Phillips v. Mercantile Nat. Bank, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596.

In paying these drafts, made out and indorsed as they were, plaintiff is so far concluded by its acts as to be estopped from now denying their validity. Phillips' Case, supra.

It is contended that section 9, par. 3, of the Illinois Negotiable Instrument Law, cannot stand as a final pronouncement of the whole law respecting fictitious payee paper, if any other provisions of the Negotiable Instrument Law in any wise modify section 9, and that section 61 of the Statute is a limitation upon section 9. A reading of section 61 discloses that that section does not presume to provide for the contingencies provided for in section 9. Therefore the later section fails to modify the earlier one.

[3] It is also contended that sections 65 and 66 make the defendant here a warrantor of the indorsements of the payees' names to the plaintiff, upon the theory that the person who presents a draft for payment makes the warranties provided in these sections to the drawer, upon the authority of Leather Bank v. Merchants' Bank, 128 U. S. 26, 9 Sup. Ct. 3, 32 L. Ed. 342, which was decided before the enactment of the Negotiable Instrument Law in Illinois.

It must not be overlooked that in this case it is stipulated that the drawer of the several drafts made them all payable to fictitious persons or living persons not intended to have any interest in them, and that it is the intention of the one making the draft which controls, even though he be an inferior officer of the United States and the United States Treasurer is the drawee. United States v. Chase National Bank, 250 Fed. 105, 162 C. C. A. 277 (C. C. A. 2d Cir.). Moreover, the warranties of those two sections run "to all subsequent holders in due course." The plaintiff, the drawee, is not a holder in due course under section 52, nor under the definition contained in section 190. These drafts being payable to bearer, under the statute, presentation for payment to the drawee was not a negotiation. Brannon's Negotiable Instruments Law (3d Ed.) 131, 132.

Section 62, however, does have a direct bearing upon the force and effect to be given to section 9, par. 3; payment in law being equivalent to acceptance, so far as the rights of the drawee or acceptor are concerned. Section 62 provides the acceptor, by accepting the instrument, engages that he will pay it according to the tenor of his acceptance and admits:

"The existence of the drawer, the genuineness of his signature and his capacity and authority to draw the instrument."

Prof. Brannon, in his excellent work, supra, in discussing the construction of section 62, says (pages 225, 226):

"Defendant bank, without negligence, cashed a forged check on plaintiff bank, indorsed it: 'Indorsement guaranteed. Pay any national or state bank or order'—and sent it for collection and it was paid by plaintiff, who, upon discovery of the forgery, sued to recover the money. *Held*, that plaintiff could not recover; that section 62 was intended to adopt the doctrine of Price v. Neal, 3 Burrows, 1354, and applied as well to payment as to acceptance by the drawee of a forged check or bill; also that the indorsement of the defendant bank was not a guaranty to the drawee but only to indorsees"—citing numerous authorities.

[4] Prof. Ames, formerly Dean of the Harvard Law School, in his very able "Comments and Criticisms upon the Negotiable Instruments Law," contained in Prof. Brannon's work, supra, says (pages 419, 420):

"If the acceptor or certifying bank must honor his acceptance or certification in such case, a fortiori a drawee who pays a raised bill or check without acceptance or certification should not recover the money paid from an innocent holder. These results are at variance with numerous American decisions, but they are changes for the better, so far as adopted, bringing the law of this country into harmony with the law of nearly, if not indeed all, of the European states."

Therefore, if Meyer, plaintiff's agent, was acting within the scope of his authority, the instruments in question were all payable to bearer within the meaning of section 9, par. 3, of the Negotiable Instrument Law, and defendant's title was derived through delivery of the several instruments to it. If Meyer exceeded his authority in making the instruments payable to fictitious or persons not intended to have any interest therein, and all of the instruments were forgeries, being in the semblance of plaintiff's drafts, then all of the instruments come within the doctrine in Price v. Neal, supra, and the forged indorsements become immaterial.

"As the bill was a forgery, and created no obligation, it could make not the slightest difference to the drawee what indorsements it bore, or whether or not they were genuine. The bill, being void, could never be presented by the true owner, assuming the payee ever became its true owner. Now, in the case of a genuine bill stolen and forged, the wrong done the drawee, who pays on the forged indorsement, is only that he must pay again, a wrong which cannot arise when the bill is a forgery. Hence the forgery of the indorsement was wholly irrelevant, even if the bill had been stolen from the actual payee." United States v. Chase Nat. Bank (D. C.) 241 Fed. 535–538.

This is an action in assumpsit, under the common counts, for money had and received. The right to recover is governed by principles of equity, although the action is at law. The action is maintainable in all cases, where one person has received money, or its equivalent, under such circumstances that, in equity and good conscience, he ought not to retain it and which ex æquo et bono belongs to another. Highway Commissioners v. City of Bloomington, 253 Ill. 164–174, 97 N. E. 280, Ann. Cas. 1913A, 471; Donovan v. Purtell, 216 Ill. 629, 75 N. E.

334, 1 L. R. A. (N. S.) 176; First National Bank v. Gatton, 172 Ill. 625, 50 N. E. 121.

In determining the equities in this case, it must be considered that there is no suggestion of negligence on the part of the defendant and that the presenting holder or indorsee is not presumed to have any knowledge of the arrangement between the drawer and drawee. However, the plaintiff, for more than 10 years prior to the commencement of this suit, maintained John C. Meyer as its local managing agent in charge of its elevator, at Garber, Ill. All of the plaintiff's business, of buying and shipping grain at and from that point, was transacted for it by Meyer. He paid for the grain he bought with drafts drawn by him, as agent, upon the plaintiff as drawee, under the name of Suffern-Hunt Mills, Branch American Hominy Company. Each draft was a plain order to pay money. However, there were blank spaces provided upon the face of each draft, which, when filled by Meyer, showed the amount, kind of grain, and price per bushel for which each draft was supposed to have been issued. Meyer made daily reports of his purchases, and when the various drafts were presented by the defendant for payment they would be paid, upon checking them up with the daily reports.

At no time before the issuing of the first and last drafts sued upon in this case was any inspection made of the grain in the elevator, or of the grain received and weighed as shown by the scales record, to ascertain whether or not Meyer had received the grain for which he had issued drafts. A checking up of any of the drafts at any time with Meyer's records and the grain in the elevator in all probability would have disclosed the fraud. The plaintiff was at liberty to make this investigation; the defendant was not and could not have done so.

There are 129 drafts sued upon in this case, aggregating the sum of $52,449.21; the first, No. 2173, dated June 8, 1914, purporting to be indorsed in blank by the payee, and the second, No. 2185, dated July 7, 1914, purporting to be indorsed by the payee in blank and by John C. Meyer. Of the 129 drafts, 73 bore the name of John C. Meyer beneath the apparent indorsement of the payee named. One draft was indorsed in the name of the payee "per John C. Meyer." The other 55 bore the apparent indorsements of the payee named, written almost invariably with an indelible pencil. As late as May 21, 1917, Meyer issued draft No. 2898 to Herman Hoffman for $1,318.05. On the back of that draft, under the purported indorsement of the payee, was written the name of John C. Meyer. On June 5, 1917, he issued draft No. 2908 for $2,337.60, on which, below the apparent indorsement of the payee, was written "Dep to credit of John C. Meyer WAD," evidently the notation of the banker with whom it was negotiated. Drafts Nos. 2195, 2244, 2275, 2523, 2613, 2875, 2795, 2651, 2584, 2754, 2806, 2815, and 2835, all purporting to have been indorsed by the payee, were negotiated with one G. G. Eddy, who indorsed and cashed them at the First National Bank at Paxton, Ill., where Mr. Eddy was engaged in the speculative grain business. The first of the Eddy drafts was dated July 29, 1914. Three drafts, Nos. 2781, 2782, and 2784,

after having the names of the payees written upon the backs of them by Meyer, were negotiated with James M. Bennett & Co., Board of Trade operators in Chicago. One of these drafts was sent by Bennett & Co. to its local representative at Decatur, who presented it at the plaintiff's offices and asked if it (Bennett & Co.) could use the draft in its business; the character of Bennett & Co.'s business being known to the officers of plaintiff. He was told it might do so, and it did. It was reported to plaintiff's representative at Decatur that Meyer was speculating on the Board of Trade; a representative called to see Meyer, and asked him if that was true; he said he had had some trades, but they were all closed.

Plaintiff was bound to know the signatures of Meyer, and its officers and agents at Decatur certainly did know it. To one familiar with his handwriting, the similarity in the writing of the indorsements of the payees' name to the names as written in the bodies of the drafts might be suggested, while a stranger would not be likely to have his suspicions aroused. But, aside from that, it is perfectly apparent that an occasional checking up of Meyer's transactions undoubtedly would have shown the truth. In the diligent prosecution of its business, plaintiff should have done this. After permitting Meyer to run its business with a free hand all the years covered by these drafts, and paying them upon presentment, plaintiff cannot now be permitted to dishonor them.

"The presentment of a bill to the drawee is a direct appeal to him to sanction or repudiate it. It is an inquiry as to its genuineness, addressed to the party, who, of all men, is supposed best able to answer it, and whose decision is most satisfactory. He is, moreover, the person to whom the bill itself points, as the legitimate source of information to others and if he were permitted to dishonor a bill after having once honored it, the very foundation of confidence in commercial paper would be shaken. There is a wide difference between such a transaction and the passing of paper as a representative of money, between persons equally strangers to it, in the ordinary course of business. In the latter case the receiver relies in a measure upon the paper, while in the former the case is reversed, and the holder relies, and has a right to rely, upon the decision of him to whom the bill is addressed, and who alone is to determine whether it shall be honored or not." Bank of St. Albans v. Farmers' & Mechanics' Bank, 10 Vt. 141–145, 33 Am. Dec. 188.

The rule is that, where one of two persons must suffer loss, he who by his negligent conduct made it possible for the loss to occur must bear it. Whatever neglect there was, was on plaintiff's side. Price v. Neal, 3 Burrows, 1354. It is his duty to use reasonable and ordinary precaution to avoid imposition, for it is against reason that a party who stands fair should suffer for the negligent conduct of another. Anderson v. Warne, 71 Ill. 20–23, 22 Am. Rep. 83; Keohane v. Smith, 97 Ill. 156–159; Miller v. Larned, 103 Ill. 562–581; Bartlett v. First Nat. Bank, 247 Ill. 490–498, 93 N. E. 337; Straus v. National Bank, 163 Ill. App. 310; Armour & Co. v. Greene County State Bank, 112 Fed. 631, 50 C. C. A. 399 (C. C. A. 7th Cir.).

In the latter case, Morelan, the agent of Armour & Co., issued checks supposedly in payment for the purchase of grain. A portion of the checks in question bore the indorsement of Morelan himself, just as in

this case 74 of the drafts in question bore the indorsement of Meyer, plaintiff's agent. The United States Circuit Court of Appeals of this circuit said:

"If this was irregular, the bank should have been notified by Armour & Co. as soon as the practice began. In the absence of such notice, Morelan's indorsement was in effect a certificate by the drawer of the genuineness of the indorsement of the payee. The bank, so long as it acted in good faith, could not be expected to look beyond such a certificate."

The Court of Appeals continues:

"Nor were Armour & Co., in another respect, without fault. The checks each bore a memoranda of the amount of purchase. The period over which they ran was from October to April. [In this case from June 8, 1914, to June 5, 1917.] The truthfulness of the memoranda could have been tested at any time by inspection of the corn in the cribs. Such inspection was within the power of Armour & Co., but not within the duty undertaken by the bank. A failure to make it by the former, at apt times, lies at the bottom of this loss; and its consequence ought not to be visited upon the bank. Of course, if the relationship between the parties was that of banker and depositor, these facts relating to negligence are largely immaterial. But, in our opinion, such legal relationship is not applicable to the transactions under consideration. Clearly, a deposit for safe keeping was not intended, except to the extent of making the bank Armour & Co.'s disbursing agent. The transaction more nearly resembles the drawing of inland bills of exchange; in which case, it is well settled, that the drawee cannot recover back money paid to the holder"—citing Hortsman v. Henshaw, 11 How. 177, 13 L. Ed. 653.

The following language from the opinion of the Circuit Court of Appeals is particularly apt in this case:

"* * * The bank was therefore guiltless of negligence, and laying aside, for the time, any consideration of Armour & Co.'s negligence, the case is one where one of two innocent parties, standing in equal relation as to obligation, must suffer through the fraud of the third. By a familiar maxim of law, the loss in such case must fall upon Armour & Co., who, by their selection of Morelan in the first instance, made the loss possible."

Plaintiff contends that Armour v. Greene County State Bank, supra, is not, and ought not to be considered as, an authority in this case, for the reason that the relationship of the litigants in that case was not identical with that of those in the case at bar. The opinion of the Circuit Court of Appeals is in itself a sufficient answer to this contention, where it was said that, while the relationship between the parties in that case was that of banker and depositor, yet "the transaction more nearly resembles the drawing of an inland bill of exchange," and then proceeded to apply what the Circuit Court of Appeals considered the law of this circuit with reference to inland bills of exchange (112 Fed. 633, 50 C. C. A. 399), making the Armour Case clearly an authority in the case at bar, and especially so as to the equitable principle therein announced.

The court finds the issues for the defendant; and it is so ordered.

O'KEEFE et al. v. CITY OF NEW ORLEANS et al.

(District Court, E. D. Louisiana, at New Orleans. April 21, 1921.)

No. 16579.

1. **Courts ⇐351½—Bill in federal court will not be dismissed on motion, unless clearly insufficient.**
   A bill will not be dismissed on motion made under equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi), unless ground for dismissal clearly appears on its face, and the court in its discretion may refuse to act on the motion and require the filing of an answer.
2. **Carriers ⇐2—Contract fixing street railway rates invalid as abridging police power of state, in violation of Constitution.**
   The making of rates for public service corporations is within the police powers of the state, and under Const. La. art. 263, providing that "the exercise of the police powers of the state shall never be abridged," as construed by the Supreme Court of the state, a city, though having delegated authority to grant franchises to street railways and to regulate the same, is without power to make a binding contract fixing a rate of fare to be charged by a street railroad company during a term of years, and where a rate so fixed becomes confiscatory and in violation of the federal Constitution the contract does not preclude its change by the city or state, nor prevent a court from enjoining its enforcement.

In Equity. Suit by J. D. O'Keefe, receiver of the New Orleans Railway & Light Company, and others, against the City of New Orleans and others. On motions by complainants for preliminary injunction, and by defendants to dismiss bill. Motion to dismiss denied, and injunction granted.

Farrar, Goldberg & Dufour, of New Orleans, La., for plaintiffs.

Ivy G. Kittredge, Michel Provosty, and W. Catesby Jones, all of New Orleans, La., for defendants.

HENRY D. CLAYTON, District Judge. The court has taken jurisdiction of the subject-matter here involved in the case of the Empire Trust Company as trustee, complainant, against the New Orleans Railway & Light Company et al., defendants, No. 15960, in equity, pending in this court. This suit, styled in the caption hereof, was brought by direction of the court under order made April 15, 1921, and it is therefore ancillary to the main cause.

This cause came on for hearing on the application of the plaintiffs, the receiver and the others, for an interlocutory injunction as prayed for in the bill, and at the same time on the motion of the city of New Orleans and the other defendants to dismiss the bill. By consent of the parties in open court the application and motion were submitted, heard, and argued at the same time.

The defendants made no formal answer to the bill, but for the purposes of this hearing, on the motion to dismiss, the defendants rest their case upon the proposition, in effect, that the bill does not present a case for equitable cognizance, and therefore should for that reason be dismissed, and that as a necessary corollary the application of the receiver for injunction should be denied.

The bill is supported by affidavit and other documentary evidence. The verified motion to dismiss does not challenge the material facts alleged in the bill.

[1] In the application of equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi), abolishing pleas and demurrers, and providing that other defenses in point of law arising on the face of the bill, which previously should have been made by plea or demurrer, shall now be made by motion to dismiss or in answer, the law is settled in numerous adjudged cases that upon the consideration of the motion the court may in its discretion, when promotive of justice, refuse to decide a case on such motion, and that defense by answer may be required. Indeed, the rule goes to the extent that, unless the motion clearly discloses that on the allegations of the bill, which are taken as true, it must be dismissed upon final hearing, the preliminary motion to dismiss must be denied.

Under the facts and circumstances disclosed in the bill, justice can be better secured by leaving the merits of the case to be disposed of after the coming in of the answer, rather than by now dealing with the controversy in ultimate way. At the present stage of the case the developments are not sufficient to afford a satisfactory and final determination of the questions of fact and law involved. Accordingly an order will be entered, denying the motion of the city to dismiss the bill.

[2] Coming, now, to the consideration of the application for injunction pendente lite, it may be said that the immediate cause for such application is the ordinance adopted by the city commission council of New Orleans. It is in these words:

"Section 1. Be it ordained by the commission council of the city of New Orleans that, subject to the provisions hereinafter set forth, Ordinance No. 5892, C. C. S., is hereby continued in full force and effect for the period of thirty days from and after April 20, 1921: Provided that the receiver of the property of the New Orleans Railway & Light Company shall sell to the public on demand at the offices of the company and at such other places as are convenient to their patrons of the various street car lines, car fare tickets or metal checks in lots of ten or more at the rate of seven and one-half cents per ticket, check or fare: And provided further that during said period no charge for transfers shall be made and a single fare shall be charged on belt lines as at present: And provided further that all money or revenue derived from that part of every car fare in excess of six cents shall be used and employed for wages and taxes and shall not be used to pay interest or dividend upon securities: And provided further that during said period there shall be no increase in the present rates for electric light and power service.

"Sec. 2. Be it further ordained, etc., that this ordinance shall become effective upon the receiver with the authority of the United States District Court for the Eastern District of Louisiana, filing his written acceptation hereof with the clerk of the commission council."

With the approval of the District Court the receiver declined to accept said ordinance and has refused to operate the street railway system under his control on the conditions named therein, and afterwards the receiver, joined therein by his codefendants, and by direction of this court (Judge Foster) filed the bill in this case, and alleges among other things that the authorities of the city of New Orleans had passed the ordinance to reduce the fare to 7½ cents on the street railways now in the hands of the receiver of this court with certain conditions,

among these that the revenue derived from that part of every car fare in excess of 6 cents shall be used and employed for wages and taxes, and shall not be used to pay interest or dividends upon securities. The ordinance further authorized the 7½ cents for only 30 days from April 20, 1921, and that after such time the rate would revert to five cents, and the allegations of the bill are to the effect that this would not permit the earning of the operating expenses and would therefore be confiscatory. The further contention of the plaintiffs is that the ordinance is a regulatory declaration, in effect that the owners of the street railways and the creditors who hold the bonds of the corporation are not entitled to a fair return, and therefore that this ordinance is an effort on the part of the city to take private property for public use without just compensation, and that the owners of the street railways are sought to be deprived of property without due process of law.

The city has asserted that it has, in the franchises granted to the defendant railways companies, irrevocable contracts made some years ago whereby the rate of passenger fare was fixed at five cents, and that it is not now within the power of this court to subtract therefrom, and that such rate of fare cannot be changed, except by consent of the city as one of the contractual parties. This brings us at once to the consideration of the franchise contracts between the city of New Orleans and the New Orleans Railway & Light Company and its subsidiaries, and just how far the court is bound to respect such contracts. It is not less than trite to say that the contracts are in a sense legal and also that they will be upheld in the main, and altogether if they are not in their practical working at this time rendered confiscatory. And this involves a mixed question of fact and law.

The prayer for injunctive relief is predicated upon the assertion that the fare of five cents, and indeed any fare less than eight cents, would not furnish a fair return on the fair value of the property employed in the street car public service, and therefore that to require such public service at a rate less than eight cents per fare would be to deprive the plaintiffs of their property without due process of law, and in violation of the Constitution of the United States, and particularly the Fourteenth Amendment, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"; and also in violation of that provision of the Constitution that "no person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Const. Amend. 5.

The power to grant the franchise and to make rates for public service corporations involves the inherent or police power of the state. Under the Constitutions of Louisiana adopted in 1879 and at different subsequent times, during which period all the franchises in question were granted, the police power was by express constitutional prohibition

made inalienable and rendered not subject to abridgment. It is hardly necessary to cite authorities in support of the proposition that rate-making is a sovereign power of the state, for it was declared so to be as far back as Munn v. Illinois, 94 U. S. 124, 24 L. Ed. 77, and the doctrine has been reaffirmed in a multitude of cases since adjudged. C. & A. v. Tranbarger, 238 U. S. 67, 35 Sup. Ct. 678, 59 L. Ed. 1204, and cases therein collated. Almost contemporaneous with the Munn Case the Supreme Court of Louisiana in C. C. Gaslight Co. v. N. O. Gaslight Co., 27 La. Ann. 138–147, declared that—

"No one has the right to dig up the streets and lay down gas pipes, erect lamp posts, and carry on the business of lighting the streets and houses of the city of New Orleans, without special authority from the sovereign. It is a franchise belonging to the state, and in the exercise of the police power the state could carry on the business itself, or select one or several agents to do so."

And in Portland v. Public Service Commission, 89 Or. 325, 173 Pac. 1178, the Supreme Court of Oregon said:

"The argument of the plaintiff is that the public peace, health, and safety comprise the sole objects of the police power of the state; that these are not affected by the rate of fare to be charged by a street car company; and hence that the police power is not available to modify the rates. But, as held in Woodburn v. Public Service Commission, 82 Or. 114, 161 Pac. 391, L. R. A. 1917C, 98 [P. U. R. 1917B, 967], Ann. Cas. 1917E, 996, the police power is not restricted to such narrow limits. As stated in section 1, article 1, of our state Constitution, governments are instituted for the peace, safety, and happiness of people. In other words, the general welfare of the people is within the police power of the government and one of the peculiar objects of its care. The discussion of the plaintiff omits all consideration of the principle that it is primarily the duty of the state, in the interests of the public, to see that all concerns that serve the public be content with, and also are entitled to receive, reasonable compensation for their services. 10 C. J. 411. All rate regulations depend upon this principle. Reasonableness is the polestar in all investigations of the subject. Conditions change, and what was reasonable 20 years ago may be unreasonably high or unreasonably low to-day. The question to be decided is: Who shall determine this, and is the contract subject to revision in that respect?"

In Georgia Banking Co. v. Smith, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. Ed. 377, involving the right of the people of Georgia to establish a railroad commission, the Supreme Court held that for the plaintiff, which had the powers of a public service corporation, certain rates of transportation were provided, and that the grantee under this legislative authority had no power which would preclude the exercise by the state of its sovereign power to regulate rates. And this must be so, because it was said in Milwaukee Electric v. Wis. R. R. Com., 238 U. S. 178, 35 Sup. Ct. 820, 59 L. Ed. 1254, speaking with reference to contract provisions of street railway franchises, that—

"It has been uniformly held in this court that the renunciation of a sovereign right of this character must be evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction."

Further discussion of this point is unnecessary, particularly in view of article 263 of the Constitution of Louisiana, and the cases arising thereunder. This article provides that—

"The exercise of the police power of the state shall never be abridged, nor so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the state."

In Black v. N. O. Ry. & Light Co., 145 La. 180, 82 South. 81, the franchises here under scrutiny were involved in determining whether the commission council of the city of New Orleans had a right to grant the New Orleans Railway & Light Company a six-cent fare. There the court said:

"The burden of plaintiff's complaint [the plaintiff stood in the place of the city] is that the raise in car fares 'impairs the obligation of the contract between the said city of New Orleans, its citizens, inhabitants, and people, and especially petitioners, on the one part, and the said New Orleans Railway & Light Company and underlying companies on the other part, which is a contravention of article 166 of the Constitution of the state of Louisiana and of section 10, art. 1, of the Constitution of the United States.' The only contracts referred to in the petition are those entered into between the city and various railway companies, to which plaintiffs were not parties, and which were made under express legislative authority, and under the police power of the state and city, and contracts granting privileges are always within and under the control of the state to change, modify, or revoke. These contracts are essentially not made with individual citizens."

The power to regulate public service corporations through commission, notwithstanding franchise provisions in municipal grants, is recognized in People ex rel. Village of South Glen Falls v. Public Service Commission, 225 N. Y. 216, 121 N. E. 777, and Ottumwa v. City of Ottumwa (Iowa) 178 N. W. 905.

In discussing the questions involved in the instant case, Freund, in his Police Powers (6th Ed.) refers to the fact that the police rate-making power cannot be contracted away or abridged in any respect in the states of Louisiana, Missouri, California, Mississippi, Montana, and Pennsylvania because of constitutional inhibitions. And I think that the Black Case recognizes such interpretation of section 263 of the Constitution of Louisiana.

There is in the Constitution of Missouri a provision in the identical language of article 263, and in construing this limitation in State v. Public Service Commission, 275 Mo. 201, 204 S. W. 497, the Supreme Court of that state said:

"* * * It was under similar definitions of 'police power' that this court held that the fixing of reasonable rates for public service is the exercise of the sovereign police power of the state. Such power cannot be contracted away, nor can the Legislature of the state authorize a municipal corporation to contract away this police power of the state. It is clear that the Legislature cannot confer more power upon one of its creatures (a municipal corporation) than it possesses itself. The Legislature is prohibited by the Constitution from abridging the police power of the state. It cannot legally authorize any creature of the Legislature to abridge this sovereign power. So that we care not what the literal meaning of section 9239, R. S. 1909, may be. If it be construed so as to abridge or limit the exercise of the sovereign police power of the state, the Legislature overstepped constitutional limitations in enacting it. If it be construed as simply authorizing a contract until such time as the state saw fit to assert its police power, as it did in the Public Service Commission Act, then it would be at least harmless in the instant."

The Supreme Court of Louisiana has said that the police power of the state is inalienable. Railroad Co. v. City of N. O., 44 La. Ann. 748, 11 South. 77; Capdevielle v. N. O. R. Co., 110 La. 918, 34 South. 868. In its charter the city of New Orleans is given the power to grant franchises to street railways and to regulate the same. But the limitation of the Constitution of the state forbids the Legislature to abridge or alienate the police power of the state as I have undertaken to show; and a fortiori a municipal corporation, though vested with police powers, cannot abridge or alienate those powers.

Of course, this case being one arising under the laws of Louisiana, the settled interpretation of these laws by the highest court of the state should be followed by the federal court. The Louisiana constitutional inhibition against the abridgment of the police power is equivalent to the limitation found in the Constitution of Texas (section 17, article 1), prohibiting "any irrevocable or uncontrollable grant of special privileges," etc. In City of San Antonio v. San Antonio Pub. Ser. Co. (October term, 1920) 255 U. S. ——, 41 Sup. Ct. 428, 65 L. Ed. ——, where the city ordinance had fixed a five-cent rate of fare, and it was assailed in the case, the Supreme Court, in affirming the judgment of the District Court (257 Fed. 467), said:

"That in view of the admitted fact of confiscation the court had power to deal with the subject we are of opinion is too clear for anything but statement. And we think it is equally clear that, as the right to regulate gave no power whatever to violate the Constitution by enforcing a confiscatory rate, a result which could only be sustained as a consequence of the duty to pay such rate arising from the obligations of a contract, it follows that the solitary question to be considered is whether a contract existed empowering the city to enforce the confiscatory rate.

"Primarily the answer to that question must depend upon whether the ordinance of 1899 fixing the five cents rate was a contract. That it was not, and could not be, we are of opinion is the necessary result of the provision of section 17, article 1, of the state Constitution, existing in 1899, prohibiting 'any irrevocable or uncontrollable grant of special privileges,' etc., when considered in the light of the irrevocable and uncontrollable elements which must necessarily inhere in the ordinance of 1899 to give it the contract consequence relied upon. Indeed, this result is persuasively established by the ruling in the Altgelt Case, to the effect that, if the contract right were conceded, there would, in view of the constitutional restriction, be such an inevitable conflict between that right and the dominant power to regulate as to render the contract right inoperative, and therefore to cause it to perish from the mere fact of admitting its conflict with the authority to regulate."

And again in the same case it is said:

"The bold contrast between the ordinance referred to and the statement made by the city in the ordinance refusing the increase in rate to meet the confiscation, because of the assumed restraint put by an existing contract, tends to throw abundant light on the situation. The fact is that all the contentions of the city as to implication of contract as to the 1899 rates but illustrate the plainly erroneous theory upon which the entire argument for the city proceeds: that is, that limitations by contract upon the power of government to regulate the rates to be charged by a public service corporation are to be implied for the purpose of sustaining the confiscation of private property. Home Telephone Co. v. Los Angeles, 211 U. S. 265, 273, 39 Sup. Ct. 50, 53 L. Ed. 176, and cases cited; Milwaukee Electric Railway Co. v. Wisconsin R. R. Commission, 238 U. S. 174, 180, 35 Sup. Ct. 820, 59 L. Ed. 1254."

If the authorities cited and quoted from leave any doubt as to my duty to issue the injunction in this case, I think the decision of the Supreme Court in Southern Iowa Elec. Co. v. City of Chariton (decided April 11, 1921) 255 U. S. —, 41 Sup. Ct. 400, 65 L. Ed. —, is conclusive of the question and compelling upon me. There, by ordinance, franchises were granted to build and operate street railways in the city, and the ordinance stipulated a schedule and maximum passenger fare rate, just as the franchise ordinance in the instant case provided, and the Supreme Court, by Chief Justice White, said:

"Two propositions are indisputable: (a) That although the governmental agencies having authority to deal with the subject may fix and enforce reasonable rates to be paid public utility corporations for the services by them rendered, that power does not include the right to fix rates which are so low as to be confiscatory of the property of such corporations. Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014 [other cases are cited]. And (b) that where, however, the public service corporations and the governmental agencies dealing with them have power to contract as to rates, and exert that power by fixing by contract rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract and therefore the question of whether such rates are confiscatory becomes immaterial. Freeport Water Co. v. Freeport, 180 U. S. 587, 593, 21 Sup. Ct. 493, 45 L. Ed. 679 [other cases are cited]. It follows that, as the rates here involved are conceded to be confiscatory, they cannot be enforced, unless they are secured by a contract obligation. The existence of a binding contract as to the rates upon which the lower court based its conclusion is therefore the single issue upon which the controversy depends. Its solution turns, first, upon the question of the power of the parties to contract on the subject; and, second, if they had such power, whether they exercised it."

The court then proceeds to examine the Iowa statute and to determine whether under this law the public service corporation has this contractual power, and quoted from Ottumwa R. & L. Co. v. City of Ottumwa (Iowa) 178 N. W. 905, to this effect:

"That statute in positive terms forbids any abridgment of the right to regulate and fix charges of service corporations named in the statute, either by ordinance, resolution, or contract. No one would now contend, in the teeth of the statute prohibition, that there can be a valid contract fixing permanent rates. As to corporations named in that statute we have held repeatedly that there can be no contracting that rates fixed for service shall not be changed."

And then the court concludes by saying:

"The total want of power of the municipalities here in question to contract for rates, which is thus established, and the state public policy upon which the prohibition against the existence of such authority rests, absolutely exclude the existence of the right to enforce, as the result of the obligation of a contract, the concededly confiscatory rates which are involved, and therefore conclusively demonstrate the error committed below in enforcing such rates upon the theory of the existence of contract. And, indeed, the necessity for this conclusion becomes doubly manifest when it is borne in mind that the right here asserted to contract in derogation of the state law and of the rule of public policy announced by the court of last resort of the state is urged by municipal corporations whose every power depends upon the state law. Covington v. Kentucky, 173 U. S. 231, 241, 19 Sup. Ct. 383, 43 L. Ed. 679. [Other cases are cited.]"

Of course that the limitation of the power of the city to contract was imposed by statute rather than by the state Constitution did not

militate against the application of the principle in the Iowa case, nor could it do so in the present case, if it were a mere statutory and not a high constitutional provision.

In the argument the case of Columbus Ry. & P. Co. v. Columbus, 249 U. S. 399, 39 Sup. Ct. 349, 63 L. Ed. 669, 6 A. L. R. 1648, was cited by the attorneys for the defendants. I think it sufficient to say that it has no application to the case now under consideration. There the city had, under authority of certain laws of Ohio, contracts binding on the grantees to furnish street railway service for 25 years at a specified rate in return for the use of the streets, and not permissive franchises which the grantees might surrender when they ceased to be remunerative. There was a clear contract obligation, and there was no limitation upon the power to make the contract. In the San Antonio Case and in the Chariton Case, as well as in the instant case, there were limitations upon the contractual power.

Primarily the fixing of rates is an administrative function; but when the rates are fixed, and they are alleged to be confiscatory, then a judicial question is presented. Here the rates have been fixed by the city commission authorized so to do, and these rates are alleged to be confiscatory. This allegation is not denied. On the contrary, the city insists upon its right to enforce the rates according to the franchise contracts, even to the extent of putting into effect a five-cent passenger car fare rate as provided in such contract. The insistence, in effect, is that the contracts are inviolable, although they may be confiscatory. I think such position is unsound. What rate of passenger fare is or is not confiscatory can be determined after the answer comes in and the cause is heard on its merits.

Order for injunction as prayed for in the bill will be entered.

DEMER v. PACIFIC S. S. CO. et al.

(District Court, W. D. Washington, N. D. May 28, 1921.)

No. 5856.

Removal of causes ⇐102—If federal court's jurisdiction is doubtful, and that of the state court clear, the cause should be remanded.

Since it is doubtful whether the United States District Court has jurisdiction over an action for injuries received on a vessel, resulting from the alleged unseaworthy condition of the vessel, as a suit under the maritime law, and therefore arising under the laws of the United States, in view of Comp. St. §§ 1584, 1585, and of the language used by the Supreme Court in some of the cases decided by it, while there is no doubt under the decisions of the Supreme Court of the state as to the state's jurisdiction to afford the advantage of its common-law procedure in such a case, a motion to remand an action for such injuries, brought in the state court and removed to the United States District Court, will be granted.

At Law. Action by Walter J. Demer against the Pacific Steamship Company and another, begun in the state court and removed to the

United States District Court. On motion to remand. Motion granted on reargument.

Walter S. Fulton and Elmer E. Todd, both of Seattle, Wash., for plaintiff.

B. S. Grosscup, and W. C. Morrow, both of Tacoma, Wash., and W. A. Johnson, of Seattle, Wash., for defendant Pacific S. S. Co.

Jones, Riddell & Brackett, of Seattle, Wash., for defendant Schmittling.

CUSHMAN, District Judge. A reargument has been had in this case upon the representation that the court fell into error in holding that a federal question was involved in an action where plaintiff sues, alleging that he was injured on a vessel, the injury resulting from her alleged unseaworthy condition, and that the question was an important one going to the court's jurisdiction. It is contended that the court probably erred, because certain decided cases were not pressed upon the court's attention.

The following reasons influenced the court in reaching its conclusion: Plaintiff's injury was suffered in waters of the state of Washington. Section 1 of the Washington Workmen's Compensation Act provides:

"The common-law system governing the remedy of workmen against employers for injuries received in hazardous work *is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the workman and that little only at large expense to the public. The remedy of the workman has been uncertain, slow and inadequate.* Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wageworker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extrahazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; *and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this* act provided." Laws 1911, pp. 345, 346.

The repeal by the state of the common-law rights and remedies, and the conferring upon the District Court of the Circuit Court jurisdiction by the Judicial Code, open up a vista through which it may appear that a suit upon a tort suffered by one in the service of the ship upon navigable waters, not only arises under the Constitution and laws of the United States, but is now removable to the District Court, for the decisions of a state court as to its own laws are binding upon the federal court, and the state of Washington, in Sandanger v. Carlisle Packing Co., 192 Pac. 1005, has reached the conclusion that, in such a suit, it is not administering a state law, but a United States law—the maritime law.

No one claims that Congress has the power to impose the burden on the state of trying common-law actions based upon rights not recognized

by the state law. If the body of the admiralty law, adopted by the Constitution, thereby became something else then a law of the United States, then this case does not arise under the Constitution and the laws of the United States; otherwise, it does. There are two sets of laws in the United States: Laws of the United States and state laws. There are no others. This suit is not brought under the law of the state. If not brought under the laws of the United States, what is it brought under?

While the courts have refrained from deciding that such a case was one arising under the Constitution and laws of the United States, it appears to this court that it is hardly less significant that the courts have refrained from saying that it did not so arise. Why should the trial by jury in the District Court of maritime rights be limited to cases of diversity of citizenship? It is understandable why that should be if the maritime law is a part of the common law of the state; but, if it ever was, it has ceased to be a part of the law of the state of Washington.

Should the state court be burdened with determining rights and obligations growing out of federal law, which the federal courts will not entertain—that is, where there is no diversity of citizenship, even though the requisite amount is involved—particularly after the state has determined that these laws are wholly inadequate? There is no express enactment, law, or controlling decision denying the jurisdiction. When resort must be had to construction in order to determine the intent, the reason for ascribing a particular intent becomes important. No reason has been advanced why either the Constitutional Convention or Congress should have intended to treat the maritime law in this matter any different than any other law of the United States.

Granting that there are judicial expressions at variance with what is said herein, the safest guide to a law is to find its purpose, and the surest guide to its purpose is to find the reason for its enactment. The reason for saving the common-law remedy was that the common law was competent to afford to certain suitors relief. When the common law ceases to be competent to afford relief, as the Washington Legislature has declared, the reason ceases, and when the reason ceases, those rules that rest to such a large extent upon judicial decisions, because of the reason that has ceased to exist, are no longer safe guides, and new rules are necessary, even though they are based upon court decisions rather than statutes.

We now have this condition in suits at common law to enforce a maritime right: One litigant has a right to a jury trial in the courts of the United States, that is in case of the requisite diversity of citizenship, and without such diversity he has not. There would be nothing incongruous about this, if the suits arose under the state law, for it would be the state's duty to furnish the forum to administer its own laws. But, arising under the maritime law, after the repudiation of the law of master and servant, as to compensation for injury to the servant, by the state of Washington, the law would then appear not to be the perfection of logic, for, should the state court in any case decline

the jurisdiction, where there was diversity of citizenship, the party complaining of a maritime tort could sue in the federal court at common law, but would have no right of suit in any court in the absence of diversity of citizenship.

If the suitor has more confidence in the jury than in the admiralty, and if he prefers what he conceives to be an advantage at common law over the more expeditious proceeding in admiralty, and should bring his suit at common law in the state court, why should not the defendant, if he hopes to secure more expeditiously the advantage of that uniformity of rule which the courts have ever declared to be the reason for giving the United States courts jurisdiction in admiralty, remove the cause to the District Court, rather than carry it through the state courts to the Supreme Court of the United States?

In case of injury upon navigable waters while engaged in a maritime service to the ship, an injury caused by its unseaworthiness, the injured person was given concurrent remedies. There is no question but that he might sue in admiralty or in the common-law courts of the state. In the admiralty he would have full compensation for his injuries, and also if he sued at common law; but the common-law court did not borrow from the admiralty the remedy of full compensation. To the contrary, the admiralty borrowed that right from the common law. While the duty of the owner in the admiralty to furnish a seaworthy ship, properly manned and equipped, may in some respects be narrower than a safe place in which to work and suitable appliances required of the master at common law for the servant's protection (McLanahan v. Universal Ins. Co., 1 Pet. [26 U. S.] 170, at 183 and 184, 7 L. Ed. 98; Olson v. Oregon Coal & Nav. Co., 104 Fed. 574, 44 C. C. A. 51; The Governor Ames, 55 Fed. 327; The Santa Barbara [C. C. A.] 263 Fed. 369; John A. Roebling's Sons Co. of N. Y. v. Erickson [C. C. A.] 261 Fed. 986), yet the reason for both requirements being, in general, the same, the former may be said to fall fairly within the latter. Therefore practically, if not theoretically, what the common-law courts of the state have been applying in these cases, prior to the enactment of the compensation laws, abolishing the common-law rights and remedies, has been common-law remedies based upon common-law rights, and what the admiralty has been doing is the adding to the common-law rights of a safe place to work and suitable appliances (which rights it borrowed from the common law), as well as the remedy of full compensation (a remedy which it also borrowed from the common law), the lien upon the offending vessel. The latter was solely the contribution of the maritime law. The borrowed right and borrowed remedy have so long been established as part of the maritime law as to at least, broadly speaking, now form a part of the law of the United States, as Judge Killits says in Schuede v. Zenith S. S. Co. (D. C.) 216 Fed. 566, as much so as though they were covered by the statutes of the United States.

To say that what the state courts have been doing in such cases before the adoption of Compensation Acts was the administration of the maritime law under common-law procedure, such as trial by jury and

attachment of property, prior to judgment, is to lose sight of the fact that the common law originally furnished the right of a safe place to work and safe appliances with which to work, and also furnished the remedy of full compensation in such cases. It had this established right and this remedy, and they were borrowed from the common law by the admiralty. The common-law courts of the state did not have to borrow them back again under the saving clause. They already had them.

It is true that, where this borrowed right and remedy have so long been a part of the maritime law, they would not be destroyed therein when the state compensation laws wiped out both the right and the remedy at common law; such state action would have no more effect upon the settled maritime law in that respect than would the repeal of the original maritime laws of Oleron and Rhodes. Aside from the relief afforded by the compensation laws, all that is left now to the suitor is the maritime rights and remedies. The saving clause in such statutes is without effect.

The rights and remedies are now purely maritime, although they may have been, in great part, borrowed, as pointed out, from the common law. The state still has the common-law courts, and those courts, having jurisdiction of persons, are not forbidden, generally speaking, to try the differences between any and all suitors; but, when the state courts try such a case as the present, after the compensation laws have repealed the common-law remedies and rights, they are hearing maritime rights and administering maritime remedies as preserved by the Constitution, laws, and decisions of the United States. The Supreme Court of the state of Washington has apparently reached this conclusion. Sandanger v. Carlisle Packing Co., supra.

If the foregoing conclusion is sound, why is a suit arising out of the maritime law of the United States to be treated any differently than one arising out of any other law of the United States? The jurisdiction of the courts, federal and state, may be concurrent in suits in personam, but the rights and remedies have become purely federal and maritime, save, perhaps, in the matter of procedure.

There would appear to be a more reasonable explanation than that the jurisdiction in admiralty, preserved by the saving clause, was a compromise growing out of a fight between jealous jurisdictions. The ship against which the lien was given by the admiralty, while in the suitor's jurisdiction, might have sailed far away from the jurisdiction of her owners, and the lien afforded by the admiralty be the only practical remedy a suitor would have. While, upon another occasion, the ship departing the jurisdiction where the obligation arose, the jurisdiction might be had in personam against the owner, and again a suit might lie in the state court at common law, and be preferable to the suitor because of the fact that the federal court was at a considerably greater distance from the parties and the witnesses than the state court, and litigating in the former would therefore necessitate greater expense, and possibly delay.

It is true that the rule laid down by the Supreme Court of this state, in construing its Workmen's Compensation Law, as abolishing the

right of action of the injured shore servant, leaves open this common-law jurisdiction of the state court for a redress of a seaman injured through a maritime tort. Therefore, where there is diversity of citizenship and the requisite amount involved, the action can be removed to, or brought in, the federal court. As the saving clause of the act simply and only "leaves open" the "common-law jurisdiction" of state courts over torts committed at sea (The Hamilton, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264), it then follows that, should a state abolish the common-law right of action for a tort upon its waters, there would, in the absence of diversity of citizenship, be no right of action at common law saved to the suitor in the federal court.

The language of Justice Hughes, in The Hamilton, supra, in speaking of it—saying that all the Judiciary Act does is to "leave open the door"—certainly does not imply that there is any obligation on the part of the state to keep the door of the court open for the administration of federal law. The original and subsequent Judiciary Acts provided:

"The District Courts shall also have cognizance, concurrent with the courts of the several states."

No such language appears in the Judicial Code. This shows a full realization on the part of Congress that it could not keep open the state courts for the determination of federal rights. The state of Washington has undertaken to administer the maritime law of the United States. Sandanger v. Carlisle Packing Co., 192 Pac. 1005. The suitor has not yet been deprived of a forum for the determination of his maritime rights at common law.

If part of the states should hold, in construing the compensation laws, as the state of Washington has, that the Compensation Act does not apply to tort actions under maritime law between master and servant where the injuries are inflicted upon navigable waters, and still other states should decide, as held in Berton v. Tietjen & Lang Dry Dock Co. (D. C.) 219 Fed. 763, that the compensation laws did apply to certain torts where the injury occurred upon navigable waters, and still others should hold—which is not at all improbable, as it appears to this court—that, the Legislature having condemned both the common-law rights and remedies as inadequate, such action on its part constitutes the declaration of a public policy which renders recognition by its courts of such condemned rights and remedies unworthy, and justifies them in refusing as a matter of comity to administer such condemned and discarded rights and remedies, even though they have been adopted and preserved by the admiralty law—we would then have a checkerboard jurisdiction in the federal courts sitting in the various states; that is, if there is no power in the federal courts, other than the common law of the state to administer remedies (common-law remedies) for torts committed on navigable waters. If this is to be the result, it should give us pause.

Section 991, Comp. Stats., provides for two classes of cases: Cases where there is diversity of citizenship and those where there is a federal question, in each of which there must be over $3,000 involved to give jurisdiction; and other particular classes of cases arising under

the Constitution and laws, in which it is not required that any minimum amount be involved. Included in the latter is the admiralty and maritime jurisdiction, in which a common-law remedy is expressly saved to the suitor, where it is competent. From this arrangement, it certainly does not appear but that the court's decision, in a case of the latter character, depends upon the construction of a law of the United States, the maritime law. This renders applicable the rule laid down in the following: Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648; Cohens v. Virginia, 6 Wheat. 264, 5 L. Ed. 257; Patton v. Brady, Executrix, 184 U. S. 608, 22 Sup. Ct. 493, 46 L. Ed. 713.

The fact that it arises under such law, and depends for its correct decision upon the interpretation and construction of the maritime law, appears from plaintiff's complaint, wherein it is averred that the injury occurred on shipboard, where the plaintiff was assisting in the loading of the vessel. This renders applicable the rule laid down in Tennessee v. Union & Planters' Bank, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511; Chappell v. Waterworth, 155 U. S. 102, 15 Sup. Ct. 34, 39 L. Ed. 85; Postal Tel. Cable Co. v. Alabama, 155 U. S. 482, 484, 15 Sup. Ct. 192, 39 L. Ed. 231; Ore. Short Line v. Skottowe, 162 U. S. 490, 16 Sup. Ct. 869, 40 L. Ed. 1048. There is the same necessity for applying the rules for the settlement of the maritime law that there is in determining any other federal law.

"The purpose of the creation of the right to remove a case from a state to a federal court was to enable a defendant to have claims against him under the federal Constitution or federal statutes adjudicated, in the first instance, by a federal tribunal." 34 Cyc. p. 1215.

In Berton v. Tietjen & Lang Dry Dock Co. (D. C.) 219 Fed. 763, at page 770, where the cause was remanded, while the suit was one on navigable waters, it was a suit by a repairman, a machinist, for injuries sustained while at work upon the vessel in dry dock. While there was a question regarding the safety of the place to work, there was no question in the case of the seaworthiness of the vessel, and the services being rendered, while for the benefit of the vessel, were not of a strictly maritime nature. The repair of the vessel would be in the nature of preparing the ship to perform its function as an instrument of commerce, rather than help it in the performance of such a function.

It has been argued that the Judiciary Act, in using the words "arising out of the Constitution and laws of the United States," used those words in a restricted sense, and that the word "laws" refers to statutes of Congress alone. An argument that proves too much defeats itself.

Section 24 of the Judicial Code, subsection 1, which defines the general jurisdiction of the District Court, including suits of a civil nature at common law or in equity, where there is diversity of citizenshp, or where there is a federal question in both of which there must be the necessary amount in controversy to give jurisdiction, concludes with this language:

"Provided, however, that the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section."

Then follows a description of suits, proceedings, actions, causes, claims and cases of some 24 different characters, among which are "civil causes of admiralty and maritime jurisdiction." If these latter causes were not considered as arising under the Constitution and laws of the United States, there would appear to be no reason for the above-quoted proviso.

The jurisdiction to entertain a libel in personam is most naturally ascribed to the fact that it arose under the Constitution and laws of the United States. No reason is suggested, or suggests itself, why, if a libel may be entertained in personam, a common-law action is not a competent remedy, saved to the suitor upon the same cause of action.

Section 12 of the original Judiciary Act of September 24, 1789, the same being section 648, R. S. (section 1584, Comp. Stats.), provided:

"Trials of issues of fact in the Circuit Courts shall be by jury, except in cases of equity, admiralty and maritime jurisdiction."

The act of February 16, 1875 (section 1585, Comp. St.), provides for a jury in the Circuit Court in deciding a cause of admiralty and maritime jurisdiction, such jury to be of not less than 5 or more than 12 persons, "to whom shall be submitted the issues of fact in such cause, under the direction of the court, as in cases of common law," discloses a view on the part of Congress that it was appropriate to have such issues of fact tried by a jury. It is true that it appears there may be some question about whether the above act is still in effect.

If it was appropriate on an appeal in an admiralty case from the District to the Circuit Court to have a jury, although not a common-law jury, determine the facts, where is the justification for contending that, on a removal of a common-law action based on a maritime tort from the state court to the District Court, the common-law jury, which the suitor would have had in the state court, is not to be secured to him in the District Court? It certainly would be in cases where the basis of the removal was diversity of citizenship. Why should it not be where the cause is to be removed on account of a federal question?

The Judicial Code, by which the Circuit Court was abolished, by section 24, subsection 3, changed the language of the original section of the Judiciary Act, section 9, as already changed by subsection 8, section 563, R. S., by omitting the word "exclusive" in describing the admiralty and maritime jurisdiction of the District Court. This, as well as the saving clause, shows, as does the explanatory expression in subsection 8, "except in the particular cases where jurisdiction of such causes and seizures is given to the Circuit Court," that what was intended to be excluded was the Circuit Court jurisdiction, and not the jurisdiction of the courts of the state at common law.

It has been contended that the fact that this question has never before arisen in the more than 100 years that the District Court has had jurisdiction of suits in admiralty is significant. This argument appears formidable, but, when examined, it is not as convincing as it sounds. There was no opportunity for the question arising prior to the adoption of the Judicial Code in 1911, abolishing the Circuit Court. The reason is that original exclusive jurisdiction in admiralty was conferred

upon the District Court; the Circuit Court only having appellate jurisdiction. The District Court was given no general jurisdiction at common law, only having the latter jurisdiction conferred upon it in a few particular classes of cases.

Section 11 of the Judiciary Act gave the Circuit Court jurisdiction in equity and the common-law jurisdiction, generally; that is, subject to general limitations as to amount in controversy and the like, where the United States was plaintiff, an alien was a party, or where there was diversity of citizenship. Section 12 provided for the removal from the state court to the Circuit Court where the suit was against an alien, or by a citizen of one state against a citizen of another state. No jurisdiction, either original or derivative by removal, was conferred by this act upon either the District or Circuit Court generally over a cause that arose under the Constitution or laws of the United States.

Between the time of the adoption of the Judiciary Act and the close of the Civil War, particular statutes had provided for the removal to the Circuit Court of certain special classes of cases (sections 639–647, R. S.; 34 Cyc. 1216); but there was still no general removal act, nor was there prior to the Act of March 3, 1887 (24 Stat. 552). By this act jurisdiction was first conferred on the Circuit Court, concurrent with the courts of the states, of "all suits of a civil nature, at common law or in equity, * * * arising under the Constitution or laws of the United States," and by section 2 of that act it was provided that suits of that character, "of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, * * *" may be removed by the defendant or defendants therein to the Circuit Courts of the United States.

As the Circuit Court had no original jurisdiction, under the admiralty and maritime law, a cause arising thereunder could not be removed. Under the foregoing terms of section 2, of course, there was no removal from the state court to the District Court, which did have such original jurisdiction. By the Judicial Code, taking effect January 1, 1912, both the original jurisdiction of the Circuit Court and its jurisdiction upon removal were transferred to, or merged in, the District Court.

Steamboat Co. v. Chace, 83 U. S. (16 Wall.) 522, 21 L. Ed. 369, was a suit on account of a tort in a collision on navigable waters, and was decided in 1872, long before the first general removal statute and the conferring of jurisdiction on the Circuit Court because of what has now come to be known as a federal question was involved. The following language occurs in that decision:

"Difficulties, it must be conceded, will attend the solution of the question, but it is not necessary to decide it in the present case, as the jurisdiction of the state court may be supported, whether such a suit may or may not be maintained in the admiralty courts. Sufficient has already been remarked to show that the state courts have jurisdiction if the admiralty courts have no jurisdiction, and a few observations will serve to show that the jurisdiction of the state courts is equally undeniable if it is determined that the case is within the jurisdiction of the admiralty courts. Much discussion of that topic cannot be necessary, as several decisions of this court have established that rule as applicable in all cases where the action in the state court is in form a

common-law action against the person, without any of the ingredients of a proceeding in rem to enforce a maritime lien. Where the suit is in rem against the thing, the original jurisdiction is exclusive in the District Courts, as provided in the ninth section of the Judiciary Act; but when the suit is in personam against the owner, the party seeking redress may proceed by libel in the District Court, or he may, at his election, proceed in an action at law, either in the Circuit Court if he and the defendant are citizens of different states, or in a state court as in other cases of actions cognizable in the state and federal courts exercising jurisdiction in common-law cases, as provided in the eleventh section of the Judiciary Act. He may have an action at law, in the case supposed, either in the Circuit Court or in a state court, because the common law in such a case is competent to give him a remedy, and wherever the common law in such a case is competent to give a party a remedy, the right to such a remedy is reserved and secured to suitors by the saving clause contained in the ninth section of the Judiciary Act. * * * Questions of the kind cannot arise in suits in rem to enforce maritime liens, as the common law is not competent to give such a remedy, and the jurisdiction of the admiralty courts in such cases is exclusive. Such a question can only arise in personal suits where the remedy, in the two jurisdictions, is without any substantial difference. Examined carefully, it is evident that Congress intended by that provision to allow the party to seek redress in the admiralty if he saw fit to do so, but not to make it compulsory in any case where the common law is competent to give him a remedy. Properly construed, a party under that provision may proceed in rem in the admiralty, if a maritime lien arises, or he may bring a suit in personam in the same jurisdiction, or he may elect not to go into admiralty at all, and may resort to his common-law remedy in the state courts, or in the Circuit Courts of the United States if he can make proper parties to give the Circuit Court jurisdiction of his case." 83 U. S. (16 Wall.) at pages 532–534, 21 L. Ed. 369.

A portion of the language used may not have been necessary to the decision; that is, in determining that the state court of Rhode Island had common-law jurisdiction to try the cause, it was not absolutely necessary to determine in what cases the courts of the United States would also have jurisdiction.

The foregoing case was one of the authorities upon which chief reliance was placed upon the reargument. Another was Garcia y Leon v. Galceran, 11 Wall. (78 U. S.) 185, 20 L. Ed. 74, in which the language used is not materially different from that above quoted; while the decision in American Ins. Co. v. Canter, 1 Pet. (26 U. S.) 511, 7 L. Ed. 242, was controlled by reason of the fact that the case arose in Florida while it was a territory, and therefore at a time when the authority of Congress was supreme. Another case relied upon was Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 8 Sup. Ct. 811, 31 L. Ed. 629. This was a case regarding what was claimed to be a nuisance, the obstruction of a navigable stream. In such a cause, the reason for maintaining that, under the limited powers delegated to the general government, it was necessary that there be a particular statute penalizing the act of which complaint is made, is apparent. There had, at the time of this decision, been no such legislation by Congress as to take all control from the state of such matters as the authorizing of a bridge over a navigable stream.

In view of the Sixth Amendment, the proviso at the close of subsection 1 of section 991, Comp. Stats., and the saving clause in subsection 3 of said section, if this cause is held to be removable, it would seem to logically follow that a suitor, suing on account of a maritime

tort at common law in the District Court for an amount where the value in controversy alleged should exceed $20, could demand a jury as a matter of right. Such a radical departure from the established practice is alone sufficient to cast a doubt upon the right of removal.

While not convinced that the views we have expressed herein are erroneous, yet the language used in Steamboat Co. v. Chace, supra, and the language of Justice McReynolds regarding the Supreme Court's not having "delimited * * * the precise effect" of the saving clause upon the jurisdiction (Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171); the language of Justice Holmes in the case of The Hamilton, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264, in saying that the effect of the saving clause was simply to leave open the common-law jurisdiction of the state courts over torts committed at sea; the holding in Berton v. Tietjen & Lang Dry Dock Co. (D. C.) 219 Fed. 763, and sections 1584 and 1585, Comp. Stats., with no precedent directly in point upholding the jurisdiction, leaves the question, at least, doubtful, in spite of the decision in Hanrahan v. Pacific Transport Co., Ltd. (C. C. A.) 262 Fed. 951, in which certiorari was denied (252 U. S. 579, 40 Sup. Ct. 345, 64 L. Ed. 726). In the latter case it does not appear whether jurisdiction was invoked on account of diversity of citizenship or not.

There being no doubt, under the Washington Supreme Court's decision in Sandanger v. Carlisle Packing Co., 192 Pac. 1005, as to the state's jurisdiction to afford to suitors the advantage of its common-law procedure, and the jurisdiction of this court being not at all clear, it is the court's duty to remand the cause. Simkins' A Federal Equity Suit, p. 803; Groel v. United Electric Co., 132 Fed. 265, and cases cited; Concord Coal Co. v. Haley (C. C.) 76 Fed. 882; Hutcheson v. Bigbee (C. C.) 56 Fed. 329; Boatmen's Bank v. Fritzlen, 135 Fed. 650, 68 C. C. A. 288; Wrightsville Hdwe. Co. v. Colwell (C. C.) 180 Fed. 589; Western Union Tel. Co. v. Louisville & N. R. Co. (D. C.) 201 Fed. 932; Drainage Dist. v. Chicago, M. & St. P. R. Co. (D. C.) 198 Fed. 264.

Motion to remand will be granted.

LUCKING v. DETROIT & C. NAVIGATION CO.

(District Court, E. D. Michigan, S. D. May 20, 1921.)

No. 392.

1. Courts ⇐289—Suit held within jurisdiction of federal court as involving federal question.

A bill against a steamship company, alleging that it has for many years during each navigation season on the Great Lakes, through arrangements with connecting railroad carriers, established through routes and rates for the transportation of passengers and property in interstate commerce, partly by water and partly by rail, that it threatens, without lawful reason, to discontinue operation of its vessels in violation of the provisions of Interstate Commerce Act Feb. 4, 1887, as amended, and

praying an injunction restraining such discontinuance, *held* to state a cause of action arising under a law of the United States, within the jurisdiction of a federal court, regardless of the citizenship of the parties.

2. **Shipping ⟸13—Common carrier by water not bound to continue operation over certain route.**
A common carrier by water, having no public franchise and enjoying no special public rights or privileges, which has established regular routes for the transportation of passengers and property in interstate and intrastate commerce, is not bound by the common law to continue to operate its vessels over any such route, if it finds it desirable to discontinue and abandon the same.

3. **Shipping ⟸13—Interstate Commerce Act does not prevent discontinuance of service by water carrier.**
The provision of Interstate Commerce Act Feb. 4, 1887, § 1 (4), as amended by Act Feb. 28, 1920, requiring carriers subject to the act to provide and furnish transportation on reasonable request therefor, merely requires common carriers, when actually engaged in the transportation of passengers and property, to receive and carry such passengers and property as may be offered to them without discrimination, and does not prohibit a carrier by water from discontinuing its service, especially in view of the specific provision of subdivision 18 of that section that "no carrier by railroad subject to this act shall abandon all or any portion of a line of railroad, or the operation thereof," without permission of the Interstate Commerce Commission.

In Equity. Suit by William Lucking against the Detroit & Cleveland Navigation Company. On motion to dismiss bill. Motion granted.

William Lucking, of Detroit, Mich., in pro. per.
Angell, Turner & Dyer, of Detroit, Mich., for defendant.

TUTTLE, District Judge. This cause is before the court on motion to dismiss the bill of complaint. The material allegations of such bill are as follows:

That plaintiff is a citizen and resident of the city of Detroit, Mich., which is situated in this district; that the defendant is a Michigan corporation, having its principal office and place of business in said city, and that it was incorporated for the purpose of engaging in the business of maritime commerce; that said defendant is now, and has been for the last 20 years and more, during the navigation season, which includes the months of May, June, July, August, and September, a common carrier for hire, and engaged in interstate and intrastate transportation of passengers and property on Lake Huron and Lake Erie and connecting waters; that in such capacity defendant has each season carried many passengers and much freight over well-known and defined routes, such as between Detroit, Mich., and Buffalo, N. Y., between Detroit and Cleveland, Ohio, and between Toledo, Ohio, and Detroit, Mich., and thence through Lake Huron to and from various cities and ports in Michigan, on said Lake Huron, including Port Huron, Harbor Beach, Oscoda, St. Ignace, and other places; that defendant will continue its interstate business, in its capacity as a common carrier for hire, during the navigation season

of 1921 and thereafter; that defendant owns and operates in its said business several large steamers; that in the conduct of such business defendant has, by arrangement with other common carriers by railroad, been engaged in the continuous transportation of passengers and freight, partly by railroad and partly by water, from various ports on the routes reached by defendant's steamers to and from various points on the railroads of said other carriers, in both interstate and intrastate commerce, by means of joint tariff rates and arrangements duly entered into in accordance with law, and that defendant will continue so to do through the navigation season of the year 1921 and afterwards, and will derive a fair and reasonable return therefrom; that it has been the custom of defendant for several years past to file with the interstate Commerce Commission, just before the opening and just after the close of its navigation season, supplements to its tariffs announcing the establishment and the suspension, respectively, of said joint tariffs with said other railroad carriers; that one of the most popular and largely traveled routes on the Great Lakes for years has been that of the defendant from Cleveland and Toledo, Ohio, to and from Detroit and the cities and ports on Lake Huron already referred to; that in the conduct of its said business as a common carrier for hire said defendant has made large profits on its capital investment therein, and in so doing has availed itself of many valuable and costly river and harbor improvements maintained by the United States as an aid to navigation along said water routes; that for several years continuously defendant has operated certain of its steamers over its route, familiarly known as the "Detroit and Mackinac Route," between Toledo, Ohio, and Detroit, Mich., and thence northerly to and from said points on Lake Huron, and that many of the communities on said Lake Huron depend largely on the service rendered by said steamers during the navigation season of each year, and transport therein large quantities of freight and great numbers of passengers to and from points in Ohio and New York, and to and from cities and destinations on the lines of said common carriers by railroad in said continuous carriage; that such freight is transported by defendant regularly from year to year, during the navigation season, in said steamers, which have maintained a regular service of four trips per week in each direction on said Detroit and Mackinac route, including four departures from said points on Lake Huron for Detroit and Toledo and way ports on said route, and four departures from Detroit and Toledo for said way ports on Lake Huron; that plaintiff in the past has, and in the future intends to, become a passenger on said steamers of defendant over said route, and has shipped property, including household furniture and supplies for his summer residence, on said steamers, and desires to continue to do so during the navigation season of the year 1921 and thereafter; that plaintiff has been informed and believes that, because of an alleged dissatisfaction on the part of defendant with one of the navigation laws of the United States, commonly referred to as the "Seamen's Act" (Act March 4, 1915, c. 153, 38 Stat. 1164), defendant has threatened, and intends, to discontinue and abandon the operation of its said steamers over said Detroit and

Mackinac route; that it is necessary, before the opening of the navigation season, for the defendant to overhaul and repair said steamers in preparation for operation during the coming season, but that defendant, following its expressed intention to abandon said route, will not prepare said steamers for their usual and customary transportation service; that it is the duty of defendant, both at common law and under the federal statutes, including the Interstate Commerce Act, to provide and furnish such transportation during 1921 and thereafter, over said route, as has been its usual custom in the past; that plaintiff has heretofore filed a petition, similar to its present bill, with the Interstate Commerce Commission, but that said Commission has ruled that it has no jurisdiction in the premises; and that this bill is filed also on behalf of all other persons and corporations who may desire to intervene herein.

The specific relief prayed includes an order requiring defendant to furnish proper and suitable transportation for passengers and property during its navigation season of 1921 and thereafter over said Detroit and Mackinac route according to its past custom, an injunction restraining the defendant from discontinuing such transportation over said route, and a mandatory injunction requiring the defendant to prepare its said steamers for service on said route during the ensuing season of navigation in accordance with its past custom.

The defendant has filed a motion to dismiss the bill of complaint, alleging that it appears from said bill (1) that this court is without jurisdiction in the premises; and (2) that the plaintiff is not entitled to the relief prayed. These two objections will be considered in the order named; the allegations of fact contained in the bill being, of course, accepted as true for the purposes of the motion to dismiss.

[1] 1. Has this court jurisdiction to entertain the bill and to grant any of the relief prayed? Diversity of citizenship is not involved, and the necessary jurisdiction must depend upon the presence of a federal question. Is this, then, a case arising under the Constitution or laws of the United States? As already noted, one of the contentions of the plaintiff is that the proposed discontinuance by the defendant of the operation of its steamers over the route referred to would be a violation of the Interstate Commerce Act, certain provisions of which, claimed by plaintiff to be applicable, are quoted in its bill.

It is, of course, well settled that, if the result of a suit depends upon the construction and effect of a federal statute, such a suit arises under the laws of the United States, within the meaning of the constitutional provision conferring jurisdiction upon the federal courts in such cases. Louisville & Nashville R. R. Co. v. Rice, 247 U. S. 201, 38 Sup. Ct. 429, 62 L. Ed. 1071. It is equally well settled that, where the plaintiff in a case plants a claim for relief upon a federal law, and such claim is apparently made in good faith, is based upon real and substantial grounds, and is not so unreasonable and wholly destitute of merit as to be merely frivolous and colorable, such a case presents a federal question within the general jurisdiction of the federal court, irrespective of the presence or absence of diversity of

citizenship. Boston Store v. American Graphophone Co., 246 U. S. 8, 38 Sup. Ct. 257, 62 L. Ed. 551, Ann. Cas. 1918C, 447.

Plaintiff invokes the Interstate Commerce Act as a basis for its claim to relief. The first subdivision of the first section of said Interstate Commerce Act (the Act of February 4, 1887, chapter 104, 24 Stats. at Large, 379, as amended) provides that the provisions of such act shall apply to common carriers engaged in "the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment." The fourth subdivision of the same section provides that:

"It shall be the duty of every common carrier subject to this act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto."

Considering, then, these provisions of the statute in connection with the allegations in the bill of complaint to the effect that in the conduct of its business as a common carrier the defendant "has, by arrangement with other common carriers by railroad, been engaged in the continuous transportation of passengers and property, partly by railroad and partly by water, from various ports and points on the routes reached by defendant's steamers to and from various points on the railroads of said other carriers," and in view of the allegations in the bill as to the interstate character of the commerce carried by the defendant over its various routes, I cannot avoid the conclusion that plaintiff has stated a claim for relief based upon a federal law, and that such claim is not so unsubstantial and unreasonable as to be frivolous and merely colorable. The bill raises, in my opinion, a real and substantial federal question, which it is the duty of this court to consider and decide. It follows that the objection based upon the supposed lack of jurisdiction of the court to entertain this suit must be overruled.

[2] 2. Coming, then, to consider the merits of the case, as shown by the bill, the question presented is whether a common carrier by water, after establishing several regular routes for the transportation of passengers and freight by vessel, in both interstate and intrastate commerce, is under any legal obligation to continue to operate its vessels in such transportation over all of such routes, in the absence of a franchise or other arrangement with the state imposing upon it such an obligation.

Plaintiff contends that the duty to continue such operation is created both by the Interstate Commerce Act and also by the common law. If such duty does arise from either of the sources mentioned, plaintiff is entitled to the relief prayed in this court, since the federal jurisdiction, having been invoked upon real and substantial grounds of federal law, extends to the determination of all questions involved in the case, whether resting upon federal or state law, and irrespective

of the disposition made of the federal question involved. Greene v. Louisville & Interurban Railroad Co., 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88.

As the federal statute thus invoked must be construed in the light of the circumstances existing and known to Congress at the time of its enactment, including the state of the common law then in force, it will be more convenient to first consider the extent of the duty of a common carrier, with reference to the subject under consideration, at the common law. It is elementary that it is the duty of a common carrier, even in the absence of any statute to that effect, as incidental to the occupation in which it is engaged, to receive and carry freight and passengers, upon reasonable request therefor, without discriminations and on reasonable rates and charges. Winona & St. Peter Railroad Co. v. Blake, 94 U. S. 180, 24 L. Ed. 99; Louisville & Nashville Railroad Co. v. F. W. Cook Brewing Co., 223 U. S. 70, 32 Sup. Ct. 189, 56 L. Ed. 355; Chicago, Rock Island & Pacific Railway Co. v. Lawton Refining Co., 253 Fed. 705, 165 C. C. A. 299; 10 Corpus Juris, 65. No authority, however, has been called to my attention, and I have discovered none, to the effect that a common carrier, such as the defendant here, not enjoying any public franchises or exercising any public powers or privileges, is bound, after commencing to operate vessels over a certain route, to continue such operation, if it finds it desirable to discontinue and abandon the same.

It is true that common carriers, like railroad companies, which enjoy peculiar rights and powers at the hands of the state, are not permitted to discontinue at will the rendition of the transportation services for the performance of which they have been endowed with such special privileges and powers. A railroad company is clothed by the state with special rights, franchises, and privileges, including certain attributes of sovereignty itself, as, for example, the power of eminent domain. Enjoying, therefore, as it does, these special and public powers, such railroad company is subject to correspondingly special and public duties, among which is the obligation, arising by operation of law from the acceptance of its rights and franchises, and continuing during its enjoyment thereof, to continue to operate as a common carrier over the lines and routes established by it for that purpose; such obligation arising out of, and depending upon, the unusual and peculiar rights and privileges so exercised by it. Missouri Pacific Railway Co. v. Kansas, 216 U. S. 262, 30 Sup. Ct. 330, 54 L. Ed. 472; Chesapeake & Ohio Railway Co. v. Public Service Commission, 242 U. S. 603, 37 Sup. Ct. 234, 61 L. Ed. 520; 4 Ruling Case Law, 672; 22 Ruling Case Law, 750.

The reasons, however, which underlie and prompt the imposition of this duty upon common carrier railroad companies, do not apply to common carriers such as the defendant. The latter holds no public franchise and enjoys no rights or privileges other than are held by any private individual desiring to engage in the business of transporting freight and passengers by water. It cannot exercise the power of eminent domain. It has no private right of way or special facilities for acquiring means of access by its vessels to docks or wharves,

but must use the open sea as its highway, and depend, for the proper maintenance of its vessels and equipment, upon such arrangements as it may be able to make by private contract, like any other private citizen. In the eyes of the law it occupies no different position than that of a common carrier operating taxicabs or other vehicles upon land, and it is under no greater obligation than is the common carrier last mentioned, so far as the continued operation of its lines is concerned. It has never been supposed, and could not seriously be contended, that every person who engages in the business of transportation as a common carrier is obliged to continue in such business indefinitely, and may be restrained by injunction from abandoning such of its routes as it may wish to discontinue.

The mere fact, then, that the defendant is a common carrier, does not subject it to the duty to continue the operation of its vessels over any or all of its routes of transportation. As, therefore, it does not appear that the defendant is a public or quasi public corporation, or exercises any powers or rights from which flow the duty in question, I am unable to find in the common law any basis or warrant for the coercive order sought, and I am clearly of the opinion that, in the absence of some statutory provision applicable, the plaintiff is not entitled to the relief prayed.

[3] Is there, then, any statutory provision which prevents the defendant from exercising the right, which it otherwise has, to withdraw from the business in which it has been engaged, to the extent which it deems necessary or desirable? Plaintiff invokes the fourth subdivision of the first section of the Interstate Commerce Act, hereinbefore quoted, to the effect that:

"It shall be the duty of every common carrier subject to this act, engaged in the transportation of passengers or property, to provide and furnish such transportation upon reasonable request therefor."

This language is merely declaratory of the common-law rule governing the duty of common carriers. 10 Corpus Juris, 66. It is to be observed that the provision in question applies to common carriers subject to the act "engaged in the transportation" of passengers or property, and the obligation referred to is the duty "to provide and furnish such transportation upon reasonable request therefor." It is clear that the meaning and effect of this language is that a common carrier, subject to the act, which is actually engaged in transporting passengers or freight must receive and carry such passengers or freight as may be offered to it, without discrimination, and in the performance of the duty under which it rests so long as it holds itself out as a carrier of such passengers or freight, to provide the necessary facilities and equipment for "such transportation," provided that "reasonable request" is made therefor.

There is nothing in this or any other section of the statute which prevents a common carrier, such as the defendant, from disengaging itself from the transportation of passengers or freight between particular points, or which makes it the duty of such a carrier to furnish such transportation if it is not actually "engaged in" the business of

furnishing any transportation between such points. If in the present case the grievance of the plaintiff were that the defendant, while engaged in transporting passengers and freight over its so-called Detroit and Mackinac route, refused or failed to furnish adequate facilities or equipment for such transportation, the claim of plaintiff for proper relief from such a situation, on the ground that the defendant was violating a duty created or expressed in the language just quoted, would not be without force. The situation, however, actually presented, is quite different. To the extent that defendant discontinues the furnishing of any transportation over one of its routes, to that extent it ceases to be engaged as a common carrier in transportation, or subject to the obligation referred to in this portion of the statute. Considering the right which a carrier such as defendant has at common law to abandon entirely one or more routes for the operation of its vessels, an intention on the part of Congress to take away such right, and impose on such a carrier the duty resting upon a carrier by railroads in this respect, cannot be deduced from language which falls so far short of expressing such an intention as does the provision now under consideration. It would have been easy to have expressed such a purpose, and it must be assumed that if Congress had intended to create such an obligation, in derogation of the common-law rule applicable, it would have done so in appropriate terms.

The conclusion, moreover, that it was not intended by the Interstate Commerce Act to impose upon such a carrier the obligation mentioned, is strengthened and confirmed by the provision in the eighteenth subdivision of section 1 of the act to the effect that:

"No carrier by railroad subject to this act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

In this part of the statute, Congress has legislated upon the subject of the abandonment of existing lines of transportation, and in so doing it has expressly imposed the limitations created, not upon "every common carrier subject to this act," as in other sections and clauses of the statute, but only upon a "carrier by railroad subject to this act." "Expressio unius exclusio alterius." The express imposition of this obligation upon common carriers by railroad evidences, in my opinion, an intention to exclude from the burden thereof every other common carrier. But, however this may be, I am unable to discover in any of the comprehensvie terms of the statute invoked any language indicating a purpose to subject a carrier such as the defendant to the duty which plaintiff seeks to have this court enforce. Nor do I know of any statutory provision creating such an application, or any decision applying or announcing such a rule; none of the cases cited by plaintiff involving a proposed discontinuance or abandonment of a route of transportation by such a carrier. For the reasons stated, it results that the motion to dismiss the bill must be granted, and an order will be entered accordingly.

INTERNATIONAL FILM SERVICE CO., Inc., v. ASSOCIATED PRODUCERS, Inc.

(District Court, S. D. New York. June 9, 1921.)

1. **Trade-marks and trade-names and unfair competition ⟸68—When unfair competition in use of photoplay title established stated.**
The title of a photoplay, if not strictly descriptive, is at least suggestive, and not arbitrary, and in a suit for unfair competition in its use plaintiff succeeds as soon as he shows an audience educated to understand that the title means his play.

2. **Trade-marks and trade-names and unfair competition ⟸93(1)—Presumption that story had many readers, of whom substantial part remembered title.**
In a suit for unfair competition in the use of a title for a photoplay, first used as the title of a story on which plaintiff's play is based, the story published 15 years ago in a magazine of wide circulation presumptively had many readers, of whom a substantial number remember the title; but the presumption is an extremely doubtful inference, and will not warrant a preliminary injunction when the same title has been twice used in other photoplays since the publication of the story.

3. **Trade-marks and trade-names and unfair competition ⟸93(1)—Presumptions can help plaintiff's establishment of case only as they give ground for inference, in absence of facts.**
In a suit to enjoin unfair competition in the use of a title for a photoplay, presumptions can only help plaintiff to prove a case as they give ground for an honest inference, in the absence of adequate information.

4. **Trade-marks and trade-names and unfair competition ⟸93(1)—Presumption that many people saw photoplays having same name as that sought to be protected.**
In a suit to enjoin unfair competition in the use of a title for a photoplay, where the court must act upon presumptions, it must be presumed that many people saw plays previously produced under the same title.

5. **Trade-marks and trade-names and unfair competition ⟸95(1)—Preliminary injunction against use of photoplay title not granted because of two exhibitions.**
Where, since the publication of the story on which plaintiff's photoplay was based, the title has been twice used by other photoplays, a preliminary injunction cannot rest on speculation that people who saw two exhibitions of plaintiff's play may recommend it to others, who may go to defendant's play supposing it to be the one recommended.

6. **Trade-marks and trade-names and unfair competition ⟸95(1)—Temporary injunction against use of photoplay title denied.**
Where plaintiff and defendant produced photoplays based on entirely different stories, but having the same title, and defendant has made 74 films, all of which must be changed if it changes the title, and entered into 240 contracts with exhibitors, and has advertised very widely, and a change of title would constitute a genuine hazard to its success, and some of the films were prepared, and some of the contracts let and advertisements displayed, before it knew of plaintiff's claims, a preliminary injunction *held* to be denied.

7. **Injunction ⟸137(2)—Defendant's loss balanced against plaintiff's gain in granting or denying temporary injunction.**
On application for a temporary injunction, defendant's loss must be balanced against plaintiff's gain, and a sufficient disproportion will put plaintiff to his action.

8. Trade-marks and trade-names and unfair competition ⟸98—Expense of changing name of photoplay is proper element of damage from unfair competition.

If plaintiff in good faith finds it necessary to change the title of its photoplay, because of defendant's unfair competition in the use of the same title, the expense of such change will be a proper item of damage.

In Equity. Suit by the International Film Service Company, Incorporated, against the Associated Producers, Incorporated. On motion for preliminary injunction. Denied.

This is a motion for an injunction against the exhibition of a photoplay by defendant. In 1906 one Bruno Schelling wrote and published in the Cosmopolitan Magazine a story under the title "Broken Doll." This was copyrighted under the general copyright of the magazine for that month, but appeared in no other form. In 1910, and again in 1914, two photoplays appeared under the name "Broken Doll," but the scenario of neither was in any sense based upon the story of Bruno Schelling. In the Saturday Evening Post during the year 1921 appeared a story on which the defendant's scenario is based, not in any way similar to Schelling's story. This has become the foundation of a play which is about to be exhibited under the name "Broken Doll." The play is in four reels, and was completed before April, 1921. It was advertised widely in trade papers at the end of April and the early part of May, and of the 74 contracts with exhibitors which were made before the motion came on to be heard, several had been closed before May 13th.

During the spring of 1921 the plaintiff caused a scenario to be made from Schelling's story, upon which it made a photoplay of two reels under the title "Broken Doll." The defendant had no notice of the plaintiff's play, nor any notice of the original story of Bruno Schelling, until May 13, 1921, at which time the plaintiff, having been advised of the proposed production of the defendant's play, asserted its rights. On May 16th it gave two single exhibitions at two theaters in the city of New York. It has not, however, exhibited again, and it is fair to suppose that these were for the purpose of obtaining the priority of right. The bill is based, not upon the plaintiff's copyright, but upon the unfair competition in the defendant's use of the title "Broken Doll," which had been earlier acquired by the plaintiff. The defendant was proposing to publish its play for the first time on June 12th.

Nathan Burkan, of New York City, for plaintiff.
Edward I. Devlin, Jr., of New York City, for defendant.

LEARNED HAND, District Judge (after stating the facts as above). This case does not turn upon any copyright in the title. So much the plaintiff appears to concede. Harper v. Ranous (C. C.) 67 Fed. 904; Glaser v. St. Elmo Co. (C. C.) 175 Fed. 276; Corbett v. Purdy (C. C.) 80 Fed. 901; Osgood v. Allen, Fed. Cas. No. 10,603; Atlas, etc., Co. v. Street, 204 Fed. 398, 403 (semble), 122 C. C. A. 568, 47 L. R. A. (N. S.) 1002. The rule appears to me to have been implicitly recognized in Nat., etc., Co. v. Foundation Film Co. (C. C. A.) 266 Fed. 208, 210. At least I shall dispose of the case on that assumption, in view of the plaintiff's reliance upon unfair competition.

In Osgood v. Allen, supra, unfair competition was said to depend upon whether the similarity of titles would lead purchasers of copies to suppose that they were to read a book written by the plaintiff. The rule has been frequently applied since that time, and was extended to photoplays in Nat., etc., Co. v. Foundation F. Co., supra. A dictum

in Atlas, etc., Co. v. Street, supra, seems to hold that the title to a story will not be protected against use in a photoplay, but it is not necessary to go so far here. On the contrary, the author of a story may contemplate turning it into a photoplay, and the use of its title by another in a different play may prejudice his rights when he does. Under Aunt Jemima Mills Co. v. Rigney & Co., 247 Fed. 407, 159 C. C. A. 461, he would certainly be protected. The English cases there cited have carried the protection of a name or mark into wholly dissimilar fields, quite as unlike as are a story and a play. It is not, therefore, in compliance with that dictum that I think the plaintiff should not here succeed.

[1, 2] A title is, if not strictly descriptive, at least suggestive, and not an arbitrary sign. Hence in Nat., etc., Co. v. Foundation F. Co., supra, the question is said to be of secondary meaning, following the long line of decisions in the Webster Dictionary cases. The plaintiff succeeds as soon as he shows an audience educated to understand that the title means his play. Once he shows a prior publication under that title, this becomes easier than in most cases of secondary meaning, because the title is the proper name of a specific thing, not the differential of a species, as in the case of fungibles. Ordinarily, I should, indeed, think that a single publication in a magazine so broadly circulated as the Cosmopolitan would be prima facie enough. The story presumptively has many readers, of whom a substantial number remember the title. That title, billed or advertised as the title of a photoplay, leads them to expect a play based on the story.

[3] Still, as is always the case in such suits, the question is one of fact. Here the story came out only once, and that 15 years ago. It was never reprinted, had nothing but the fugitive publicity of a magazine, which is not permanently preserved, except in the few files of collectors. If it remains at all in people's memory, it must be only in the recollection of such especially retentive minds as were impressed, unduly I should think, with its conventionally sentimental theme. The plaintiff must prove a case, and presumptions only help him as they give ground for an honest inference, in the absence of adequate information; that is all they ever are. The presumption here is an extremely doubtful inference.

[4] Furthermore, not only is the story 15 years old, but the title has been twice used since that time on other photoplays; i. e., in 1910 and 1914. It is impossible to say what effect this has had in fact; but, as we must in any case proceed upon presumptions, it must be presumed that many people saw these two plays, and they at any rate could no longer have supposed that "Broken Doll" meant only Schelling's story. In the face of all this, it seems to me an ingenuous assumption to suppose that there are any substantial number of people who to-day attribute any secondary meaning to the title at all. The plaintiff's right, so far as based upon the original story, is therefore, in my judgment, too doubtful to sustain a preliminary injunction.

[5] As to the exhibitions of May 16, 1921, it is perhaps enough to say that as exhibitions they were not the first; the title having already

been used twice before. Since priority is always the test, the only priority on which the plaintiff can rely is therefore that of the story. It is indeed quite true that there may be people now who, having seen the performances on May 16, 1921, and being careless of more than the title, will spread the title about among others. These in turn may go to the defendant's play, supposing it is that recommended to them. But obviously cases cannot be decided on such speculation, and it is indeed for that reason that in this subject priority counts for so much. Based upon the exhibitions of May 16, 1921, the plaintiff's case seems to me, also, too uncertain.

[6] Yet if I am wrong in both these respects, and if the plaintiff can base a prima facie case either on the story or on the two exhibitions last month, it still seems to me clear that no preliminary injunction should issue now. Let me assume that it might be otherwise if the defendant's venture were just beginning, and if a change of title could be made without loss. The facts in the case at bar are quite different. The defendant has made 74 films, all of which it must change in many places; it has entered into 240 contracts with exhibitors; it has advertised very widely, and the success of its play is at genuine hazard, if it must now recall it on the very eve of the exhibitions. It is true that, since May 13, 1921, it knew of the plaintiff's claims; but the films were already all prepared, some of the contracts let, and the advertisements had been several times displayed. Moreover, at that date, the plaintiff had done nothing to acquire any rights, except under the original story, which the defendant might honestly have disregarded. How soon after the performance of May 16th it learned of them does not clearly appear. At best, it had no reason till then, I think, to change its plans, and that time is not fixed.

[7] Against this embarrassment of being obliged so to change its plans, nothing can be balanced but the possibility that some who read the story and who did not see the earlier plays, or some who saw the later plays and not the earlier, may be misled, or may mislead others, into mistakenly attending the defendant's plays. The right to a preliminary injunction is not so absolute as to require me to grant one under such conditions. In cases of the piracy of a mark (Waldes v. International Mfrs.' Agency [D. C.] 237 Fed. 502), or of a name (Kathreiner's Malzkaffee Fab. v. Pastor Kneipp's Med. Co., 82 Fed. 321, 27 C. C. A. 351), little prior use is necessary; the court imposes the chances of loss upon those who deliberately steal the name. But such is not this case; the defendant is quite innocent of plagiarism, and finds itself unwittingly in peril of losing much of its investment to protect the plaintiff against an extremely doubtful and probably insubstantial loss. Nothing in the books requires a court to give such an injunction, especially a preliminary injunction. On the other hand, it has been repeatedly said that the defendant's loss must be balanced against the plaintiff's gain, and that a sufficient disproportion will put the plaintiff to his action. This has indeed even been held where the plaintiff's loss is clearer than it is at bar. Sampson, etc., Co. v. Seavor-Radford Co. (C. C.) 129 Fed. 761; Kemmerer v. Midland, etc., Co.,

229 Fed. 872, 876, 144 C. C. A. 154; Contra Costa Water Co. v. City of Oakland, 165 Fed. 518, 533; Amelia Milling Co. v. Tenn. C. I. & R. Co. (C. C.) 123 Fed. 811, 813. As Judge Taft said in New England, etc., Co. v. Oakwood, etc., Co. (C. C.) 71 Fed. 52, "preliminary injunctions are granted on a balance of convenience."

[8] It therefore appears to me that, granting the doubtful conclusion that the plaintiff will be damaged to some extent, justice will not be served by unconditionally stopping the performance of the defendant's plays at this eleventh hour. However, the plaintiff may take an order compelling the defendant to keep an account of its profits and to its books the plaintiff shall have access. Furthermore, the defendant will give a bond in the sum of $25,000, to secure it for any profits or damages which the plaintiff may prove on final hearing. If the defendant fail to file the bond on or before June 11, 1921, an absolute injunction may issue. I am, of course, aware that such a bond is of small value in cases of this sort. It is practically impossible to prove damages, and the defendant's profits are scarcely available. Yet at least this is true: If the plaintiff in good faith feels it necessary to change its own title, the expense of that change would be a proper item of damage. The plaintiff will not be secured against any loss arising from the difference in success of its play under the new title and the old; that cannot probably be ascertained in any way, so far as I can see. That difference, for the reasons I have already given, is, however, so tenuous and uncertain that at least at this stage in the case it is an undependable basis for relief.

Motion denied.

CHISHOLM et al. v. CREEK & INDIANA DEVELOPMENT CO. et al.

(District Court. E. D. Oklahoma. May 10, 1921.)

No. 2596.

1. **Homestead ⇐118(3)—Wife must join in oil and gas lease in Oklahoma.**
Under Const. Okl. art. 12, § 2, and Rev. Laws Okl. 1910, §§ 1143, 1145, 1146, 3343, relating to conveyances of a homestead, the wife must join with the husband in the execution of an oil and gas mining lease covering the homestead.

2. **Courts ⇐366(19)—State decision as to effect of homestead laws is controlling.**
A decision of the Supreme Court of the state of Oklahoma that the wife must join with the husband in the execution of an oil and gas mining lease covering the homestead in that state is controlling on the United States District Court.

3. **Indians ⇐13—Homestead under state law may include allotment homestead and tribal surplus allotment.**
The homestead of an Indian in Oklahoma may, under Const. Okl. art. 12, § 1, and laws of that state, include not only the homestead allotment, which is a term used in treaties and acts of Congress for classification in the imposition of restrictions, but may also include the tribal surplus allotment, provided the two do not exceed 160 acres.

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4. **Indians ⇐16(3)—Extension of oil lease on homestead must be signed by wife, notwithstanding approval by Secretary of the Interior.**
Though an oil and gas lease on an Indian allotment, which did not contain any provision for extension thereof, and a subsequent extension and modification of the lease, were executed in conformity with Act July 1, 1902, Act April 21, 1904, and Act May 27, 1908, and the regulations thereunder, and were approved by the Secretary of the Interior, the extension, which was executed after the Indian had married and established his homestead on the land, was not binding on the wife, if she did not join therein, as required by the state Constitution and laws, since the approval of the Secretary was not conclusive that the extension was executed in conformity with the state law, which was essential to its validity.

5. **Homestead ⇐122—Facts held not to estop wife's repudiation of oil lease on homestead.**
The fact that an Indian allottee had collected an oil royalty on the basis provided by an extension of the lease, executed after he had married and established his homestead on the property, and that additional wells had been drilled under the extension, does not estop the wife from repudiating the lease because she did not join therein, where she did not learn of the extension until five years after it was executed, and shortly before she brought suit to cancel it.

6. **Homestead ⇐133—Lessee's credits after repudiation of extension of oil lease on homestead stated.**
In an accounting after the cancellation of an oil lease extension covering the homestead, which was executed without the wife's consent, the lessee is entitled to credit for the difference between the royalty paid under the extension and that which would have been payable under the original lease, and also for the sum expended in completion of wells on the premises after the extension was executed.

In Equity. Suit by Pearl Chisholm and others against the Creek & Indiana Development Company and others. Finding for plaintiff.

S. R. Lewis and O. S. Booth, both of Tulsa, Okl., and Langley & Langley, of Pryor, Okl., for plaintiffs.

Alvin Richards and West, Sherman, Davidson & Moore, all of Tulsa, Okl., for defendants.

WILLIAMS, District Judge. The following questions are essential for determination:

(1) Was it necesary for the wife to join with the husband in the modification and extending or renewal of the oil and gas mining lease on the part of the husband, the original having been executed prior to their marriage, and the homestead status having attached subsequent to such original execution, but prior to the execution of such modifying and extending or renewing instrument, both instruments having been approved by the Secretary of the Interior?

(2) Are the plaintiffs estopped from setting up the failure of the wife to join in the execution of the second instrument?

[1] The "owner, if married," may not "sell or grant" the homestead without the consent of his or her spouse, in the manner as is required by the statute. Section 2, art. 12, Constitution of Oklahoma; section 303, Williams' Anno. Ed.; section 3343, R. L. Okl. 1910. The third proviso to section 1, article 12, Constitution of Oklahoma (section 302, Williams' Ann. Ed.), provides:

"Nothing in the laws of the United States or in the treaties with Indian Tribes in the state shall deprive any Indian, or other allottee, of the benefit of the homestead and exemption laws of the state."

See Montana v. Rice, 204 U. S. 291, 27 Sup. Ct. 281, 51 L. Ed. 490; Goudy v. Meath, 203 U. S. 146, 27 Sup. Ct. 48, 51 L. Ed. 130; Romine v. State, 7 Wash. 215, 34 Pac. 924.

No conveyance or contract relating to the homestead except a lease for a period not exceeding one year is valid unless in writing, subscribed by both husband and wife, where both are living and not divorced or legally separated. Section 1143, R. L. Okl. 1910; Kelly v. Mosby, 34 Okl. 218, 124 Pac. 984. As to exceptions, see sections 1145 and 1146, R. L. Okl. 1910.

[2] As determined by the Supreme Court of the state of Oklahoma, which as to such matters is controlling on this court, the wife must join with the husband in the execution of an oil and gas mining lease covering the homestead. Carter Oil Co. v. Popp, 174 Pac. 747; McCrary v. Miller, 78 Okl. 16, 184 Pac. 782, 186 Pac. 1089; Treese v. Shoemaker, 80 Okl. 235, 195 Pac. 767.

[3] The term "homestead," pertaining to allotments of members of the Five Civilized Tribes in Oklahoma as used in treaties and acts of Congress, is for the purpose of classification in the imposition of restrictions. The obvious purpose was to provide a more permanent restriction for the land classed as "homestead" allotment. Under the Constitution and statutes of Oklahoma, the tribal surplus allotment, as well as tribal homestead allotment, may constitute a rural "homestead" under the state law, provided same do not comprise over 160 acres. See Belt v. Bush, 176 Pac. 935; Norton v. Kelley, 57 Okl. 222, 156 Pac. 1164; Hyde v. Ishmael, 42 Okl. 279, 143 Pac. 1044; section 1, art. 12 (section 302, Williams' Ann. Ed.) Constitution of Oklahoma.

In the original lease, executed May 14, 1904, for a period of 15 years from that date, and covering the south half of the southeast quarter of section 13, township 21 north, range 12 east of the Indian Meridian, which constituted both his tribal "homestead" and "surplus" allotment, the lessee was granted—

"the right to prospect for, extract, pipe, store, refine, and remove such oil and natural gas, and to occupy and use so much only of the surface of said land as may be reasonably necessary to carry on the work of prospecting for, extracting, piping, storing, refining, and removing such oil and natural gas, including also the right to obtain from wells or other sources on said land, by means of pipe lines or otherwise, a sufficient supply of water to carry on said operations, and including still further the right to use such oil and natural gas as fuel so far as it is necessary to the prosecution of said operations."

The plaintiff, Webster Chisholm, the allottee, a half-blood Cherokee Indian, at the time of the execution of the lease and its approval by the Secretary of the Interior, was a single person. Prior to March 9, 1914, on, to wit, November 11, 1911, he married his coplaintiff, Pearl Chisholm and in April, 1912, took up his residence on said tract of land; a homestead character attaching and continuing and existing when he executed, without the joinder of his said wife, the modifying and extending or renewal stipulation or lease. Neither in the original

lease is any provision, either expressly or impliedly, contained stipulating for an extension or renewal of said lease on the part of said lessor, nor is such authority provided for in any rules and regulations on the part of the Secretary of the Interior then in force. Section 72 of Act of Congress approved July 1, 1902 (32 Stat. 716), provides:

"Cherokee citizens may rent their allotments when selected for a term not to exceed one year for grazing purposes only, and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same; but leases for a period longer than one year for grazing purposes and for a period longer than five years for agricultural purposes and for mineral purposes may also be made with the approval of the Secretary of the Interior and not otherwise. Any agreement or lease of any kind or character violative of this section 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."

See Jennings v. Wood, infra.

By Act of Congress of April 21, 1904, 33 Stat. 204, it is provided that:

"And 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. The finding of the United State Indian agent and the approval of the Secretary of the Interior shall be in writing and shall be recorded in the same manner as patents for lands are recorded."

On April 23, 1904, regulations were prescribed by the Secretary of the Interior permitting individual citizens of the Cherokee Nation, Indian Territory, to extract minerals from their allotments, wherein it was provided that:

(a) "Citizens of the Cherokee Nation desiring to develop their allotments for the purpose of extracting oil or gas, or mining coal or other minerals upon said lands, without entering into leases with other persons for such purposes, are required to first procure authority from the Secretary of the Interior in the following manner:

"(1) Application to be made first to the United States Indian agent at Union agency, and to be transmitted through the customary channels to the Secretary of the Interior for consideration; and only such applications as were of date subsequent to that of issuance of allotment certificate by the Commission to the Five Civilized Tribes to the allottees to be considered;

"(2) Such application under oath to give full name of allottee, date and number of the allotment patent or certificate, together with a description of the land, and also to state fully purpose, extent, manner, and character of the proposed operations, and amount of the capital or resources at hand for development and operation;

"(3) No operation to be made through a third party;

"(4) No development to be begun until approval obtained and authority granted by the Secretary of the Interior;

"(5) Permit to be revoked by the Secretary of the Interior if investigation demonstrates breach of conditions;

"(6) United States Indian agent to make report and recommendations."

Said rules and regulations were in force and effect when said lease of May 14, 1904, was approved. By section 2 of Act of May 27, 1908, 35 Stat. 312, a limitation as to restricted lands of the Five Civilized Tribes is imposed on state agencies as to the age of minors, and also required the leases of all restricted lands for oil and gas or other mining purposes, and of such restricted homesteads, for all purposes, for more than one year, and of such restricted lands, for other purposes, for more than five years, to be made, with the approval of the Secretary of the Interior, under rules and regulations promulgated by him and not otherwise. Rogers v. Rogers (D. C.) 263 Fed. 160. On April 20, 1908, new rules and regulations were promulgated, and on June 20, 1908, such rules and regulations for the mining of lands of the Five Civilized Tribes were repromulgated.

The renewal or extending agreement on the part of the said Webster Chisholm which was executed on March 9, 1914, for a consideration of $1 and other and further recited valuable considerations, not therein specifically expressed, recites:

"Said lease is hereby modified so as to in all respects conform to the terms and conditions of the lease form authorized and adopted in pursuance of the amended regulations approved by the Secretary of the Interior on February 6, and June 29, 1911, * * * and all terms and conditions of said original lease contract in conflict therewith are hereby abrogated and held for naught: Provided, however, that nothing herein contained shall be construed to change the date of said above described lease or the date from which rents and royalties thereunder shall be computed and be payable."

The land covered by this lease had been prospected and developed and oil found in paying quantities by the lessee on March 9, 1914, when by amendment and modification an attempt was made to extend said lease for a period "as much longer thereafter as oil or gas is found in paying quantities."

By the Act of March 3, 1901, every Indian in the Indian Territory became a citizen of the United States. 31 U. S. Stat. at Large, c. 868, p. 1447. By section 2 of the Enabling Act "all male persons over the age of twenty-one years who are * * * of any Indian nation or tribe in said Indian Territory and Oklahoma * * * are hereby authorized to vote * * * and * * * shall be eligible to serve as delegates." 34 U. S. Stat. at Large, c. 3335, p. 268. Obviously this legislation was in mind when section 1 of article 3 of the Constitution of the state of Oklahoma was framed, wherein it was provided that "male persons of Indian descent native of the United States," when possessing the necessary qualifications as to age and residence, etc., should be qualified electors in said state. In Jennings v. Wood et al., 192 Fed. 507, 112 C. C. A. 657, involving the validity of an oil and gas lease executed by a minor of the age of 15 years, as approved by the Secretary of the Interior, it is said:

"An approval which proceeds upon a consideration of the terms of the instrument offered and whether they are reasonably for the interests of the Indian was intended as an additional safeguard for his protection. It would not, however, reach back and supply or confirm all the essential, legal prerequisites of a valid contract. It was no more a conclusive determination that the lessor, though a minor, was an adult, than that he was sound mentally or that he belonged to the class or his land was of the character covered by the

statute, if in fact those conditions were wanting. The instrument went to the Secretary of the Interior as lease competently executed and he could act on that presumption. He might properly make preliminary inquiry for his further assurance and he doubtless would decline to approve if advised of fatal defects, but he was not required to investigate and decide judicially matters lying back of and not appearing upon the face of the instrument. If he did his decision would not be conclusive."

Webster Chisholm, on March 9, 1914, at the time he executed the extension, renewal, or modification of the original lease, was not only an enrolled half-blood member of the Cherokee Tribe of Indians and a citizen of the United States, but also a citizen of the state of Oklahoma. When entering into a contract affecting lands located therein, it was necessary that such contract should be made in conformity with the laws of the state. In addition thereto, in so far as it affected a restriction upon him or his rem as a member of said tribe imposed by the laws of Congress, or Indian treaty, such contract must conform thereto in order to be completed or have validity.

Attention has been called to Molone v. Wamsley et al., 195 Pac. 484, construing section 2, c. 198, Session Laws of 1915, which provides:

"All petitions for the approval of deeds to lands inherited by full-blood Indian heirs shall be verified by one or more of the grantors, and shall contain" certain information.

It was there held that the state Legislature had no power to enact a statute which affected the validity of a conveyance by full-blood heirs on account of its approval by virtue of section 9 of Act of Congress approved May 27, 1908, and which in effect limited the power of such federal agency as to such approval.

[4] The county court, in approving such conveyance, was a federal agency acting in an administrative and ministerial capacity. Any legislative act of the state of Oklahoma which sought to limit such agency, in that it would render void the conveyance, if not approved in accordance with such state prescribed procedure, would be invalid. However, if such conveyance covered inherited tribal lands of the full-blood Indian heirs upon which such heir resided, and to which a state homestead character had attached and then existed, it would be essential for the spouse of the full-blood Indian heir to join therein in order that said conveyance should be valid, although approved in accordance with such authorization by act of Congress.

In cases of inherited tribal lands of an Indian minor under existing law, as a preliminary condition to approval by the county court or the Secretary of the Interior, acting as a federal agency, conveyance must first be executed in the manner and by the parties as required by the state or local law. In case such inherited tribal or allotted land constitutes the family homestead, the conveyance must first comply with the requirements of the state or local law as a matter preliminary to the approval by the federal agency.

In the case at bar, neither was this requirement met, nor does the original lease of May 14, 1904, contain any stipulation, either expressly or implied, binding the lessor to any future extension or modification, nor did any such rule of the Interior Department in force at that time

so provide. The conclusion naturally follows that the modification, renewal, or extension of March 9, 1914, which was not joined in by the allottee's wife as required by the Constitution and statutes of the state of Oklahoma, was void. And this applies, not only to the restricted, but also to the unrestricted, part of said land to which the state homestead status had attached.

[5] 2. The allottee, Webster Chisholm, from and after March 9, 1914, the date of the supplemental agreement entered into by him, collected the oil royalty on the basis of one-eighth, instead of one-tenth, as provided in the original lease. The record discloses that the first six wells were drilled and completed on said 80-acre tract prior to March 9, 1914, that the seventh well was completed on May 20, 1916, the eighth on April 28, 1916, the ninth on July 26, 1916, the tenth on April 26, 1917, and the eleventh on October 18, 1917. I find from the record that the wife, Pearl Chisholm, had no knowledge of the supplemental agreement or stipulation entered into by her husband, Webster Chisholm, on March 9, 1914, until after May 14, 1919; that soon after such fact was ascertained by her, to wit, on August 4, 1919, this action was commenced. In the record it is stipulated that 7,750 barrels in oil was the gross production from said lease from May 14, 1914, the date of the expiration of the original lease, to December 31, 1920, and that the market value of such production was $22,944.40; that Webster Chisholm, one of the plaintiffs, has received pay for 968.76 barrels at the said market value in the sum of $2,868.05.

Under the facts disclosed in the record, the wife, Pearl Chisholm, is not estopped from asserting her homestead rights. Cumps v. Kiyo, 104 Wis. 656, 80 N. W. 937; Thompson v. Millikin, 102 Kan. 717, 172 Pac. 534; Franklin Land Co. v. Wea Gas, Coal & Oil Co., 43 Kan. 518, 23 Pac. 630; Peterson v. Skidmore (Kan.) 195 Pac. 600; Ergenbright v. Henderson, 72 Kan. 29, 82 Pac. 524; Law v. Butler, 44 Minn. 482, 47 N. W. 53, 9 L. R. A. 856; Cherokee National Bank v. Riley, 56 Okl. 133, 155 Pac. 1140; Kelly v. Mosby, 34 Okl. 218, 124 Pac. 984; Alton Mercantile Co. v. Spindel, 42 Okl. 210, 140 Pac. 1168.

[6] In an accounting, the defendant should be allowed the difference between the one-eighth and one-tenth royalty paid by it to the allottee, Webster Chisholm, after March 9, 1914. It being further stipulated in the record that the sum of $2,355.81 was expended in completion of said wells after the time the supplemental stipulation was entered into on March 9, 1914, and prior to December 31, 1920, in such accounting this sum should also be allowed the defendant. Muskogee Development Co. v. Green, 22 Okl. 246, 97 Pac. 619.

It will be necessary for an additional hearing as to the facts or a supplemental stipulation as to facts on the accounting before a final decree may be entered.

SANDUSKY CEMENT CO. v. A. R. HAMILTON & CO.

(District Court, N. D. Ohio, E. D. March 22, 1921.)

No. 10911.

1. **Garnishment ⟸97—Irregularities in service do not defeat jurisdiction.**
Objections which refer merely to the regularity of the execution of the order of attachment, the service of the garnishee summons, and of the order of publication do not defeat the jurisdiction of the court, even if such proceedings were irregular.

2. **Attachment ⟸77—Garnishment ⟸86—Sufficient affidavit is essential to jurisdiction.**
A sufficient affidavit is essential to a valid order of attachment or garnishment, and no jurisdiction can be acquired in the absence of personal service, either by levy of attachment or by service of garnishee summons, unless the affidavit is sufficient in law.

3. **Courts ⟸366(10)—Whether plaintiff may garnishee himself is question of local law.**
The question whether plaintiff can obtain service on defendant by service upon himself as garnishee is a question of local law, depending on the interpretation of the statutes of the state regulating garnishee process, and relating to tangible things having a local situs, so that the Ohio decision permitting a plaintiff to be a garnishee is controlling on the United States court sitting in that state.

4. **Garnishment ⟸21—Plaintiff may be garnisheed, though he claims more than the debt he alleges he owes defendant.**
Even though the claim by plaintiff against defendant exceeds the debt which he alleges he owes to defendant, and which, under Gen. Code Ohio, § 11317, is a proper subject of set-off against the debt he owes defendant, he still may obtain service on defendant by summons to himself as garnishee, since set-offs and counterclaims are separate causes of action until extinguished by verdict and judgment, and the Ohio law does not require the debt of the garnishee to be payable absolutely and unconditionally.

5. **Garnishment ⟸88—Positive affidavit of indebtedness is equivalent to affidavit of reasonable belief.**
An oath positively made on personal knowledge that the garnishee is indebted to defendant is equivalent to the oath required by Gen. Code Ohio, § 11828, that the party has good reason to believe and does believe the garnishee is indebted.

6. **Garnishment ⟸88—Statement garnishee is indebted to defendant is sufficient description of property.**
In an affidavit for attachment and garnishment, the positive statement that a named corporation is indebted to the defendant is sufficient description of the property to be attached, under Gen. Code Ohio, § 11822, to sustain a service of garnishee summons, since the words "debts" and "credits," used in that section and in sections 11832, 11837, are equivalent to each other, and the description is sufficient to enable the court to provide for the custody of the property pending further proceedings.

At Law. Action by the Sandusky Cement Company against A. R. Hamilton & Co., a corporation, begun in the state court and removed to the United States District Court. On motion to dismiss. Denied.

Dustin, McKeehan, Merrick, Arter & Stewart, of Cleveland, Ohio, for plaintiff.

Day, Day & Wilkin, of Cleveland, Ohio, for defendant.

WESTENHAVER, District Judge. This action was begun in the court of common pleas of Cuyahoga county and was properly removed to this court. The defendant, appearing specially for the purpose, moves to dismiss this action on the ground that it appears that no jurisdiction was properly acquired of either the person or property of the defendant.

The summons in this action was returned as to the defendant "Not found." An order of attachment and notice of garnishee was also issued at the same time upon an affidavit duly filed. The return of the order of attachment shows no levy or seizure of any property, but a service of the garnishee summons upon the alleged garnishee, the plaintiff in this action, the Sandusky Cement Company. Since the removal, this garnishee has filed an answer admitting that on December 1, 1920, the date the garnishee summons was served, it was indebted to the defendant in the sum of $19,932.48.

[1] Of the several grounds urged in support of the motion, all except the fifth must be regarded as ruled adversely to the defendant's contention, by Cleveland & Western Coal Co. v. J. H. Hillman & Sons Co. (D. C.) 245 Fed. 200, and cases therein cited. These several grounds go merely to the regularity of the execution of the order of attachment, the service of the garnishee summons, and of the order of publication. They seem to me to be regular, but, even if irregular, would not go to the jurisdiction of the court, but might even now be remedied, for the reasons stated in the case just cited.

[2] The fifth, however, is fundamental, and, if sustained, the order of attachment and the garnishee summons must be quashed, and the plaintiff's action will fail for want of jurisdiction. A sufficient affidavit is essential to a valid order of attachment of garnishee process, and, if the affidavit is insufficient in law, no jurisdiction has been or can be acquired, in the absence of personal service, either by the levy of an attachment or the service of a garnishee summons. See case last cited. In support of the fifth ground of the motion, two reasons are urged why the affidavit is fatally defective: (1) That the person stated therein to be indebted to the defendant is the plaintiff itself, and hence no funds or property was or can be garnisheed; and (2) that the affidavit fails to state that the affiant had good reason to believe, and does believe, that the garnishee has property of defendant in its possession, and does not describe that property, as is required by section 11828, G. C. of Ohio.

[3] 1. Whether or not garnishee process may be issued against and levied on an indebtedness due from the plaintiff to the defendant in the same action is a question respecting which the authorities are in much conflict. For a general review of the conflicting decisions on this question, reference is made to 55 L. R. A. 353, editor's note. The cases holding that garnishee process may not be so levied, and jurisdiction thus acquired, base this conclusion on the view that garnishee process is, in substance, an action by the plaintiff against the garnishee debtor, and that the same party may not be both plaintiff and defendant in the same action. This view is repudiated in the leading federal case of Graighle v. Notnagle, Fed. Cas. No. 5,679, opinion by Mr. Justice

Washington. The only other federal case to which my attention has been called is Rice v. Sharpleigh Hdwe. Co. (C. C.) 85 Fed. 559, a decision by District Judge Hammond, which holds that, in an action at law under the statute of Tennessee, the plaintiff cannot garnishee an indebtedness owing by him to the defendant; but this decision is based on the restrictive language of the Tennessee statute. In my opinion, this question is one of local law, since it depends on the interpretation of the statutes of the state, providing for the issue and levy of garnishee process, and relates to tangible things having a local situs. See Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865; B. & O. R. R. Co. v. Baugh's Admr., 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772. In Ohio in Norton v. Norton, 43 Ohio St. 509, 3 N. E. 348, it is held that the plaintiff may thus be garnisheed, and, inasmuch as this decision has never been overruled, or even criticized, it is upon this question an authority controlling in this court.

[4] Defendant's proposition that the allegations of plaintiff's petition, if true, show an excess of indebtedness in plaintiff's favor over the debt owing by it to the defendant, which is garnisheed, and hence that no indebtedness was due and owing from the person garnisheed, to the defendant, at the time the garnishee summons was served, is, in my opinion, not tenable. This proposition assumes the very matter in dispute, namely, whether plaintiff is entitled to recover at all upon the cause of action set forth in its petition. Whether plaintiff's indebtedness to the defendant is a good set-off, or a good counterclaim on behalf of the defendant to the claim or demand made in plaintiff's petition, cannot be determined from the record. It may, however, be admitted that plaintiff's cause of action is so connected with plaintiff's indebtedness to the defendant that one is available as a set-off or counterclaim against the other, under section 11317, G. C. of Ohio; but, even so, set-offs and counterclaims are independent and separate causes of action, and remain so until extinguished by verdict and judgment. The authorities cited and relied on by defendant are not in point. Some are to the effect that the indebtedness owing by the garnishee to the defendant must be a demand payable absolutely and unconditionally; but this is not the law of Ohio, under which any interest is the subject of garnishee process. See Norton v. Norton, 43 Ohio St. 509, 3 N. E. 348, and cases cited. Other cases cited hold that, if there are mutual credits or demands between the garnishee and the defendant, and those of the defendant exceed those of the garnishee, the garnishee process cannot be maintained, because no funds are thereby seized or levied on. These cases have no application to the situation now before me.

[5] 2. The other objection to the sufficiency of the affidavit presents a question of greater difficulty. Section 11828 requires the plaintiff or its agent or attorney to make oath in writing that he has good reason to believe, and does believe, that some person "has property of the defendant in his possession, describing it," in order that garnishee process may issue. The affidavit in this case was made by the secre-

tary of the corporation plaintiff. It is positive in form, and not merely upon information and belief. It says:

"Affiant further says that the following parties are indebted to the defendant, to wit: The Sandusky Cement Company, Engineers' Building, Cleveland, Ohio."

An oath positively made upon the personal knowledge of the affiant includes both the affiant's reason to believe and his actual belief in the truth of his positive statement. For this reason, the words of the statute, "good reason to believe and does believe," are, it seems to me, fully satisfied, and the defendant's objection in this regard is untenable.

[6] The other criticism of the affidavit is that the property in the defendant's possession is not described therein. The question thereby presented is whether a positive statement that the Sandusky Cement Company is indebted to the defendant is a description of property in the defendant's possession within the meaning of this section. An order of attachment requires the sheriff to attach "lands, tenements, goods, chattels, stocks, or interest in stocks, rights, credits, money, and effects of the defendant." Section 11822. The procedure to be followed in the event tangible property is seized, is set forth in section 11826. When garnishee process is served on any third person, it binds all the property of the defendant in his hands, and money and credits due from him to the defendant (section 11837), and this seems to include property other than that described in the affidavit. If the garnishee admits an indebtedness to the defendant, the court may order the payment of it in whole or in part to the plaintiff. Section 11832.

The words "debts" and "credits," as used in these several sections, are, it seems to me, equivalent to each other. One is indebted to another only when there is a sum of money due and owing from one to another. That which one owes to another is a credit in favor of the person to whom it is owing, and a debt of the person by whom it is owing. Hence the statement in the affidavit that the Sandusky Cement Company is indebted to the defendant is the equivalent of a statement that defendant has a credit in the hands of the garnishee debtor, or that the garnishee debtor owes a debt to the defendant. This, it seems to me, is a sufficient description of property in the possession of the garnishee to satisfy the requirements of the statute. A description is required only with a view to identifying the property, and to enable the court and its officers to provide for its custody pending further proceedings. No statement is required of the consideration out of which the debt or credit arose. My conclusion is that the affidavit is sufficient.

The garnishee having filed an answer admitting the indebtedness owing to defendant, section 11850 requires the court either to order the payment thereof into court or to take from the garnishee a bond in favor of plaintiff, with sufficient surety that the amount will be paid as the court directs. In view of the fact that the plaintiff is also the garnishee debtor, the order proper to be made is that this sum should

be paid into court, and unless defendant acquiesces in the substitution of a bond or some other method for the preservation and safe-keeping of the fund, it will be so ordered.

An exception may be noted on behalf of the defendant to the overruling of this motion.

UNITED STATES v. O'DOWD.

(District Court, N. D. Ohio, E. D. June 7, 1921.)

No. 6413.

1. **Searches and seizures ⟸5—Application for return of evidence illegally seized must be made within reasonable time.**
   Defendant in a criminal case is entitled to return of evidence procured by an illegal search and seizure only on application filed within a reasonable time after the seizure.
2. **Searches and seizures ⟸5—Trial will not be stopped to hear motion for return of evidence illegally obtained.**
   The court will not delay a criminal trial to inquire whether evidence, otherwise competent, was unlawfully obtained.
3. **Criminal law ⟸395—Searches and seizures ⟸7—Evidence seized by state officers without warrant not inadmissible in federal court.**
   The provision of Const. Amend. 4, prohibiting unreasonable searches and seizures, is limited to federal agencies, and the fact that whisky in the unlawful possession of a defendant, and to which he could have no lawful title, was seized on a search by state officers without a warrant, does not render it inadmissible in evidence on his trial in a federal court for having it unlawfully in his possession.

Criminal prosecution by the United States against Edward O'Dowd. On motion by defendant for new trial. Denied.

H. L. Eastman, Asst. U. S. Atty., of Cleveland, Ohio.
W. J. Hawley, of Cleveland, Ohio, for defendant.

WESTENHAVER, District Judge. Defendant was by information charged with having unlawfully in his possession 114 quarts of Old Tucker whisky. Upon trial to a jury he was found guilty, and now moves for a new trial. The only error urged in support of this motion is the admission in evidence of some bottles of this whisky and of the circumstances under which it was obtained, which, it is asserted, were seized and removed from defendant's private dwelling without a lawful search warrant.

The whisky in question was found in a one-story frame building used exclusively for lodging or dwelling purposes. The defendant was the lessee of the premises. It will be assumed that it was his dwelling, although he was unmarried, and his brother and father lived there with him. Two police officers of the city of Cleveland, acting without a search warrant and without any direction from any federal officer, entered these premises and found this whisky. At the time of such entry the defendant was absent, and the officers were admitted and permitted to make the search by his brother. The whisky bore

labels showing that it had been bottled in bond for medicinal purposes, and when found was wrapped in Pittsburgh newspapers of a date only two or three days prior thereto. Upon finding the whisky, the police officers telephoned the federal prohibition agent and requested him to come and examine it. The latter, upon so doing, informed the officers that, under the National Prohibition Enforcement Act and the regulations with respect to the withdrawal and sale of whisky for medicinal purposes, it could not have been lawfully acquired or possessed by the owners, and thereupon the officers, without any instructions from the prohibition agent, and without other warrant or authority, seized the whisky, took it to the police station, and at some later date surrendered it to the federal authorities.

This seizure was made August 3, 1920. The criminal information against the defendant was filed February 3, 1921. A petition was filed herein by him March 23, 1921, requesting its redelivery on the ground that the seizure had been made without a search warrant and in violation of the Fourth and Fifth Amendments to the Constitution of the United States. The court, when the petition was thus presented, declined to consider it, and ordered the trial to proceed, announcing that the question would be reviewed upon objections to the admissibility of evidence. A trial was had the same day, with the result above stated.

[1, 2] The motion for a new trial will be overruled. I am of opinion that, under all the circumstances, no error was committed in admitting this evidence. The application for redelivery was not made within a reasonable time after the alleged illegal seizure. According to Weeks v. U. S., 232 U. S. 384, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, a defendant in a criminal case is entitled to the redelivery of evidence procured by an unreasonable search and seizure only when he makes a timely application; that is, an application within a reasonable time after the alleged seizure. It is also settled law that a court will not delay or halt a trial to inquire whether evidence, otherwise competent, has been unlawfully acquired. Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575; Lyman v. U. S. (9 C. C. A.) 241 Fed. 945, 154 C. C. A. 581. Within what time defendant should have made his application, in order to be timely, need not be determined, because, upon any view of the facts, it was made at an unreasonably late day.

[3] This evidence should not have been excluded for another reason. The alleged unlawful search and seizure was not made by or under the direction of any officer of this court or of the United States. It was made by state police officers, acting upon their own initiative. The Fourth Amendment, it is settled law, is a limitation only upon the action of officers of the United States, and not upon the action of private persons or state officials. The object of the amendment was to restrain and prevent arbitrary and despotic action on the part of the national sovereignty, or persons acting under its authority. This is clearly stated in the Weeks and other cases which have followed it. The amendment, while forbidding unreasonable searches and seizures, is silent as to whether evidence thus obtained is or is not admissible. The only explicit restriction upon the admissibility of evidence is con-

tained in the Fifth Amendment, which forbids the compelling of any one to give testimony against himself in a criminal case. It expressly declares the ancient and time-honored doctrine that no defendant in a criminal case can be called as a witness or made to testify against himself. It is out of this doctrine, and under the protection of this and similar constitutional provisions, that has grown the rule that confessions are inadmissible in criminal cases if procured by force or tnreats. Boyd v. U. S., 116 U. S. 616,[1] and Silverthorne Lumber Co. v. U. S., 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319, are examples of cases falling within the prohibition of the Fifth Amendment, although the opinion in the Boyd Case is to the effect that the Fourth Amendment likewise is applicable. It was, however, in the Weeks Case that it was first held that documents having only evidential value, procured as the result of an unreasonable search and seizure, although otherwise competent, should be redelivered to the defendant upon a timely application, and may not be used in evidence against him.

The United States Supreme Court have so far not applied this doctrine, except to documents having only evidential value, procured by an unreasonable search and seizure. It has not yet held that a thief is entitled to have returned to him stolen goods found in his possession and seized by an officer without a search warrant. It has not yet held that a burglar, a counterfeiter, or a smuggler, has a similar right to the return of the implements and tools of his trade and crime, merely because possession of them was obtained as the result of an unreasonable search and seizure. The property seized in this case is like unto stolen property. No title to it or property in it can exist in the defendant. Section 25, title 2, National Prohibition Enforcement Act (41 Stat. 315), explicitly declares that no property rights shall exist in such liquor. The only exception in the law pertains to liquor which was lawfully acquired and is not being illegally used.

It results from these observations that it would be an unsound policy and unwarranted extension of the doctrine of the Weeks Case to order the surrender either of stolen goods or contraband whisky to a known thief or a proved bootlegger, merely because that property had been taken from his possession by a private individual or by a state official without a search warrant. So far the United States Supreme Court has ordered the return only of documents having merely an evidential value thus procured. It has also declared that the object and purpose of the Fourth Amendment is limited to federal agencies, and was designed to prevent autocratic and despotic action under color of national authority. The object and purpose thus declared does not require the extension of the rule to the acts of state officials or private persons.

That these views are sound, and that evidence is not inadmissible because seized by state officers without a search warrant, is evidenced by the Weeks Case. In that case the documents seized by state police officers were not ordered to be redelivered, and it was held not to be error to admit them in evidence. The same holding was explicitly made in Youngblood v. U. S. (8 C. C. A.) 266 Fed. 795. This is in accord with the ancient and undisputed rule that confessions wrongfully ob-

[1] 6 Sup. Ct. 524, 29 L. Ed. 746.

tained by private individuals, or evidence the possession of which has been procured by the fraud or trickery of public officials, will not, if otherwise competent, be rejected because of the methods whereby it was thus acquired. That this rule remains unmodified, has been declared by the United States Supreme Court in Burdeau v. McDowell, 255 U. S. —, 41 Sup. Ct. 574, 65 L. Ed. —, decided June 1, 1921. See, also, for an exhaustive discussion of this subject, to which nothing can be added, note 136 Am. St. Rep. 135–161.

The motion for a new trial is overruled. An exception may be noted.

UNITED STATES v. BURNSIDE.

(District Court, W. D. Wisconsin. June 11, 1921.)

1. **Intoxicating liquors ⇐248—Complaint for search warrant sufficient.**
Under Laws Wis. 1919, c. 556, § 3, authorizing issuance of a search warrant on complaint of any peace officer, made on information and belief, "to the effect that provisions of this act are being violated," and that liquors are kept for unlawful sale at a designated place, a complaint is sufficient if it alleges the requisite facts, though it does not mention such act, but erroneously refers to an earlier statute repealed or suspended.

2. **Criminal law ⇐395—Liquor not inadmissible in evidence because unlawfully seized by state officers.**
That liquor was obtained through an unlawful search and seizure by state officers, having no connection with federal authorities, does not render it inadmissible as evidence on the trial of a defendant in a federal court.

Criminal prosecution by the United States against Urias J. Burnside.

On application by defendant to suppress evidence in the possession of the United States attorney, such property consisting of whisky found in the premises at 606 Tower avenue, Superior, Wis., occupied by the defendant as a place of business, on two occasions, to wit, March 4, 1920, and June 7, 1920. Denied.

William H. Dougherty, U. S. Atty., of Janesville, Wis., and Arthur Mulberger, Asst. U. S. Atty., of Watertown, Wis.

John A. Cadigan, of Superior, Wis., for defendant.

LUSE, District Judge. Prosecution by the government against the defendant under the National Prohibition Law (Act Oct. 28, 1919. c. 85, 41 Stat. 305), under an indictment containing three counts, the first of which charges the defendant with having in his possession, for beverage purposes, certain intoxicating liquor on June 7, 1920. The second count makes a similar charge against the defendant; the date thereof being alleged as March 4, 1920. The third count charges the defendant with maintaining a nuisance at premises known as 606 Tower avenue, Superior, Wis., on March 4, 1920, by keeping therein intoxicating liquor.

[1] Before trial the defendant applied to the court for an order suppressing as evidence the liquor found in the premises in question on

the dates above stated, on the ground that the police officers of the city of Superior, who seized the liquor, had no proper search warrants which would justify their entrance into the premises and the seizure of the liquor. It appears that on both occasions the police department made complaint to the municipal court of Douglas county, which court issued a search warrant directing the search of the premises of the defendant; but the defendant claims that both the complaints and the search warrants used were insufficient in that the affidavits and warrants both specifically recite violations of section 1550 of the Wisconsin Statutes and Ordinance No. 880 of the city of Superior.

Section 1550 of the Wisconsin Statutes was a part of the excise law during the time that trafficking in liquor under the license system was in force in this state, and was expressly suspended by the state Prohibition Act (chapter 556 of the Laws of 1919), which was passed by the Legislature pursuant to the concurrent jurisdiction therefor given by the Eighteenth Amendment to the United States Constitution. Defendant contends, also, that Ordinance No. 880 of the city of Superior likewise is an ordinance only applicable to licensed saloons, passed during the time when such licensed business was lawful, and was likewise repealed, or, at any rate, suspended, by the passage of the state Prohibition Act; also that such ordinance does not and could not legally provide for search warrants being issued for the purpose of discovering violations thereof, proceedings thereunder being merely of a quasi criminal character, and not such as to permit of the use of search warrants.

It must be conceded that section 1550 of the Wisconsin Statutes was not in effect at the time these search warrants were issued, and for the purpose of this discussion it may also be assumed (but without deciding the question) that the ordinance referred to furnished no authority for the issuance and execution of such warrants. The state Prohibition Act (chapter 556, Laws 1919), by section 3 thereof, expressly provides that it shall be the duty—

"of all peace officers of the state, to make complaints and institute prosecutions for a violation of the same, and all such officers * * * may, on information and belief make complaint before any magistrate or court to the effect that provisions of this act are being violated and that intoxicating liquors are being kept for purposes of unlawful sale at a particular place to be designated and praying that a warrant may be issued to search the premises where said intoxicating liquors are so being kept and seize the same, and upon filing any such complaint a warrant may issue commanding the officer to search the premises and seize any and all liquors believed to be intoxicating and bring the same before the court for further proceedings according to law."

While it is true that both of the affidavits underlying the search warrants state that there is "good reason to believe that an offense under section 1550 of the Wisconsin Statutes has been committed," and the search warrants in each instance recite a complaint having been filed to the effect that an offense under section 1550 of the Statutes and under Ordinance No. 880 of the city of Superior has been committed by the defendant, nevertheless both affidavits and both warrants, in addition thereto, expressly charge and recite respectively "that beer,

whisky, and other intoxicating liquors have been transported to, kept in, and sold to customers in such place [606 Tower avenue] in violation of law" by the defendant, and are concealed therein. In addition to the references to section 1550 and the ordinance contained in these papers, the search warrants and complaints, or affidavits upon which they are based, thus allege and show a violation of the state prohibition act by the defendant and authorize the issuance of a search warrant under section 3 of that act above quoted. Under these circumstances, I see no reason why the references to section 1550 of the Wisconsin Statutes and the city ordinance should not be treated as mere surplusage.

I cannot accede to the contention of the defendant that in proceedings to obtain a search warrant under section 3 of the state Prohibition Act, which provides that complaint may be made "to the effect that provisions of this act are being violated," it is essential that such act be referred to by name or section number. It seems to me to be sufficient if the complaint or affidavit for the search warrant sets forth facts sufficient to show that the law is being violated by a certain person, by unlawfully keeping liquor in a designated place, and that under such affidavit a search warrant may properly issue.

[2] However, in my judgment, it is not necessary to rest the decision of this application upon the validity of the search warrants issued out of the municipal court of Douglas county. The United States had no part in securing the search warrants in question, nor in executing the same. The proceedings were carried on by the police officers of the city of Superior prior to the time when any proceedings were taken by the United States government, and it appears from the testimony taken in connection with this application that the proceedings by the city officers were entirely independent of the United States government or any of its agents, and that it was some time after the search had been executed and the liquor seized that the police officers of the city of Superior delivered the liquor so seized to the United States attorney for use as evidence in the pending proceeding. While it is well settled that competent evidence tending to prove crime is rendered inadmissible, where it has been secured by federal officers by unlawful search and seizure in violation of the Fourth Amendment, or where its admission is deemed a violation of the Fifth Amendment to the Constitution (Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575; 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), and this rule has recently been applied by the Supreme Court to contraband articles in the case of Amos v. U. S., in an opinion handed down February 28, 1921, 255 U. S. —, 41 Sup. Ct. 266, 65 L. Ed. —, I know of no case where such effect has been given to the trespasses of strangers to the government. That an unlawful seizure by state officers has no such effect was held by the Circuit Court of Appeals of the Eighth Circuit in Youngblood v. U. S., 266 Fed. 795, and correctly so, it seems to me, both on principle and in conformity to the language of Mr. Justice Day, found in the opinion in Adams v. New York, 192 U. S. 585, at page 596, 24 Sup. Ct. 372, 374 (48 L. Ed. 575):

"A trespasser may testify to pertinent facts observed by him, or may put in evidence pertinent articles or papers found by him while trespassing. For the trespass he may be held responsible civilly, and perhaps criminally; but his testimony is not thereby rendered incompetent."

See, also, Commonwealth v. Acton, 165 Mass. 11, 42 N. E. 329; Commonwealth v. Smith, 166 Mass. 370, 44 N. E. 503.

Application is denied.

In re JENS.

(District Court, S. D. Iowa, W. D. May 31, 1921.)

1. **Bankruptcy ⇐143(12)—Trustee entitled to surrender value of insurance policies payable to wife, with absolute right to change beneficiaries.**
   Insurance policies on the life of a bankrupt, payable to his wife, but reserving to him the absolute right to change the beneficiary, so that the bankrupt had full control over the policies, are assets of his estate, and the trustee is entitled to receive the surrender value thereof.
2. **Bankruptcy ⇐143(12)—Necessity of consent of beneficiary to surrender for protection of insurer does not defeat trustee's right to surrender value of insurance policies.**
   Where an insurance policy on the bankrupt's life, payable to his wife, reserved to him the absolute right to change the beneficiary, the fact that the consent of the present beneficiary was necessary to a surrender of the policies for the protection of the company against possible controversy does not defeat the trustee's right to the surrender value of the policy.
3. **Bankruptcy ⇐396(3)—State statute held not to exempt to insured surrender value of policy, whose beneficiary could be changed.**
   Code Iowa 1897, § 1805, providing that a policy of insurance shall inure to the separate use of the husband or wife of insured independently of his creditors, applies to the proceeds of a policy of insurance on the death of insured, especially in view of the further language of the section specifically exempting the proceeds of an endowment policy, and therefore does not prevent the trustee in bankruptcy from claiming the surrender value of the policy on the life of the bankrupt, the beneficiary of which he had the absolute right to change.

In Bankruptcy. In the matter of Harry John Jens, bankrupt. On petition by the trustee in bankruptcy for review of an order of the referee holding certain insurance policies on the life of the bankrupt exempt. Order reversed, and case remanded to referee for further proceedings.

W. H. Schurz, of Council Bluffs, Iowa, for bankrupt.

Galvin & Byers, of Council Bluffs, Iowa, for trustee.

WADE, District Judge. 1. Harry John Jens was duly adjudged a bankrupt. The referee, upon application of the trustee and resistance by the bankrupt, held that certain policies of the bankrupt, issued by the Northwestern Mutual Life Insurance Company, in the sum of $25,000, were exempt to the bankrupt, and that the trustee was not entitled to their possession, nor to the surrender value thereof. The Northwestern Mutual Life Insurance Company is making no resistance, being ready to pay the surrender value to the trustee or bankrupt as may

be adjudged. Two other policies are also involved, but there is no certainty as to surrender value, and in any event, they will be governed by the ruling herein.

[1] 2. The material facts are not in dispute. In each of the policies the wife of the insured was named as beneficiary, but by the expressed terms of each of the policies the insured (the bankrupt) reserved the absolute right to change the beneficiary at will. No change of beneficiary has been made.

3. The wife is not a party to this proceeding, nor is she making any claim to the policies.

"The authorities are uniform in holding that when the right to change a beneficiary is reserved in the contract, and in the absence of other controlling provisions, the beneficiary named in the certificate acquires no vested interest until the death of the assured, and prior to that time the assured may change the beneficiary at will." Carpenter v. Knapp, 101 Iowa, 712, 70 N. W. 764, 38 L. R. A. 128, and numerous cases cited.

[2] 4. Whether, under the terms of the policies, the consent of the present beneficiary is necessary to the surrender of the policies for their present value, it is unnecessary to decide. If such consent is required, it is merely for the protection of the company against possible controversy or dispute, because, so far as present value is concerned as a property right, it belongs absolutely to the insured, and not to the beneficiary. The Supreme Court of the United States in Cohen, Trustee, v. Samuels, 245 U. S. 50, 38 Sup. Ct. 36, 62 L. Ed. 143, says:

"It is true the policies in question here are not so payable [to himself, estate or personal representative], but they can be or could have been so payable at his own will and by simple declaration."

5. In the consideration of the question before the court, the element of public policy must not be overlooked. If the contention of the bankrupt be sustained, there is nothing to prevent any failing creditor from investing all his assets in life insurance, over the proceeds and surrender value of which he retains absolute control, and thus he would be enabled in bankruptcy proceedings to be cleared of all obligations while he possessed and retained property of large value. In Cohen v. Samuels, supra, the Supreme Court of the United States says:

"Under such conditions [a policy with surrender value in which the insured retains the right to change the beneficiary], to hold that there was nothing of property to vest in a trustee would be to make an insurance policy a shelter for valuable assets, and it might be a refuge for fraud."

In Burlingham v. Crouse, 228 U. S. 459, 33 Sup. Ct. 564, 57 L. Ed. 920, 46 L. R. A. (N. S.) 148, the court says:

"Congress recognized also that many policies at the time of bankruptcy might have a very considerable present value, which a bankrupt could realize by surrendering his policy to the company. We think it was this latter sum that the act intended to secure to creditors by requiring its payment to the trustee as a condition of keeping the policy alive."

[3] 6. In view of the foregoing considerations, it is quite apparent that the trustee is entitled to the surrender value of the policy, unless such surrender value is expressly exempted by section 1805, Code of Iowa 1897, which is as follows:

"Sec. 1805. *Policy Exempt from Execution.* A policy of insurance on the life of an individual, in the absence of an agreement or assignment to the contrary, shall inure to the separate use of the husband or wife and children of said individual, independently of his creditors. The proceeds of an endowment policy payable to the assured on attaining a certain age shall be exempt from liability for any of his debts. Any benefit or indemnity paid under an accident policy shall be exempt to the assured, or in case of his death to the husband or wife and children of the assured, from his debts. The avails of all policies of life or accident insurance payable to the surviving widow shall be exempt from liability for all debts of such beneficiary contracted prior to the death of the assured, but the amount thus exempted shall not exceed five thousand dollars."

In construing such a statute, the whole of the enactment must be considered together. Carefully reading the language of the Legislature it is quite apparent that we can find no words which cover the contention in the case at bar. The first sentence does not use the word "exemption." It states that "a policy of insurance * * * shall inure to the separate use of the husband or wife and children of said individual, independently of his creditors." How can a policy of insurance "inure to the separate use of the husband or wife and children" under the circumstances of this case? The wife and children are making no claim and could make none. The person making the claim is not the "husband"; he is the insured. He is demanding that a property interest belonging absolutely to him shall be held exempt, not to his wife or children, but to himself. The section cannot bear such construction. It is quite apparent that, when the Legislature used the words "policy of insurance," it meant "proceeds" of a policy of insurance. This follows clearly from the latter words, "inure to the separate use of the husband or wife and children." It means that upon the death of the husband the proceeds shall inure to the benefit of the wife, and in case the policy be upon the wife it shall upon her death inure to the benefit of the husband, and in each case that the children shall become vested with an interest therein.

This conclusion is required by further language of the section, which exempts specifically the proceeds of an endowment policy, which, if the previous language meant the policy itself, would be entirely unnecessary, because the language "policy of insurance" includes all forms of policies.

From the foregoing it follows that the ruling by the referee must be reversed. The conclusion reached herein is not inconsistent with the opinion of Justice White in Holden v. Stratton, 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018, when due consideration is given to differences in the terms of the policies, and to the distinction between the statutes involved. Support is found in Re Moore (D. C.) 173 Fed. 679, 23 Am. Bankr. R. 110.

The case is remanded to the referee for further proceedings consistent with this opinion.

The bankrupt excepts.

THE COASTER.

(District Court, W. D. Washington, N. D. June 4, 1921.)

No. 5593.

Maritime liens ⊂=24—Furnisher of supplies to charterer not entitled to lien.

Where libelant for five years had furnished oil supplies to a canning company for the operation of a large number of motor launches, which it chartered during the canning season, a mere change by libelant in its bookkeeping, by making the charges against each boat and sending the bills in care of the company, which received and promised to pay the same, *held* not to entitle libelant, which had knowledge that the company had no authority to bind the boats, to a lien under Act June 23, 1910, §§ 1, 3 (Comp. St. §§ 7783, 7785).

In Admiralty. Suit by the Standard Oil Company against the launch Coaster; Ole Hoeck, claimant. Decree for respondent.

Edward H. Chavelle, of Seattle, Wash., for libelant.

Reynolds, Ballinger & Hutson, of Seattle, Wash., for respondent and claimant.

NETERER, District Judge. During the year 1919, from July 1 until October 15, the tug Coaster was under oral charter with the San Juan Canning Company, for the use of which the Canning Company agreed to pay a stipulated sum covering the period of service. The Canning Company was to pay for all supplies, fuel, and crew, and all damages occasioned to the boat. A. T. Hoeg was in the employ of the Canning Company during the year 1919, in the capacity as buyer of fish, overseer of various parts of the fishing business, and likewise operating the launch Coaster. The boat, when not operated under this charter, was employed by the owner in such water traffic as could be obtained. The libelant maintained an oil station at Friday Harbor, the seat of the Canning Company, and furnished supplies to the boats employed by the Canning Company, including respondent, throughout the year. From July 1 to November 15, the account was rendered to the Coaster c/o San Juan Canning Company, and the mail was received by the Canning Company. During the other months of the year the account was rendered to the claimant and paid by him. No demand was made of the claimant for payment of the fuel furnished covering the period in issue until July 23, 1920, when the following letter was addressed to him:

"We are advising you of unpaid account on our books against your launch Coaster, in the amount of $646.59, contracted while operating for the San Juan Canning Company in 1919. We have been unable to make collection from the above Company, and would ask that you kindly arrange to take care of this account, sending us a check direct, or making settlement at our office."

During each year from 1913 inclusive to 1919, the Canning Company employed the boat of the claimant, with others, paying for all supplies and fuel, which was furnished by libelant to the Canning Company upon general account. On the left-hand column of the ledger of the

libelant appears the following account, in the manner below indicated, stars denoting omissions:

Names
* * * * *
San Juan Canning Co.
* * * * *
For delivery to boats
keep separate from Cannery
5/5/19 (Credit Dept.)
* * * * *
Lch Coaster
% San Juan Canning Co.
* * * * *

In this same column appear the names of 35 other launches operated by the San Juan Canning Company.

Prior to July, 1919, the agent of libelant at Friday Harbor advised the Canning Company that thereafter all bills would be charged to the boats, but was told by the representative of the Canning Company that the company would pay the bills. Prior to 1919, all supplies furnished to the launches, including the claimant's, was paid by the Canning Company. The libelant, upon receiving checks from the Canning Company on account, credited the amount to the oldest account, and, when the fishing company finally failed to pay, asserted a lien against the launches whose supplies were not paid.

Do the facts establish a maritime line under Act of June 23, 1910, 36 Stat. 604 (Comp. Stat. §§ 7783–7786)? Section 1 of the act, supra, provides:

"That any person furnishing * * * supplies * * * to a vessel * * * upon the order of the owner * * * or of a person by him * * * authorized shall have a maritime lien * * * and it shall not be necessary to * * * prove that credit was given to the vessel. * * *"

Section 3 of the act, supra:

"* * * But nothing in this act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party * * * or for any other reason, the person ordering the * * * supplies * * * was without authority to bind the vessel therefor. * * *"

Section 4 of the act, supra:

"Nothing in this act shall be construed to prevent a furnisher of * * * supplies * * * from waiving his right to a lien at any time, by agreement or otherwise. * * *"

Prior to May 5, 1919, admittedly libelant knew that the Canning Company was without authority to bind the vessel for supplies. Upon this date notation was made upon the ledger, and thereafter the agent of the libelant advised the president of the Canning Company that the charge on the books of the company would be made against the vessel. The arrangement between the libelant and the Canning Company, in force for five years with relation to furnishing the fuel and supplies to the claimant's launch, was thus changed. Libelant knew that the Can-

ning Company was without power to bind the vessel, and knew that the same relation obtained between the Canning Company and the claimant for the year 1919 with relation to the use of the launch, and furnished the fuel and supplies with this knowledge. Demand was made upon the Canning Company for the amount of the fuel and supplies furnished, and it was not until after a failure to collect from the Canning Company that demand was made upon the claimant. Ely v. Murray & Tregurtha Co., 200 Fed. 371, 118 C. C. A. 520. It is true that the statement was sent to the Coaster, °/o San Juan Canning Company, and was received by the Canning Company, in whose possession it was, but this fact does not vest authority to bind the launch.

The presumption of the statute may unquestionably be removed, and the right of lien based upon it destroyed by proof which overcomes it. The Patapsco, 80 U. S. (13 Wall.) 329, 20 L. Ed. 696. This proviso is merely a statutory declaration of a principle long recognized in maritime jurisprudence and announced by the Supreme Court in The Kate, 164 U. S. 458, 17 Sup. Ct. 135, 41 L. Ed. 512, and The Valencia, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710. No one with knowledge that fuel or supplies are ordered by one without authority acquires a lien, and one cognizant of circumstances which suggest inquiry may not close his eyes and avail himself of presumptions of the law. Under these circumstances a lien may not be impressed.

There is no question as to whom credit was given prior to 1919 for fuel and supplies furnished to the same launch, nor can it be reasonably asserted that the credit was not primarily extended to the Canning Company in 1919. That credit was primarily extended to the Canning Company, or the lien waived by demand upon the Canning Company for many months, is shown by the letter, supra, and is fatal to the right of lien. The Millinocket (D. C.) 266 Fed. 392.

The facts in this case are distinguished from those in the cases cited by libelant, in that in the instant case there was a full and complete understanding between the libelant and the Canning Company, and the authority which the Canning Company had to bind the vessel, which understanding had been carried out for a period of five years and was continued for 1919, except as to the manner of bookkeeping, and not until July, 1920, when demand was first made upon the claimant for the supplies furnished the preceding year, was he advised of the claim for lien.

In re PEOPLE'S WAREHOUSE CO.

(District Court, S. D. Mississippi, Jackson Division.)

No. 1447.

Bankruptcy ⇐43—Voluntary petition on behalf of corporation held sufficient to give jurisdiction.

A petition in voluntary bankruptcy filed by the attorney for a corporation, whose action was ratified by a majority of the stockholders and by all the directors who were competent to act for it, the other directors having claims against it, *held* sufficient to give the court jurisdiction.

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

2. Bankruptcy ⊂=391(3)—Bankrupt entitled to injunction restraining suits in state courts.

Where there were more than 100 separate damage claims against a bankrupt corporation, all arising from the same transaction, on some of which actions had been brought in the state courts, and on all of which liability depended on the same facts, the bankrupt *held* entitled to an injunction restraining prosecution of suits on such claims until it could obtain its discharge, and its trustee *held* entitled to an order requiring adjudication of the claims in the bankruptcy court, where they could be consolidated for trial as to liability.

In Bankruptcy. In the matter of the People's Warehouse Company, bankrupt. On motion to vacate injunction. Denied.

Watkins, Watkins & Eager, of Jackson, Miss., and C. H. Williams and J. G. Holmes, both of Yazoo City, Miss., for complainant.

Barbour & Henry and E. L. Brown, all of Yazoo City, Miss., for defendants.

FOSTER, District Judge. In this case it appears that the People's Warehouse Company, a Mississippi corporation conducting a cotton compress and warehouse, was adjudicated a bankrupt on a voluntary petition in September, 1920. A receiver was appointed, and thereafter a trustee was duly elected and authorized by the court to conduct the plant of the bankrupt as a going concern. The bankrupt listed on its schedules debts amounting to $22,840, and there are a number of claims for damages, over 100 at least, on which it denies liability. These claims arose from the breaking of a levee surrounding the premises of the bankrupt, as a result of which certain cotton then in storage was damaged by water.

Within a few weeks prior to the adjudication, and even after the adjudication, a number of suits, 22 or more, were filed against the bankrupt in the state courts of Mississippi to recover damages, all growing out of the breaking of the said levee. The trustee and the bankrupt joined in a petition to the District Court, praying that the prosecution of the said suits be enjoined, in order to allow the bankrupt to plead his discharge in bar of same, and in order to prevent a multiplicity of suits against the bankrupt's estate, and suggesting that all such claims and demands should be consolidated into one action, for the purpose of saving costs, and to avoid inconvenience and delay in their trial.

On this petition a restraining order issued, after which Hon. Edwin R. Holmes, District Judge, recused himself, and the case was allotted to me by designation. Thereafter a petition was presented to Hon. F. M. West, referee, for a preliminary injunction. The referee, doubting his jurisdiction in the matter, declined to issue the preliminary injunction prayed for, but filed findings of fact indicating clearly that the injunction should issue. Thereupon the preliminary injunction issued as prayed for. Thereafter answers were filed to the petition for injunction.

[1] In April, 1921, a motion was filed to vacate the injunction theretofore granted, and this motion was heard by me in New Orleans. At

this hearing it was suggested that the adjudication in bankruptcy should be set aside as a fraud on the court. A petition to dismiss the bankruptcy proceedings had previously been filed, and may be noted incidentally, although perhaps not regularly before this court.

It appears that five members of the board of directors, including the president, of the bankrupt corporation, have adverse claims for damages against the company growing out of the breaking of the levee. These directors adopted a resolution seeking a dismissal of bankruptcy proceedings. It is elemental that directors having adverse claims cannot represent the corporation in any matter pertaining to their claims. See Clark on Corp. p. 493; Fletcher, Cyclopedia Corp. par. 2330.

It is doubtful that ab initio the petition for adjudication was filed by proper authority. Mr. Williams, one of the directors, who was the retained attorney of the corporation, deeming it for the best interests of the corporation, had assumed that authority; however, after the adjudication two of the directors, the only other two entitled to vote on the question, and a majority of the stockholders, ratified his action.

Undoubtedly any person owing debts has the right to seek the bankruptcy court for the purpose of winding up his affairs, and his motive in doing so is immaterial. It also may be considered settled that on a voluntary petition an adjudication may be made as to a perfectly solvent person. Section 4, Bankruptcy Act (Comp. St. § 9588); Collier on Bankruptcy (12th Ed.) p. 141.

The bankruptcy court has been operating the property, and the trustee has incurred liabilities for borrowed money and for expenses under due authority of the court. The court has jurisdiction to authorize the trustee to operate the bankrupt's property as a going concern for a limited period. Bankruptcy Act, § 2 (5), being Comp. St. § 9586. The term "limited period" is, of course, relative, and I do not consider that as yet the administration has been unduly prolonged. Furthermore, I do not consider that any fraud has been practiced on the court in seeking an adjudication in bankruptcy in this case.

[2] The bankrupt also undoubtedly has the right to have a stay of proceedings against him in a state court for such time as may be necessary to secure his discharge. Section 11, Bankruptcy Act (Comp. St. § 9595). As he has 12 months in which to apply for his discharge, I do not think the court should interfere with his discretion in applying for it within that period.

It is unfortunate that in this case the parties have not been able to agree upon some method of liquidating the claims for damages against the bankrupt. There are about 108 claims of this character, all arising from the same transaction. Most of the claimants are represented by the same attorneys. The evidence as to liability in one claim will be the same as in all others. There are certain claims of persons who were directors in the bankrupt corporation. As to them there is some question of estoppel or contributory negligence to be raised, but that will not affect the general proof of liability.

It would be manifestly impracticable for all of these suits to be liq-

uidated in the state courts in separate cases within a reasonable time, and the result might be different in various suits, both as to liability and to equitable assessment of damages, if liability were decreed. The bankruptcy court, possessing equity powers, can give more equitable relief as to all of these claims.

It would then seem a proper case for the exercise of the court's discretion as to the consolidation of these claims as presented. Liability can be established by a hearing in open court before the judge, and, once established, the consolidated case can be referred to a master or an auditor, to ascertain the amount due each claimant. Delay would be avoided and costs saved by such procedure. However, I doubt that at this time the court can take action with regard to such a consolidation. No claims for damages have been filed, and I do not think it would be proper to enter an order for consolidation until the claims are filed in the bankruptcy proceedings. There is yet ample time for filing of all these claims and for a hearing of them.

The motion to vacate the injunction will be denied, without prejudice to the rights of all parties to renew the motion at a proper time.

THE AMOLCO.

(District Court, D. Massachusetts. June 16, 1921.)

No. 1851.

Collision ⇐91—Steam vessels meeting.

A collision in the daytime in lower New York Bay between a steam trawler passing out and a steamship coming in *held*, on the evidence, due solely to the fault of the trawler in taking a diagonal course, which carried her into the east side of the channel and across the course of the steamship, which properly kept to that side, and persisting in such course after signals of the steamship for passing port to port.

In Admiralty. Suit for collision by Louis H. Green against the steamship Amolco. Decree for respondent.

Harrington, Bigham & Englar and T. Catesby Jones, all of New York City, for libelant.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for claimant.

MORTON, District Judge. This is a case of collision between the steam trawler Heroine and the steamship Amolco. The collision occurred in Lower New York Harbor about noon on April 23, 1920. It was a clear day with a light breeze. The Heroine was outward bound. Her general course is not greatly in dispute. From a point near the buoy at the entrance to the Pennsylvania Terminal she headed for buoy 12 (also called "12½"). This course took her on a long slant across the channel from starboard to port. She sighted the Amolco when the vessels were a mile or more apart, and kept the same course until she reversed her engines just before the collision.

The Amolco was coming in from sea and made the turn in the channel at buoy 12. The testimony of Capt. Bonia, of the trawler, places the steamer wide off the buoy when making the turn, well over on her port side of the channel, and proceeding from that position on a course that would have carried her into the anchorage ground on that side.

There is no reason why the steamer should have been in such a position or taken such a course; she was destined to a dock on the east shore. She would naturally make the turn near buoy 12, which was on her starboard hand, and hold that side up the channel; and the evidence is overwhelming that that is what she did. Her master and other witnesses testify that she left the buoy about her own length to starboard; and in this they are corroborated by Capt. Fitzsimmons of a tug which was following the Amolco. Capt. Fitzsimmons testifies that, after having made the turn as above described, the steamer proceeded up her starboard side of the channel about her own length (317 feet) from the line of the buoys. Capt. Hillyer, of the Amolco, testifies that his course took him just outside of buoy 14, which comes to about the same thing as Capt. Fitzsimmons' testimony. The compass course, as given by Capt. Hillyer, and the steamer's helmsman (Cummings), slants out into the channel. But as the steamer was undoubtedly being navigated with reference to the buoys rather than the compass, Capt. Hillyer's statement of her course with reference to them, corroborated as it is by Capt. Fitzsimmons, seems to me more likely to be right than the compass course which he gives. The difference is slight, not over three-quarters of a point. The testimony of Cummings tends to show that she made a somewhat wider turn at buoy 12. But it seems certain that she never got over the center line of the channel, and, after making the turn, proceeded up her starboard side of it. I find accordingly.

The determination of the Amolco's position when passing buoy 12 and her course thereafter is practically decisive against the Heroine's essential contention, viz. that the Amolco, from a position near the center or on her port side of the channel at buoy 12, was proceeding on a slant towards the west (her port) side, and that the vessels would have passed safely starboard to starboard but for the "Amolco's" subsequent change of course. The courses actually taken were intersecting, although at a very small angle; the trawler crossing the bow of the steamer from port to starboard.

In that situation it was the trawler's duty to give way, and the steamer's to hold her course and speed; or, if the vessels be regarded as head on under the rules, as the libelant contends, it was the duty of each to turn to starboard and pass port to port. The channel in question has been held by the Court of Appeals for the Second Circuit to be a narrow channel, within article 25, being Comp. St. § 7899 (The La Bretagne, 179 Fed. 286, 102 C. C. A. 651), and it was the further duty of the Heroine to keep her starboard side of it. She therefore held a course which was wrong, because it crossed the bow of the other vessel —or, if the positions be regarded as head on, because she did not turn to starboard—and because it carried her over to her wrong side of the channel into the path of a vessel rightfully proceeding there. The City

of Norfolk (D. C.) 248 Fed. 780; Hayne, "Rule of the Road at Sea" (2d Ed.) pp. 71, 72.

There is dispute as to the signals. The Amolco's testimony is that she signaled first with a single blast, which the Heroine answered by two blasts—i. e., she cross-signaled; that the steamer repeated her single signal, and was again cross-signaled by the trawler; that danger signals and reverse signals followed from both vessels. The Heroine's testimony is that she gave the first signal, two blasts; that the Amolco cross-signaled, by answering with a single blast; and that very shortly the danger and backing signals were given. Whether the Amolco first announced her intention of holding her starboard side of the channel, or whether she first did so in answer to the signal of the Heroine, which was endeavoring to crowd her out, seems to me not important. The Amolco seasonably discovered the Heroine, and seasonably indicated her intention to adhere to her privilege, if she had the other vessel on her port bow, or her duty, if they were head on, to turn to starboard and to hold her own side of the channel, and it was the Heroine's duty to give way or do likewise. Inasmuch as the Heroine was violating two important rules of navigation, and as I have found that the testimony of her master is on one important point, viz. the position of the Amolco with reference to buoy 12, erroneous, I am disposed to accept the testimony of the Amolco as to signals, rather than that of the Heroine; and I so find. The likelihood that a vessel clearly at fault in a collision will make unfounded charges against the navigation of the other vessel has been often recognized by courts of admiralty.

It does not seem to me that the Amolco was at fault for continuing to turn to starboard after receiving the second two-blast signal from the Heroine. The movement carried her away from the other vessel and still farther onto her own side of the channel. It gave the other vessel more room in which to maneuver and to perform her statutory duty under articles 18 and 19 (Comp. St. §§ 7892, 7893) of avoiding the threatened collision by turning to starboard. Capt. Hillyer was certainly not bound to anticipate that the other vessel would not give way and would hold her wrongful course into collision.

The bottom facts of the case are, I think, that the trawler, whose crew were thoroughly accustomed to New York harbor, was cutting to sea by the shortest line; that, relying on her speed and ability to maneuver quickly, her master anticipated no trouble in avoiding this slow-moving cargo steamer, and planned to cross the channel ahead of her. Feeling confident he could do so, he kept on, even after the steamer's one-blast signal had notified him that she was turning to starboard; and his miscalculation resulted in the collision.

Decree dismissing libel, with costs.

UNITED STATES v. BLUMBERG et al.

(District Court, E. D. Pennsylvania. May 25, 1921.)

No. 79.

Criminal law ⇐942(2)—Prior opinion expressed by witness not ground for new trial.

Newly discovered evidence, which went no further than to show that a material witness for the government had, at a time prior to the indictment, expressed an opinion that defendants were ignorant of facts essential to establish the fraud charged, *held* not ground for granting a new trial, where the verdict of the jury was supported by evidence of substantive facts.

Criminal prosecution by the United States against Jacob and Barney Blumberg. On motion in arrest of judgment and for new trial. Denied.

T. Henry Walnut, Sp. Ass't. U. S. Atty., and Chas. D. McAvoy, U. S. Atty., both of Philadelphia, Pa.

Harry M. Berkowitz and J. Washington Logue, both of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The defendants were convicted upon a charge of conspiracy to defraud the United States in the making of false income tax returns. The testimony tended to show that they had obtained the assistance of the officers of a bank in which they kept the accounts of their business, that of buying and selling scrap metal, in making their return, and that the return so made was false and fraudulent, in that the income of the defendants largely exceeded that contained in the return so made up at their request. The plea of the defendants throughout the case was that of absolute ignorance of the extent of their business, of the sums received from sales of scrap, and of the sums paid out in business expenses. It was claimed that they kept no books and were too ignorant to know any of the details of their business. Books found in their place of business with leaves cut out and showing entries beginning the first part of the year after the taxable year for which they made their return were produced in evidence.

At the trial, which occupied several days, vigorous objection was made to various items of testimony offered on the part of the government, and rulings upon the admission of evidence have been set up as reasons for granting a new trial. I am of the opinion that there was no such substantial error in the admission of evidence as to justify a new trial upon that ground.

Before the argument, however, the defendants' counsel presented additional reasons based on after-discovered evidence. The after-discovered evidence consisted of a receipt signed by Joseph E. Kelly, the internal revenue agent who had charge of the investigation of the case, in which he acknowledges receipt from the attorney for Bernard and Jacob Blumberg of amended partnership and individual income tax

returns and which contains a recital that "after George K. Watson & Co. had been employed to build a set of books for the year 1917 for the said firm and individuals and after obtaining said information, which was not in the hands of either the Ridge Avenue Iron & Metal Company or Bernard Blumberg or Jacob Blumberg prior to that time, the said revenue agent, Joseph Kelly, is to file the same," etc.

The court permitted the taking of depositions for the purpose of showing that the receipt in question was not available at the time of the trial, the original counsel for the defendants having died after obtaining the receipt and before the trial, and its existence not being known to their present counsel. Its only significance is in the statement as to obtaining information which was not in the hands of the defendants prior to the date of the receipt. It is urged by counsel for the defendants that it is very material to their case that Mr. Kelly, who was one of the principal witnesses for the government, made such an admission, that it was an important fact for the jury and he should be cross-examined upon it at the trial.

The most that could have been proved by the production of the paper was that, at the time it was signed, Mr. Kelly was of the opinion that the information for making up the income tax returns had not been in the hands of the defendants prior thereto. Whether Mr. Kelly was of that opinion at that time or whether he subsequently changed his opinion would have no direct bearing upon the case.

The facts which were left to the jury to consider were substantive facts in relation to the amount of the defendants' net income as shown by the evidence of sales and receipts in their business, obtained directly from their customers, a comparison of the resultant amount of income with what was set out in the original return, and facts showing motive and intent. It was a question for the jury to determine whether the defendants had information upon which they could have based an income tax return different from the one they did present. And it was for the jury to infer the facts from the evidence and not from any opinion formed in Mr. Kelly's mind. The verdict of the jury was entirely justified by the evidence in the case and all the facts were left to them to determine. It is hardly probable that the question of Mr. Kelly's opinion as to the availability of information could in any respect have effected the verdict.

While it is apparent that neither Mr. Logue nor Mr. Berkowitz had knowledge of the existence of the receipt, it did develop that it was known to Mr. Watson, the accountant who was actively interested in the case on behalf of the defendants, and he might have called the attention of counsel to its existence. The presumption is that the paper was not considered of any special significance by anybody in connection with the case who knew of its existence until after the trial, and there is nothing to show that information of its existence was purposely withheld by Mr. Kelly. As its relevancy on cross-examination is doubtful, and in all probability it would not effect the result, I do not consider it such after-discovered evidence as should influence the court in setting aside the verdict and granting a new trial.

The motion in arrest of judgment and for a new trial is denied, and it is ordered that the defendants appear in court on Tuesday, the 31st instant, at 10 o'clock a. m., for sentence.

ITALIAN BOOK CO. v. CARDILLI.

(District Court, S. D. New York. September 28, 1918.)

No. E 15-119.

Copyrights ⇐32—Publication in foreign country held not to prevent American copyright.

The publication in Italy of the words and music of a song written in the Italian language and copyrighted in Italy does not prevent American copyright four years later, where there had been no publication in the United States prior to that of the copyright owner, the publication in the United States was in the Italian language and thus identical with that in Italy, and all copies sold in Italy bore a statement thereon that the proprietor owned the rights for all countries and that all rights were reserved.

In Equity. Suit by the Italian Book Company against Mauro V. Cardilli for infringement of a copyright. On final hearing. Decree for plaintiff.

Samuel F. Frank, of New York City, for plaintiff.

Mr. Barra, for defendant.

HOUGH, Circuit Judge. The subject-matter of this suit is of no great value. The principle is important and should be decided authoritatively. So far as I am concerned, it remains, after the investigations of both counsel and myself, a matter of first impression.

An Italian wrote a song in Italy, and another Italian furnished music therefor; both words and music were published in Naples in 1913, and forthwith copyrighted in accordance with the law of Italy. Each copy of said words and music sold, stated in Italian who was the proprietor, that said proprietor owned the rights for all countries, and that all rights were reserved.

The song was popular, and four years later the Italian proprietor sold to the plaintiff, an American corporation, the privilege of copyrighting and selling the same in the United States, apparently on a royalty basis. Thereupon the plaintiff did copyright words and music; the registration being of December 10, 1917, and the date of original publication stated as September 1, 1913. The defendant copied words and music and sold the same after this registration date. There are no intervening rights, as that phrase is commonly used in patent litigation.

The question (very easy to put) is this: Did the publication in Italy prevent American copyright four years later? Copyright being wholly statutory, we must first look at the act. Comp. St. §§ 9517-9524, 9530-9584. It is entirely silent on the subject; I can discover nothing which in terms precludes a proprietor doing exactly what this plaintiff has done.

The whole line of cases, holding that publication without copyrighting destroys the right to a subsequent copyright, are either founded on statutes differing from the present one, or on a proven publication in the country of the court rendering the decision. It seems to me as a matter of first impression that the publication in Italy was, by the terms of the notice printed or stamped on each copy sold, limited to Italy, and did not (in the absence of statutory prohibition) prevent the subsequent American copyright, if (as is the case here) there had been no publication in the United States prior to that of the copyright owner.

The novelty of this litigation arises from the fact that that which is printed and published in the United States is in the Italian language, and is identical with what was put forth in Italy. This seems to be left out of our present statute, and in the absence of congressional direction I feel that the equities of the matter are with the plaintiff; and therefore, with considerable doubt, I order a decree for plaintiff, with costs.

UNITED STATES v. COHEN.

(District Court, D. Massachusetts. June 7, 1921.)

Nos. 3099, 3100, 3104, 3107.

Indictment and information ⟸39—Special assistant to Attorney General without authority to file information.

Under Act June 30, 1906 (Comp. St. § 534), providing that a special assistant to the Attorney General "may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal," which district attorneys are authorized to conduct, whether or not the Attorney General may lawfully delegate authority to file a criminal information, a special assistant has no such authority unless conferred by specific direction.

Criminal prosecution by the United States against Max Cohen, against Samuel Garber and others, against Julius Ring, and against Abraham Levy. On motions by defendants to quash informations. Motions granted.

Herbert A. Horgan, Sp. Asst. Atty. Gen., of Boston, Mass., for the United States.

Thomas Stacey Bubier, of Lynn, Mass., for respondent Cohen.

James J. Moynihan, of Worcester, Mass., for respondents Garber and others.

Nathan Ullian, of Boston, Mass., for respondent Ring.

Solomon Rosenberg, of New Bedford, Mass., for respondent Levy.

MORTON, District Judge. These are informations charging the several defendants with violations of the Volstead Act (41 Stat. 305). Each information is signed "Harry M. Daugherty, Attorney General of the United States, by Herbert A. Horgan, Special Assistant to the Attorney General." Mr. Horgan's only authority to act was derived from his appointment as a special assistant to the Attorney General

which was then in force, and from letters from the Attorney General, copies of which[1] are hereto annexed.

The defendants have moved to quash or dismiss upon several grounds, among them that Mr. Horgan was not a person duly authorized to bring informations for violations of the Volstead Act. The principal questions are: (1) Whether a special assistant to the Attorney General may be empowered to bring criminal informations under the Volstead Act; and (2) assuming that such power can be granted, whether Mr. Horgan was in fact so authorized.

Prior to the passage of the Act of June 30, 1906 (34 Stat. 816 [Comp. St. § 534]), it is clear that a special assistant had no such authority. U. S. v. Rosenthal (C. C.) 121 Fed. 862; U. S. v. Heinze (C. C.) 177 F. 770, 772. Under the act of 1906, a special assistant can exercise the powers therein specified only "when thereunto specially directed by the Attorney General." The special directions to Mr. Horgan as to the cases now before me were:

"You are hereby authorized and directed to conduct grand jury proceedings in any judicial district of the United States in connection with the investigation and prosecution of these cases." Letter of January 10, 1921.

Nothing is said about filing informations.

The power to bring informations which charge crime and on which warrants of arrest issue is a great power, carrying with it possibilities of serious oppression, if improperly used. It involves the exercise of a quasi judicial discretion and the performance of duties widely different from those of an advocate in submitting a matter to the grand jury. The power is lodged in the United States Attorney (by statute as to certain crimes, R. S. § 1022 [Comp. St. § 1686]), and in the Attorney General. No statute authorizing the delegation of it has come to my attention, except the act of 1906 which, as above noted, limits the delegation to such matters as are covered by special direction. Both by the statute, therefore, and by general principles of law, a delegation of this power, if intended, must be made in clear and precise terms, and not left to inference or implication; it is not conferred by authority to conduct grand jury proceedings. For these reasons, Mr. Horgan was not, in my opinion, authorized to bring these informations, and as they were not submitted to or approved by the Attorney General they were not legally brought.

Whether the act of 1906, which in terms authorizes the Attorney General to delegate only the "conduct" of legal proceedings, authorizes him to delegate the power to bring criminal informations, it is not necessary to decide. See Brown v. U. S., 257 Fed. 703, 168 C. C. A. 653, and May v. U. S., 236 Fed. 495, 149 C. C. A. 547, which tend to uphold the delegation.

Motions allowed; informations dismissed.

(a) "January 10, 1921.

"Mr. Herbert A. Horgan, Special Assistant to the Attorney General, Federal Building, Boston, Mass.—Sir: Your appointment, dated December 31, 1920, as a special assistant to the Attorney General, is hereby extended to include the cases of United States v. David E. Roy and United States v. Joseph

[1] See (a) and (b) at end of case.

Pardiges and the other cases mentioned in your letter of the 6th instant, involving violations of the National Prohibition Act and the internal revenue laws, which are pending in the district of Massachusetts.

"You are hereby authorized and directed to conduct grand jury proceedings in any judicial district of the United States in connection with the investigation and prosecution of these cases.

"Respectfully, Frank K. Nebeker, Acting Attorney General."

The letter of the 6th instant, referred to in the above communication, contained, among others, the following cases:

United States v. David E. Roy.
United States v. Julius Ring.
United States v. Hyman Terban.
United States v. Samuel Garber.
United States v. Max Cohen.
United States v. Abraham Levy.
United States v. Abraham Levy.
United States v. Joseph Pardiges.

(b) "January 12, 1921.

"Mr. Herbert A. Horgan, Special Assistant to the Attorney General, Federal Building, Boston, Mass.—Sir: Your appointment dated December 31, 1920, as a special assistant to the Attorney General, is hereby further extended to include, in addition to the cases heretofore assigned to you, the investigation and prosecution of any other special cases arising in the district of Massachusetts involving the violations of the National Prohibition Act, and you are hereby authorized and directed to conduct grand jury proceedings in any judicial district of the United States in connection with the investigation and prosecution of these cases.

"Respectfully, A. Mitchell Palmer, Attorney General."

JAMES McWILLIAMS BLUE LINE v. PAYNE, Director General, etc. (Pennsylvania R. R.).

McWILLIAMS BROS., Inc., v. SAME.

(District Court, E. D. New York. May 28, 1921.)

Towage ⇐19—Tug liable for causing moored boats to go adrift.

A towing tug, which tied up boats in her tow to others moored to a pier during high wind, the additional strain causing breaking of the lines to the pier, *held* liable for injuries sustained by any of the boats so set adrift.

In Admiralty. Suits by the James McWilliams Blue Line and by McWilliams Bros., Incorporated, against John Barton Payne, Director General of Railroads, as operator of the Pennsylvania Railroad. Decrees for libelants.

Herbert Green, of New York City, for libelant.

Burlingham, Veeder, Masten & Fearey, of New York City, for respondent.

GARVIN, District Judge. These are libels to recover for injuries to scows which broke adrift while moored at or close by a dock near Newtown creek, on February 4, 1920. The tug Overbrook, belonging to the respondent, brought up a tow about 6 o'clock p. m. on that day. It was blowing hard, and had been snowing since morning. Respondent's witnesses testified that the Overbrook placed several boats from

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

her tow directly at the pier nearest Newtown creek to the south. The testimony of the libelants is that the boats were made fast to boats already moored to the second pier south of the creek.

Upon this disputed question of fact, I find for libelants. The cause of the going adrift of the boats was the failure of the Overbrook to make secure that part of her tow which she left. In placing the boats next to others lying at the pier (which had remained there in safety for some time before the tow arrived) the Overbrook caused strain to be put upon the lines which held the Lehigh No. 33 to the dock. These lines parted, as the tide turned and began to run out strong, aided by the wind, and the lines of the Lehigh No. 33 broke, thus setting adrift a number of boats, three of which, the Yankee, owned by McWilliams Bros., Incorporated, and the Blue Girl and the W. H. Elliot, owned by James McWilliams Blue Line, were finally injured. The Yankee actually was sunk. As the boats were safely moored until the Overbrook arrived, she is responsible for the damage. Authorities in point are: The Walter Green (C. C. A.) 266 Fed. 269; The Wm. Guinan Howard, 252 Fed. 85, 164 C. C. A. 197; The P. I. Nevius, 67 Fed. 158, 14 C. C. A. 355; The Ganoga, 257 Fed. 720, 169 C. C. A. 8. Two of the injured scows were at the mooring place when the Overbrook arrived. The third, The Yankee, was in the Overbrook's tow.

It is claimed by the respondent that there is an additional reason for dismissing the suit brought by McWilliams Bros., Incorporated, for the sinking of the Yankee, in that the respondent wrote to the libelant, stating that the respondent would not be responsible for injuries to a boat damaged while in tow by any of respondent's tugs. The libelant, however, promptly replied stating in effect that it would decline to abide by any such disclaimer of responsibility. There was, therefore, no meeting of minds by which it was mutually agreed that there was to be any change in the respondent's liability.

The libelant in each case may have a decree, with the usual references to a master to compute the damage.

Ex parte POOLE.

(District Court, D. Montana. April 21, 1921.)

No. 908.

1. **Intoxicating liquors ⇐174—Violations of National Prohibition Act held separate offenses.**
   Under the National Prohibition Act, the manufacture of intoxicating liquors without a permit, the failure to make a permanent record of such liquor, and the possession of property designed to manufacture liquor intended for use in violation of such act are separate offenses.

2. **Criminal law ⇐984—Single sentence, imposing fine and imprisonment for three offenses, held not void.**
   Where defendant pleaded guilty to an information charging in three counts the manufacture of intoxicating liquor without a permit, the failure to make a permanent record of such liquor, and the possession

of property designed to manufacture liquor for illegal use, a single sentence, imposing a fine of $150 and imprisonment for 75 days, is not void, as the imprisonment will be assigned to the first count, which charged an offense punishable by imprisonment, and the fine to the other counts.

Habeas Corpus. Application by Frank E. Poole for a writ to revise sentence after plea of guilty. Application denied.

Russell, Madeen & Barron and Patterson & Heyfron, all of Missoula, Mont., for petitioner.

Geo. F. Shelton, U. S. Atty., of Butte, Mont., for respondent.

BOURQUIN, District Judge. Habeas corpus sought for that, upon petitioner's plea of guilty to an information charging three violations of the National Prohibition Act (Act Cong. Oct. 28, 1919, c. 85, 41 Stat. 305), viz.: (1) Manufacturing intoxicating liquor without a permit; (2) failing to make a permanent record of such liquor; and (3) possession of property designed to manufacture liquor intended for use in violation of said act—a single sentence and judgment were imposed that he be imprisoned 75 days and fined $150, which fine has been paid.

The act provides for the first of said offenses imprisonment or fine, and for the second and third thereof fine. The sentence and judgment in imprisonment and fine are less than the possible maximum on the three counts. Petitioner's contention is that, though the act creates these separate offenses, they are in reality but one continuous offense, and subject to but one sentence and judgment of imprisonment or fine; that, having paid the fine, the sentence is void as to the imprisonment and he is entitled to the writ. To this he cites In re Snow, 120 U. S. 274, 7 Sup. Ct. 556, 30 L. Ed. 658; Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872; Stevens v. McClaughry, 207 Fed. 18, 125 C. C. A. 102, 51 L. R. A. (N. S.) 390; Halligan v. Wayne, 179 Fed. 112, 102 C. C. A. 410.

[1] That the separate offenses are but one, and subject to but one penalty, is an unwarranted assumption. Congress having power to define offenses, to determine what acts shall constitute offenses, has declared clearly enough that these are separate offenses. See Morgan v. Devine, 237 U. S. 632, 35 Sup. Ct. 712, 59 L. Ed. 1153; Ebeling v. Morgan, 237 U. S. 625, 35 Sup. Ct. 710, 59 L. Ed. 1151. Neither is necessarily or at all included in any of the others.

[2] The single sentence is other and greater than can be imposed on any one count, and common-law rules would probably hold it void. 1 Bishop, Cr. Prac. § 1327. Modern doctrine, however, seems to sanction it. See Brinkman v. Morgan, 253 Fed. 553, 165 C. C. A. 223. Upon error, and in view of the record, a reasonable presumption of judicial regularity will assign the imprisonment to the first count of the information, and the fine to the second and third counts, and thus each offense is visited with the penalty the act authorizes. That the sentence herein is not of time excessive upon any count, but is of character impossible upon any count, is believed to be immaterial.

The application is denied.

MILLS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. June 6, 1921. Rehearing Denied August 1, 1921.)

No. 3595.

1. **Aliens ⇐59—In prosecution for attempting to re-enter after deportation, reference in warrant of deportation to wrong statute is immaterial.**
In a prosecution under Immigration Act Feb. 5, 1917, § 4 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼bb), for attempting to enter the United States after having been arrested and deported therefrom, it was immaterial that the warrant of deportation, dated before the act of 1917 went into effect, purported to be based on such act, as the previous Act Feb. 20, 1907, as amended by Act March 26, 1910, contained the same provision.

2. **Aliens ⇐56—Statute as to attempt to re-enter after deportation not limited to re-entry within one year.**
Act Feb. 5, 1917 § 4 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼bb), providing that an alien deported under the provisions of that act relating to prostitutes, etc., and thereafter attempting to return or enter the United States, shall be guilty of a misdemeanor, applies to an attempt to re-enter more than one year after the deportation, though another provision of the act includes in the persons denied admission persons deported and again seeking admission within one year without the consent of the Secretary of Labor.

3. **Aliens ⇐56—Statute punishing attempt to re-enter after deportation not ineffective.**
Act Feb. 5, 1917, § 4 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼bb), making it a misdemeanor for certain aliens, after being deported, to attempt to return to or enter the United States, is not ineffective as penalizing an attempt to do an act which is not in itself a crime, as the attempt is expressly made punishable, and is in itself a substantive offense, and not a mere attempt to commit another offense.

4. **Criminal law ⇐695(4)—Admission of evidence not error, when objection on particular ground not made.**
On the trial of an alien for attempting to enter the United States after being deported, the admission of a Canadian certificate of naturalization to show that her husband was an alien, without proof of the authority of the Canadian court issuing it, was not error, where such objection was not interposed to its admission.

5. **Criminal law ⇐315—Foreign citizenship presumed to continue until countershowing made.**
On the trial of an alien for attempting to enter the United States after being deported, where her Canadian citizenship was shown to exist on November 15, 1911, the presumption continued until a showing was made to the contrary.

6. **Aliens ⇐59—Canadian naturalization certificate held to show prima facie Canadian citizenship.**
On the trial of an alleged alien for attempting to enter the United States after being deported, a certificate of naturalization granted by a Canadian court under Revised Statutes of Canada, and certifying that defendant's husband had been naturalized as a British subject, was sufficient to show prima facie that at the date thereof he was a citizen of the Dominion of Canada.

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

Elsie Mills was convicted of returning to the United States after deportation, and she brings error. Affirmed.

Beeler & Sullivan and C. A. Brinkley, all of Seattle, Wash., for plaintiff in error.

Robert C. Saunders, U. S. Atty., and George E. Mathieu, Asst. U. S. Atty., both of Seattle, Wash.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff in error was convicted and sentenced under an indictment which charged that on January 18, 1920, she knowingly, willfully, and unlawfully attempted to return and enter the United States from foreign territory contiguous thereto, to wit, the Dominion of Canada; the Secretary of Labor not theretofore having consented to any reapplication by her for admission into the United States, she having been theretofore, on July 29, 1917, arrested and deported from the United States of America to the Dominion of Canada, on the charge that she had been found in the United States, connected with the management of a house of prostitution in the United States, and the arrest and deportation having been made by virtue of a warrant issued March 13, 1917, by the Department of Labor. The warrant was set forth in full, and it recited, among other things, that the plaintiff in error was found in the United States in violation of the Immigration Act of February 5, 1917 (39 Stat. 874).

[1] Error is assigned to the order overruling the demurrer to the indictment, and it is contended that the indictment fails to charge an offense, in that the warrant of deportation therein set forth, which was dated March 13, 1917, was expressly based upon the Immigration Act of February 5, 1917, an act which went into effect on May 1, 1917, and was not in force at the date of the warrant. The previous Act of February 20, 1907 (34 Stat. 898), as amended in 1910 (36 Stat. 264), was in force, however, and the provisions of that law as amended are identical with the provisions of the Act of February 5, 1917, so far as they concern the charge against the plaintiff in error.

A similar contention was presented to this court in Akira Ono v. United States (C. C. A.) 267 Fed. 359, where the order of the Secretary of Labor, directing the arrest of a Japanese person and ordering that he be granted a hearing to show cause why he should not be deported, recited that he had entered the United States in violation of the Act of February 5, 1917, although the entry occurred before the passage of the act, this court held that the erroneous mention of the statute of February 5, 1917, was unimportant, for the reason that the real question was whether the case showed that the appellant was found illegally here, and, if so, whether there existed legal authority for his deportation. In Guiney v. Bonham (C. C. A.) 261 Fed. 582, 8 A. L. R. 1282, we held that, although a warrant of arrest for deportation is in terms based on a particular statute, the alien may be deported under a later statute, which, under the facts charged, is applicable. Other cases of like import are United States v. Uhl, 211 Fed. 628, 128 C. C. A. 560, United States v. Williams, 200 Fed. 538, 118 C. C. A.

632, Healy v. Backus, 221 Fed. 358, 137 C. C. A. 166, Siniscalchi v. Thomas, 195 Fed. 701, 115 C. C. A. 501, and Ex parte Pouliot (D. C.) 196 Fed. 437.

[2] The plaintiff in error refers to the Act of February 5, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼b), which provides for the denial of admission to the United States of all "persons who have been deported under any of the provisions" thereof, "and who may again seek admission within one year from the date of such deportation, unless prior to their re-embarkation at the foreign port or their attempt to be admitted from foreign contiguous territory, the Secretary of Labor shall have consented to their reapplying for admission," and contends that by implication it follows that a deported alien has the right to re-enter the United States after the expiration of the one-year period. We find no merit in the proposition. Section 4 of the act (section 4289¼bb) provides in plain terms that any alien who shall, after he has been excluded and deported, or arrested and deported, in pursuance of the provisions of this act, which relate to prostitutes, procurers, or other like immoral persons, attempt thereafter to return to or enter the United States, shall be deemed guilty of misdemeanor.

[3] Nor do we find merit in the contention that no offense against the United States is defined by the statute under which the plaintiff in error was indicted. The argument is that an indictment which alleges an attempt to return to and enter the United States, an act which is not in itself a crime, cannot be made a crime, citing 8 R. C. L. 352, where it was said:

"For it would appear to be a palpable solecism in the law to declare that a mere attempt to commit an act which is not penal is itself punishable."

Counsel for the plaintiff in error overlook the words which immediately precede the quotation, which are these:

"In the absence of a statute expressly making an attempt to commit suicide a crime, there is no satisfactory ground on which it can be classed as such."

In the present case the statute expressly makes the attempt a punishable offense. The attempt is in itself a substantive offense. It is the act of crossing the boundary line into the United States. It is not an attempt to commit an independently described offense, in the sense in which the word "attempt" is ordinarily used in criminal law. It is the actual re-entry into the United States.

[4-6] The plaintiff in error was born in the United States, but she went to Canada with her husband, and there resided before returning to the United States and to the place in Montana from which she was ordered to be deported to Canada, on the charge that she was an alien and a keeper of a house of prostitution in the United States. Her husband, L. L. Mills, had likewise been a citizen of the United States, but to show that on November 15, 1911, he became a naturalized citizen of the Dominion of Canada, the prosecution offered in evidence on the trial a certificate of naturalization, wherein, under the provisions of the Revised Statutes of Canada of 1906, it was certified that L. L. Mills had become naturalized as a British subject, "and is within Canada

entitled to all political and other rights, powers, and privileges, and is subject to all obligations to which a natural-born British subject is entitled or subject within Canada."

It is contended that the certificate was insufficient to prove such naturalization of L. L. Mills, for the reason there was no proof that the British Parliament had conferred upon the Canadian court which issued the same the power to make L. L. Mills a British subject. But no such objection was interposed to the admission of the certificate in evidence. The only objection was that there was absence of proof to show that the certificate was still in effect. The trial court overruled the objection, holding that, the Canadian citizenship being shown to exist on November 15, 1911, the presumption would be that it continued until showing was made to the contrary.

There was no showing to the contrary, and we think the ruling of the court was clearly correct, and that the certificate was sufficient to show prima facie that L. L. Mills was at the date thereof a citizen of the Dominion of Canada.

There was further proof of such citizenship in the admission of L. L. Mills to a witness in the case that he was a Canadian citizen, and in the evidence that on his attempting to enter the United States from Canada in November, 1917, he was denied admission. It was also shown that in the hearing before the United States immigration inspector at Seattle, Wash., a few days before the plaintiff in error was indicted, an affidavit of L. L. Mills was filed in whicih he stated that in the year 1911 he took out Canadian citizenship papers for the purpose of enabling him to vote as a property owner there, and to give him protection while in Canada; his understanding being, however, that the papers would automatically become invalid on his returning to the United States.

We find no error for which the judgment should be reversed. It is accordingly affirmed.

SOTO et al. v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. June 7, 1921.)

No. 2660.

1. **Courts ⟸405(1)—Circuit Court of Appeals reviews law and fact on appeal from a district court of the Virgin Islands.**
   The Circuit Court of Appeals reviews law and fact on an appeal from a conviction in the district court of St. Thomas and St. John in the Virgin Islands.

2. **Constitutional law ⟸252—Territories ⟸7—Inhabitants of Virgin Islands entitled to guaranties of Fifth and Sixth Amendments and other constitutional guaranties.**
   The Virgin Islands, acquired by treaty, while appurtenant to the United States, are not a part thereof, within several meanings, such as citizenship, revenue laws, and judicial establishment, and are governed as to judicial proceedings by Organic Act March 3, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3924¼a–3924¼h), continuing in effect the local laws, "in so far as compatible with the changed sovereign-

ty," to be administered through the local tribunals; but such territory is under the absolute dominion of the United States, and the inhabitants are entitled to the protection of the Fifth and Sixth Amendments and other constitutional guaranties, so that conviction of felony by trial beginning by a police investigation, at which the evidence was reduced to writing and followed by trial by the district court without a jury, in which the written testimony was used, but no witnesses called, though defendants were offered right to do so, was not according to due process of law, and could not be sustained.

Appeal from the District Court of St. Thomas and St. John in the Virgin Islands; Thiele, Judge.

Jose Soto and Jose Lopez were tried together, and defendant Lopez was found guilty of murder, and defendant Soto was found guilty of being an accomplice, and they appeal. Reversed, and new trial ordered.

Leo F. S. Horan, of St. Thomas, V. I. (Dallas S. Townsend, of New York City, of counsel), for appellants.

Geo. A. Keyser, Gov. Atty., of St. Croix, V. I., for the United States.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

WOOLLEY, Circuit Judge. This is a criminal appeal from a judgment of the District Court of St. Thomas and St. John in the Virgin Islands, formerly the Danish West Indies. It is brought here under the Act of Congress of March 3, 1917 (39 Stat. c. 171 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3924¼a–3924¼h]), which conferred on this court appellate jurisdiction in all cases arising in those islands. By the judgment appealed from, Lopez was found guilty of murder and was sentenced to death; Soto was found guilty of being an accomplice and was sentenced to imprisonment for six years. The appeal brings the case here for review on both the facts and the law after the manner of appeals to the courts of Denmark, as provided by the cited act, construed by this court in Clen v. Jorgensen, 265 Fed. 120.

The main question in the case is whether constitutional guarantees (especially those contained in the Fifth and Sixth Amendments) extend to inhabitants of the Virgin Islands.

The facts out of which this important question has arisen are briefly these:

On the night of September 9, 1920, the American Steamship Polar Star was lying in the Harbor of St. Thomas. Upon the sounding of her distress signal the local police hurried aboard and found a man lying dead in the mess-room and another man on the deck badly wounded. Two of the crew, Soto, a Chilean, and Lopez, a Spaniard, were missing. These men were captured in the bush, one a day, and the other two days, after the homicide. On the day following the homicide a Police Investigation was instituted in the Police Court of St Thomas and St. John. The investigation was begun before Soto and Lopez had been apprehended and was continued after their capture and production in court by repeating before them the testimony given, or "reports" made, in their absence and by introducing additional testimony, the substance of which was as follows:

There was a quarrel in the crew's quarters below deck between Soto and Lopez on one side and William Dougherty and Patrick Donahue on the other. The four men were members of the crew. All were more or less under the influence of liquor. In the course of the quarrel it was proposed that they go on deck and fight it out. Thereupon the men started for the deck. Soto, gaining possession of a large knife, handed it to Lopez. When on a stairway, or in a narrow passage, Lopez stabbed Donahue, who was above him or ahead of him, and then stabbed Dougherty, who was below him or behind him, with the result that Donahue suffered the loss of an eye and Dougherty was instantly killed.

While these were the main facts, there was much testimony bearing on the grade of the crime. The investigation continued almost daily from September 10 to September 22. Twenty-three witnesses for the government were examined; the prisoners alone spoke for themselves.

The proceeding before the Police Court has an important bearing on the case. The best that we can make out of the record is that it was purely an investigation looking toward discovering and committing the culprits. No charge of crime was made against anyone. As to the procedure, a witness on being called gave his testimony, which afterwards was reduced to writing and read to him, and, if satisfactory, was verified by his oath. The testimony of witnesses was at times read by an interpreter to the prisoners, both of whom spoke and understood nothing but the Spanish language; and at times, as the record shows, the testimony was not read to them at all. The investigation was prosecuted mainly in the presence of the prisoners, though, undoubtedly, the record shows that it continued at times during their absence. (Testimony of Patrolman Anduze and Director of Police Morningstar on September 13.)

At the conclusion of the proceeding in the Police Court, that is, at the conclusion of the "Police Investigation," for that is what it was entitled, the judge made the following entry:

"The two accused (sic) were informed that in case they have no further statement to give the investigation will be closed now and the records of it sent to the Government with the request that they be tried for murder."

The case was then transferred from the Police Court to the District Court by the appearance in the latter court of the Government Attorney, who had conducted the police investigation, and by the filing of "a summons, a plea, a transcript of the police investigation in the case and the order for prosecution." Judge Thiele (who was Judge of the District Court as well as of the Police Court) thereupon issued a summons to Soto and Lopez to appear on a named day "to answer the charge made against (them) and show cause why (they) should not be punished as recommended to the court by the prosecution in the plea filed with this Court." The "plea" which the Government Attorney filed in the District Court recited the facts of the homicide and charged Lopez with "intentional murder" in killing Dougherty and Soto with being an accomplice. The plea charging these crimes was later amend-

ed by adding the charge of assault and battery. The two prisoners were then brought to the bar and "made acquainted" with the charges against them. Counsel for their defense, having but recently been appointed by the Government, appeared for the first time and requested a postponement of the trial in order that he might familiarize himself with the transcript of the proceeding in the Police Court and prepare a plea by way of answer. Thereafter the trial proceeded by both counsel filing pleas made up entirely of discussions on the evidence taken in the police investigation. In other words, the pleas were arguments in the nature of briefs.

At the trial in the District Court no witnesses were produced by the Government and no testimony was given. Similarly, no witnesses were produced by the prisoners, although at the trial (as well as at the police investigation) the defendants were afforded an opportunity of calling witnesses in their defense. This offer at the trial was of no value to them as the Polar Star had by that time sailed away with all the witnesses to the homicide.

The case in the District Court was tried to the District Judge and four "co-judges", or lay judges, whom the Judge had summoned to his aid. The five judges found the defendants guilty respectively of "willful and unnecessary murder" and of being accessory to that crime, and concurred in a judgment that—

"The defendant Jose Lopez shall lose his life and that the defendant Jose Soto shall be punished by imprisonment in the penitentiary for six years."

This appeal followed.

[1] While it is our duty on an appeal of this character to review the case on both the law and the facts, Clen v. Jorgensen, supra, we desire to say that, if a question of law were not involved, we should not disturb the judgment of the District Court on the facts. The facts, *as they stand* are of a character on which equally fair-minded men might come to the one conclusion that Lopez killed Dougherty, and yet are such that equally fair-minded men might come to different conclusions as to the grade of the crime, whether, as in our law, it be manslaughter, murder in the second degree, or murder in the first degree. Therefore, we cannot say that, on the evidence before them, the trial judge and the co-judges erred in rendering against Lopez a judgment of "intentional murder,"—in effect a verdict of murder in the first degree.

This brings us to the question of law involved in the appeal. Before discussing this very important question we shall state, with some repetition, the salient parts of the two separate and distinct proceedings below which bear on the question.

The first proceeding was, as its title denotes, a "Police Investigation." It was instituted before one judge who alone had no power to convict, and was begun before the prisoners were apprehended. It was conducted mainly in their presence but at times during their absence. The prisoners were without counsel, and it is not clear that they were given an opportunity to cross-examine the witnesses, though called upon at the conclusion of the testimony of each witness to make "explanation," indicating apparently an opportunity for them to explain or deny what

the witness had just said, and affording them, perhaps,—as the Government Attorney maintains,—an opportunity of cross-examination. As the proceeding was in every sense an investigation and in no sense a trial, the prisoners were inclined to remain silent, thereby imposing upon the Government, as they had a right to do, the burden of establishing a prima facie case of guilt. The investigation was concluded by a finding, not of their guilt, but that "the records be sent to the Government with the request that they be *tried* for murder." This, obviously, was nothing more than a formal commitment.

Thereafter, the Government Attorney appeared in the District Court and filed a transcript of the Police Investigation and a plea formally charging the defendants with several crimes. The plea evidently served the purpose of an indictment or information in our law, and was the first act by which the defendants were charged with crime. After a procedure suggestive of calling upon the defendants to plead, the *trial* was begun before the District Judge and four lay judges. It was conducted on pleadings, or rather on arguments, based solely on the record of the Police Investigation, and was concluded by a judgment of conviction without four of the judges having seen or heard the witnesses, without confronting the defendants with witnesses, without producing any testimony except that contained in the transcript of the Police Investigation, and without affording the defendants an opportunity of cross-examining the witnesses on whose testimony they were convicted and sentenced.

[2] The question of law arising on such procedure is, broadly stated, whether the defendants were tried and convicted according to law.

What law?

The law governing judicial proceedings in the Virgin Islands is declared by the Act of Congress of March 3, 1917 (39 Stat. c. 171), locally known as "the Organic Act." By this Act it is provided:

"That until Congress shall otherwise provide, *in so far as compatible with the changed sovereignty* * * * the * * * local laws, in force and effect in said Islands on the Seventeenth day of January, Nineteen Hundred and Seventeen, shall remain in force and effect in said Islands, and the same shall be administered * * * through the local judicial tribunals established in said Islands, respectively * * *" (section 3924¼b).

We may assume that the proceedings we are reviewing were in accord with "local laws" as established by Denmark. As the sovereignty of the Islands was changed by treaty from that of Denmark to that of the United States and as Congress provided that thereafter these local laws "in so far as compatible with the changed sovereignty," shall remain and be administered through the local courts, we must inquire whether the defendants were tried according to local laws thus affected by the "changed sovereignty." Just what Congress meant by limiting the operation of Danish local laws to such as are "compatible with the changed sovereignty" is difficult to understand except as we gather its meaning from the kind of sovereignty which the United States, through its laws, constitutional and general, exercises over its possessions. Its sovereignty is exerted over possessions of three classes: States; territories incorporated into bodies politic; and unin-

corporated territories. Territory acquired by treaty is regarded as territory appurtenant to the United States, but not as a part of the United States within several meanings, such as, for instance, that of citizenship, the judicial establishment, the revenue clauses of the Constitution, Downes v. Bidwell, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088; Dorr v. United States, 195 U. S. 138, 24 Sup. Ct. 808, 49 L. Ed. 128, 1 Ann. Cas. 697; yet it becomes territory under the complete and absolute dominion of the United States over which civil government in different forms may be established. Its inhabitants, though not incorporated into a body politic, nevertheless owe allegiance to the United States and become entitled to its protection. 14 Diamond Rings v. United States, 183 U. S. 176, 22 Sup. Ct. 59, 46 L. Ed. 138.

As the treaty of cession between Denmark and the United States did not bring the Virgin Islands into the United States as incorporated territory and as Congress has since the treaty done nothing to incorporate them into the United States, they must be regarded as unincorporated territory, entitled only to the protection of such laws of the United States as are applicable to possessions of that status.

The only laws of the United States applicable to the Virgin Islands are the Act of Congress of March 3, 1917, and the fundamental law of the Constitution guaranteeing certain rights to all within its protection. These rights have, by repeated decisions of the Supreme Court, been divided into two classes—artificial or remedial rights, which are peculiar to our own system of jurisprudence; and natural or personal rights, enforced in the Constitution by prohibition against interference with them. Rights of both kinds are embraced within the Fifth and Sixth Amendments to the Constitution. Remedial rights there guaranteed are, for instance, the right of presentment by grand jury and of trial by jury. It has been decided that rights of this character are not among the fundamental rights which Congress in legislating for a territory not incorporated into the United States must secure to its inhabitants. Talton v. Mayes, 163 U. S. 376, 16 Sup. Ct. 986, 41 L. Ed. 196; Hawaii v. Mankichi, 190 U. S. 197, 23 Sup. Ct. 787, 47 L. Ed. 1016. In harmony with these decisions it has been further held that until Congress shall extend rights of this character to the inhabitants of newly acquired territory, the judicial system prevailing in such territory—not the system contemplated by the Constitution—is applicable and controlling. But in the Insular Cases—De Lima v. Bidwell, 182 U. S. 1, 21 Sup. Ct. 743, 45 L. Ed. 1041; Dooley v. United States, 182 U. S. 222, 21 Sup. Ct. 762, 45 L. Ed. 1074; Downes v. Bidwell, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088; as well as in Hawaii v. Mankichi, 190 U. S. 197, 23 Sup. Ct. 787, 47 L. Ed. 1016, and Dorr v. United States, 195 U. S. 138, 24 Sup. Ct. 808, 49 L. Ed. 128, 1 Ann. Cas. 697—where the Supreme Court reviewed nearly the whole range of sovereignty of the United States over its possessions, defining what laws, statutory and constitutional, are not applicable to unincorporated territories until Congress shall extend them, it is made very certain that there are constitutional rights of a natural or personal nature of which Congress can not, in legislating for such outlying territories, deprive their in-

habitants. In these cases the Supreme Court clearly expressed the opinion, not on the point of the decisions, to be sure, but as a logical corollary, that even if the people of such territories—not being possessed of the political rights of citizens—are regarded as aliens, they are entitled in the spirit of the Constitution to be protected in life, liberty and property and not to be deprived thereof without due process of law.

It was, we think, these natural or personal rights, vouchsafed by the Constitution to everyone within its operation, that Congress had in mind when by the Act of March 3, 1917, it provided for retention in the Virgin Islands of local laws and local procedure "in so far as compatible with the changed sovereignty." The Congress evidently intended that a man in the Virgin Islands might be, and, indeed, should be tried for his life under local laws of Danish origin, yet only when those laws are not incompatible with principles brought to the Islands by the change of sovereignty, the cardinal one being that of due process of law.

It is well known that the expression "due process of law," though never defined with satisfactory precision, Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616, broadly means law in its regular course of administration, not exclusively but generally, through courts of justice. 3 Story, Const. 264, 661. No fixed procedure is required. Yet its fundamental requirement is an opportunity for a hearing and defense. Ballard v. Hunter, 204 U. S. 241, 27 Sup. Ct. 261, 51 L. Ed. 461. Due process of law is viewed in the sense in which the English phrase "law of the land" has long been used, namely:

"A law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." Dartmouth College Case, 4 Wheat. 518, 4 L. Ed. 629.

The Supreme Court in construing the due process clause of the Fourteenth Amendment has spoken within a month as follows:

"The due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall. It restrains state action, whether legislative, executive, or judicial, within bounds that are consistent with the fundamentals of individual liberty and private property, including the right to be heard when liberty or property is at stake in judicial proceedings." James A. Ownbey v. John Pierpont Morgan et al., No. 99, October Term, 1920, April 11, 1921, 255 U. S. —, 41 Sup. Ct. 433, 65 L. Ed. —.

The proceedings below, if they had been conducted solely under Danish law, might have conformed to due process of law in that they followed, in due course, legal procedure established under Danish rule. But, while it was declared by The Organic Act that proceedings in the local courts of the Virgin Islands shall be as provided by local Danish laws, Congress wrought a change in those laws by also providing that they remain in force only so far as they are compatible with the changed sovereignty. What the change in sovereignty brought to the Islands was, we think, the right, guaranteed by the new sovereign, of "an accused to be confronted with the witnesses against him" and the right not to be "deprived of life, liberty, or property, without due

process of law." The essential element of the latter is the right to be heard.

These are principles which Congress, by the Organic Act, engrafted upon the Danish laws of the Virgin Islands. Without these principles the local laws would not be compatible with the changed sovereignty. Texas & Pacific Ry. Co. v. I. C. C., 162 U. S. 197, 218, 16 Sup. Ct. 666, 40 L. Ed. 940.

Due, perhaps, to the very real difficulty of administering together two different systems of jurisprudence, it appears that these rights were not extended to the defendants in their trial before the District Court of St. Thomas and St. John, Virgin Islands of the United States. At the trial the defendants were not confronted with the witnesses against them and they were not heard in their defense in that they were not given an opportunity to speak through the cross-examination of witnesses.

Serious as may be the effect of this decision upon the public mind in the Virgin Islands, we are compelled in the administration of individual justice to reverse the judgment of the court below and order a new trial in harmony with the views expressed in this opinion.

FARMERS' GRAIN CO. OF EMBDEN v. LANGER, Attorney General of North Dakota, et al.

(Circuit Court of Appeals, Eighth Circuit. May 3, 1921.)

No. 5728.

1. **Courts ⊜405(6)—Circuit Court of Appeals has jurisdiction to review decree in suit to enjoin enforcement of state statute as in conflict with law of United States.**
   The decree in a suit in a District Court to enjoin enforcement of a state statute on the ground that it is in violation of the Constitution of the United States as imposing a burden on interstate commerce and also on the ground that it is in conflict with a law of the United States, *held* not one which the Supreme Court has exclusive jurisdiction to review under Judicial Code, § 238 (Comp. St. § 1215), but reviewable on appeal by the Circuit Court of Appeals.

2. **Commerce ⊜33—Purchase of grain for interstate shipment is a part of the interstate commerce.**
   Purchases of grain by elevators in North Dakota for shipment to terminal markets in another state, where 90 per cent. of the annual crop of the state is marketed, and with reference to which the prices paid by the elevators are fixed, are a part of the unit of interstate commerce involved in the shipments.

3. **Commerce ⊜50—State statute invalid, as imposing burden on interstate commerce.**
   Laws N. D. 1919, c. 138, providing for the appointment of a state inspector of grades, weights and measures, with power to establish grades for grain, seeds, and other agricultural products, at which the same shall be bought and sold, to issue licenses to persons engaged in buying grain as deputy inspectors, to fix charges for grading, inspecting, and weighing grain, and to "establish a reasonable margin to be paid producers of grain by warehousemen, elevators, and mills," and requiring all buyers of

grain to procure licenses and pay an annual fee of $10 therefor, and that all grain shall be inspected and graded when offered to them for sale or shipment, *held* unconstitutional, as imposing a direct burden on interstate commerce, in view of United States Grain Standards Act (Comp. St. §§ 8747½–8747½k), which covers the subject of inspecting and grading grain shipped in interstate commerce.

4. **Commerce ⟸8(1)—State grain inspection law held invalid as in conflict with federal statute.**

Laws N. D. 1919, c. 138, authorizing the state inspector of grades, weights, and measures to establish grades for grain and to appoint as deputy inspectors owners of elevators and other buyers of grain, who are required to inspect and grade all grain offered to them for sale or shipment, *held* invalid, as in conflict with United States Grain Standards Act (Comp. St. §§ 8747½–8747½k), under which uniform grades are established and all grain shipped in interstate commerce is required to be inspected and graded, either at the point where shipped or where marketed, or at some intermediate point, by a government inspector, who shall not be interested directly or indirectly in the merchandising of grain, in accordance with which grading the grain shall be marketed.

Appeal from the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

Suit in Equity by the Farmers' Grain Company of Embden against William Langer, as Attorney General of the State of North Dakota, and others. Decree for defendants, and complainant appeals. Reversed.

David F. Simpson, of Minneapolis, Minn. (Sveinbjorn Johnson, of Grand Forks, N. D., and William A. Lancaster, John Junell, James E. Dorsey, and Harold G. Simpson, all of Minneapolis, Minn., on the brief), for appellant.

Seth W. Richardson, of Fargo, N. D. (William Lemke, of Bismarck, N. D., on the brief), for appellees.

Before CARLAND, Circuit Judge, and LEWIS and COTTERAL, District Judges.

CARLAND, Circuit Judge. Appellant commenced this action for the purpose of having chapter 138, Laws North Dakota of 1919, adjudged to be null and void, as imposing a direct burden upon interstate commerce, and as being in conflict with the United States Grain Standards Act (39 Stat. 482 [Comp. St. §§ 8747½–8747½k]), and for the further purpose of having appellees, their agents, servants, and employees, perpetually enjoined from enforcing the same. The case was heard on pleadings and proofs, and as a result thereof the action was dismissed on the merits. Appellant appealed.

[1] Counsel for appellees have moved to dismiss the appeal for want of jurisdiction. The parties are all citizens of North Dakota and the jurisdiction of the District Court was invoked upon the ground that the suit arose under the Constitution and a law of the United States. If the jurisdiction of the District Court to entertain the suit had been based alone upon the ground that it was one arising under the Constitution of the United States, then the jurisdiction of the Supreme Court to review the case on appeal would have been ex-

clusive. Judicial Code, §§ 128–238 (Comp. St. §§ 1120–1215); Raton Waterworks Co. v. City of Raton, 249 U. S. 552, 39 Sup. Ct. 384, 63 L. Ed. 768; American Sugar Refining Co. v. New Orleans, 181 U. S. 277, 281, 21 Sup. Ct. 646, 45 L. Ed. 859; Huguley Manufacturing Co. v. Galeton Cotton Mills, 184 U. S. 209, 295, 22 Sup. Ct. 452, 46 L. Ed. 546; Union & Planters Bank v. Memphis, 189 U. S. 71, 73, 23 Sup. Ct. 604, 47 L. Ed. 712; Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, 26 Sup. Ct. 660, 50 L. Ed. 1102, 6 Ann. Cas. 253; Carolina Glass Co. v. South Carolina, 240 U. S. 305, 318, 36 Sup. Ct. 293, 60 L. Ed. 658. The jurisdiction of the District Court, however, as above stated, was based upon two grounds: (a) The construction or application of the Constitution of the United States. (b) A suit arising under a law of the United States. Grain Standards Act, supra. In such a case the jurisdiction of the Supreme Court to hear an appeal from the judgment below is not exclusive, and the appeal in this case was properly taken to this court. Spreckles Sugar Refining Co. v. McClain, 192 U. S. 397, 24 Sup. Ct. 376, 48 L. Ed. 496. The Spreckles Case was one arising under both the Constitution and the laws of the United States. It arose under the Constitution, because the plaintiff's cause of action as stated in its complaint was based upon the proposition that the law under which the defendant proceeded to collect the taxes in controversy in that case was contrary to the Constitution. It also arose under a law of the United States, because the plaintiff pleaded that, if the statute was not unconstitutional, still it did not authorize the collection of the taxes in question. The Supreme Court in reference to this matter said:

"But the case distinctly presented other questions which involved simply the construction of the act, and those questions were disposed of by the Circuit Court at the same time it determined the question of the constitutionality of the act. If the case had depended entirely on the construction of the act of Congress—its constitutionality not being drawn in question—it would not have been one of those described in the fifth section of the act of 1891, and, consequently, could not have come here directly from the Circuit Court. As, then, the case, made by the plaintiff, involved a question other than those relating to the constitutionality of the act and to the application and construction of the Constitution, the Circuit Court of Appeals had jurisdiction to review the judgment of the Circuit Court, although if the plaintiff had elected to bring it here directly, this court would have had jurisdiction to determine all the questions arising upon the record. The plaintiff was entitled to bring it here directly from the Circuit Court, or, at its election, to go to the Circuit Court of Appeals for a review of the whole case."

Some confusion has existed in some of the decided cases owing to a failure to appreciate what the Supreme Court meant in the Spreckles Case by the words "other questions." It will be observed in that case that the "other questions" beside the constitutional question was the construction of a law of the United States which was also a ground of jurisdiction in the lower court. So that it is not true that merely because a case involves other questions than a constitutional question that the case may be brought to this court on appeal or writ of error. In what we now say upon the question of jurisdiction we put to one side all cases where the jurisdiction of the lower court is based upon a diversity of citizenship and confine our remarks to those cases where

the jurisdiction of the court below is based upon what is generally termed, a federal question. What is meant by "other questions" in the Spreckles Case is well illustrated by the case of Raton Waterworks Co. v. City of Raton, supra. On the face of the opinion in that case the question decided was one which the Supreme Court had decided several times before. The facts as they appeared in the certificate of this court, when taken together with the decision of the Supreme Court, illustrate what is meant by the words "other questions." In the Raton Case the waterworks company commenced an action against the city of Raton for the purpose of enjoining the city from constructing a system of waterworks of its own before the expiration of the franchise granted by the city to the waterworks company on the ground that the ordinance providing for the construction of the city system, having been passed in pursuance of authority granted by the Legislature of New Mexico, was a law which impaired the obligation of the contract between the city and the waterworks company. Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341. This and other constitutional questions were the sole grounds of jurisdiction upon which the action was based. The contract or franchise made between the city and the waterworks company contained a provision to the effect that, if the waterworks company should fail at any time for a certain period to furnish good and potable water to the city, the city should have the right to terminate the contract. The city pleaded this provision as a defense to the action of the waterworks company. On the trial much evidence was taken upon this defense. The trial court sustained the defense made by the city and rendered judgment against the waterworks company; the constitutional question serving no purpose except as a ground of jurisdiction.

The Supreme Court in the case of Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, 26 Sup. Ct. 660, 50 L. Ed. 1102, 6 Ann. Cas. 253, had decided that where complainant's bill disclosed an intention by a municipality to deprive complainant, a water supply company, of rights under an existing contract by subsequent legislation, and the city could not show any inherent want of legal validity in the contract, or any such disregard of its obligations by complainant as would absolve the city therefrom, the case was one arising under the Constitution of the United States, and that a direct appeal would lie to the Supreme Court. The facts in the Raton Case brought it within the rule stated in the Vicksburg Case. An appeal was taken to this court, and, there being doubt about our jurisdiction, the question was certified to the Supreme Court. It thus appears that, while there was another question in the Raton Case besides the constitutional one, still the Supreme Court decided that the jurisdiction of the Supreme Court to review the judgment was exclusive, thus showing, it seems to us, that the "other questions" mentioned in the Spreckles Case mean questions based upon some jurisdictional ground. We are unable to find that the Spreckles Case has been modified in any way by the Supreme Court, and it was cited with approval in City of Pomona v. Sunset Telephone & Telegraph Co., 224 U. S. 330, 342, 32 Sup. Ct. 477, 56 L. Ed. 788.

Whether or not the North Dakota law conflicts with the Grain Standards Act requires the construction of both laws. If the jurisdiction in the court below had been rested alone upon the Grain Standards Act, an appeal could not have been taken to the Supreme Court, but of necessity would have been taken to this court. We are therefore clearly of the opinion that the jurisdiction of the Supreme Court to review the judgment below in this case was not exclusive, and that this court has jurisdiction of the whole case.

Coming to the merits, the facts are as follows: The spring wheat crop of North Dakota varies from 100,000,000 to 156,000,000 bushels annually. Approximately 90 per cent. of this wheat is bought for shipment and actually shipped to terminal markets outside of the state, principally Minneapolis and Duluth, Minn. Approximately 2,200 elevators have been built, connected with railroad tracks at all stations within the grain-growing area of North Dakota, by men and companies engaged in handling this grain. Appellant is a Farmers' Co-operative Elevator Company. It buys grain from its members and other farmers at Embden, N. D., and either loads it directly into cars from the farmers' wagons or assembles it in its elevator and then loads it into cars from its elevator. The grain is shipped at once to Minneapolis or Duluth, and there sold through a commission merchant. The appellant buys grain at Embden at the Minneapolis or Duluth price and sells it at the same price. It retains no profits. If there is a surplus over operating expenses at the end of the season, such surplus is distributed among the farmers pro rata, according to the amount sold by each respectively. During the fiscal year 1920, appellant shipped and sold 57 carloads of wheat, all but one of which were shipped and sold out of the state of North Dakota. The state inspector of grades, weights, and measures of North Dakota testified as follows:

"Q. You know, also, and that is true, I presume (if I am not correct, you will make the correction), that these elevators that buy grain in this state, substantially all of them, buy that wheat for the purpose of marketing it again at the primary markets outside of the state of North Dakota? A. It is common knowledge that they do so; yes.

"Q. That so far as the elevators are concerned, after they have purchased the grain from the producer, there is no market for that grain in the state of North Dakota, but they must find their market outside; that is correct, is it not? A. Yes; that is, for the majority of it."

This testimony is not disputed. The course of interstate commerce in wheat and other grains is from the farmer's wagon to cars, or through the elevator into railway cars, and on to the terminal markets above mentioned. Inspection and grading under the state statute lays hold on it at the very inception of this movement, and if the requirements of that statute are not complied with by the owner of the elevator the movement is prohibited and stopped. August 11, 1916, Congress passed the United States Grain Standards Act. 39 Stat. 482. Section 2 of the act contains the following language:

"Sec. 2. That the Secretary of Agriculture is hereby authorized to investigate the handling, grading, and transportation of grain and to fix and establish as soon as may be after the enactment hereof standards of quality and condition for corn (maize), wheat, rye, oats, barley, flaxseed, and such

other grains as in his judgment the usages of the trade may warrant and permit, and the Secretary of Agriculture shall have power to alter or modify such standards whenever the necessities of the trade may require."

Section 4 reads as follows:

"Sec. 4. That whenever standards shall have been fixed and established under this act for any grain no person thereafter shall ship or deliver for shipment in interstate or foreign commerce any such grain which is sold, offered for sale, or consigned for sale by grade unless the grain shall have been inspected and graded by an inspector licensed under this act and the grade by which it is sold, offered for sale, or consigned for sale be one of the grades fixed therefor in the official grain standards of the United States: Provided, that any person may sell, offer for sale, or consign for sale, ship, or deliver for shipment in interstate or foreign commerce any such grain by sample or by type, or under any name, description, or designation which is not false or misleading, and which name, description, or designation does not include in whole or in part the terms of any official grain standard of the United States: Provided further, that any such grain sold, offered for sale, or consigned for sale by grade may be shipped or delivered for shipment in interstate or foreign commerce without inspection at point of shipment by an inspector licensed under this act, to or through any place at which an inspector licensed under this act is located, subject to be inspected by a licensed inspector at the place to which shipped or at some convenient point through which shipped for inspection, which inspection shall be under such rules and regulations as the Secretary of Agriculture shall prescribe, and subject further to the right of appeal from such inspection, as provided in section 6 of this act: And provided further, that any such grain sold, offered for sale, or consigned for sale by any of the grades fixed therefor in the official grain standards may, upon compliance with the rules and regulations prescribed by the Secretary of Agriculture, be shipped in interstate or foreign commerce without inspection from a place at which there is no inspector licensed under this act to a place at which there is no such inspector, subject to the right of either party to the transaction to refer any dispute as to the grade of the grain to the Secretary of Agriculture, who may determine the true grade thereof. No person shall in any certificate or in any contract or agreement of sale or agreement to sell by grade, either oral or written, involving, or in any invoice or bill of lading or other shipping document relating to, the shipment or delivery for shipment, in interstate or foreign commerce, of any grain for which standards shall have been fixed and established under this act describe, or in any way refer to, any of such grain as being of any grade other than a grade fixed therefor in the official grain standards of the United States."

The first and second provisos of section 7 read as follows:

"Provided, that in any state which has, or which may hereafter have a state grain inspection department established by the laws of such state, the Secretary of Agriculture shall issue licenses to the persons duly authorized and employed to inspect and grade grain under the laws of such state. * * *

"Provided further, that no person licensed by the Secretary of Agriculture to inspect or grade grain or employed by him in carrying out any of the provisions of this act shall, during the term of such license or employment, be interested, financially or otherwise, directly or indirectly, in any grain elevator or warehouse, or in the merchandising of grain, nor shall he be in the employment of any person or corporation owning or operating any grain elevator or warehouse."

Pursuant to the authority conferred by the act, the Secretary of Agriculture established official grain standards for wheat, shelled corn, and oats. Service and Regulatory Announcements, Nos. 33 and 46. In 1919 the Legislature of North Dakota passed a grain grading and

inspection statute, being chapter 138, Laws 1919, which is the law attacked by appellant in this action. This law authorized the Governor of North Dakota to appoint a state inspector of grades, weights, and measures, who by section 2 of the law was given the power and by said law was directed,

"(b) To issue licenses to warehouses, buyers and solicitors of grain, seeds and other agricultural products;

"(c) To establish uniform grades for grain, seeds or other agricultural products for the state of North Dakota with power to alter and modify such grades;

"(d) To establish uniform grade certificates used in the marketing of grain, seeds, or other agricultural products;

"(e) To hear and determine appeals from the decision of state deputy inspectors and from deputy inspectors of grades, weights and measures;

"(f) To conduct investigations into all matters directly or indirectly connected with or bearing upon the marketing, grading and weighing of all grain."

"(i) To establish a reasonable margin to be paid producers of grain by warehouses, elevators and mills;

"(j) To fix and determine all charges for grading, inspecting and weighing grain or other agricultural products;

"(k) To make rules and regulations for the purpose of carrying out the provisions of this act and to do any and all things necessary or expedient for said purpose."

Sections 3, 4, 5, 6, 7, and 8 of said law reads as follows:

"Sec. 3. It shall be the duty of the inspector of grades, weights and measures to proceed at once to define and establish uniform grades and weights for grain, seeds or other agricultural products, also for flour meal and products made therefrom, either singly or combined. In establishing such grades, dockage shall be considered as being of two classes, first, that having value, and second, that having no value, the former to be considered and paid for at its market value.

"Sec. 4. The term 'deputy inspector of grades, weights and measures' within the meaning of this act is defined as any firm, person, company, corporation or association that buys, weighs and grades grain, seeds or other agricultural products and holds a license issued therefor by the state inspector of grades, weights and measures.

"Sec. 5. The term 'state deputy inspector of grades, weights and measures' within the meaning of this act is defined as one who is in the employment of the state of North Dakota and has received an appointment from the state inspector of grades, weights and measures.

"Sec. 6. The term 'solicitor of grain, seed and other agricultural products' within the meaning of this act is defined as one who engages in the business of soliciting grain, seed and other agricultural products to be sold for the benefit of the consignee or otherwise disposed of for the benefit of himself, an agent, broker or factor.

"Sec. 7. The term 'public warehouse,' within the meaning of this act, is defined as all buildings, elevators or warehouses, and all grist and flour mills doing a shipping business in this state, erected or operated or which may hereafter be erected or operated by any person, association, copartnership, corporation or trust for the purpose of buying, selling, storing, shipping or handling grain for profit.

"Sec. 8. The chief deputy inspector of grades, weights and measures and chief elevator accountant shall have power and authority under the direction of the state inspector of grades, weights and measures to carry out the provisions of this act. They shall be stationed at the North Dakota Agricultural College."

Section 10 contains the following language:

"Sec. 10. It shall be the duty of deputy inspectors of grades, weights and measures to weigh, inspect and grade all grain, seeds and other agricultural products that shall be offered for sale or shipment at their market place, according to the provisions of this act and the rules and regulations established by the state inspector of grades, weights and measures."

Section 11 contains the following language:

"Sec. 11. The state inspector of grades, weights and measures may issue a license to any person engaged in buying, weighing and inspecting or grading grain, seed or other agricultural products or the buyer or agent of a privately or publicly owned warehouse, elevator or flour mill. * * * The condition of such license shall require such deputy inspectors of grades, weights and measures to fix grades and dockage of grain and seeds inspected at their respective places of business and correctly weigh the products so inspected and graded according to the provisions of this act and the rules and regulations made hereunder. The state inspector of grades, weights and measures may issue a license to any person engaged in soliciting or procuring consignments of grain, seeds. * * * The condition of such license shall require such solicitor to comply with the provisions of this act and all rules and regulations established by the state inspector of grades, weights and measures. The state inspector of grades, weights and measure may suspend or revoke any license issued by him under this act whenever after investigation he shall determine that such licensee is incompetent or has knowingly or carelessly graded grain improperly or has issued any false certificate of grading or has violated any provision of this act or the rules and regulations made hereunder."

Section 14 contains the following language:

"Sec. 14. It shall be unlawful for any person to buy or grade grain, seeds or other agricultural products who is not licensed as a deputy inspector of grades, weights and measures. It shall be unlawful for any person or persons, corporation or association operating a public warehouse to purchase, weigh, grade or inspect grain, seeds or other agricultural products without first procuring a deputy inspector of grades, weights and measures' license."

Section 16 reads as follows:

"Sec. 16. The state inspector of grades, weights and measures, may upon the cancellation or suspension of any license issued hereunder permit the business of any licensee to be completed and finally closed under the inspection and supervision of a state deputy inspector who shall be stationed at the place of business of such licensee. All the expenses of such inspection and supervision shall be paid by such licensee."

Section 18 contains the following language:

"Sec. 18. The state inspector of grades, weights and measures may establish central markets for the display of samples of grain, seeds or other agricultural products and may install a deputy in charge of any such central market at cities, or towns without or within the state of North Dakota."

Section 20 contains the following language:

"Sec 20. It shall be the duty of all deputy inspectors of grades, weights and measures to keep a record showing the name and addresses of patrons of their respective warehouses, elevators or mills; the prices paid for agricultural products; the grades given; the prices received and the grades received at terminal markets or within the state."

Section 23 reads as follows:

"Sec. 23. The state inspector of grades, weights and measures is hereby authorized, upon complaint of a producer of grain, seeds or other agricultural

products that any warehouse, elevator or mill is paying an unreasonable margin, to investigate, determine and establish reasonable margin to be paid such producer for grain, seeds or other agricultural products."

Under this statute the North Dakota inspector of grades, weights and measures established North Dakota standards for grading wheat, corn, and oats identical with the federal standards effective June 16, 1919. In establishing these standards the Inspector used the following language:

"The federal government has established grades for corn, all classes of wheat and oats, so that all interstate shipments must be graded according to these standards. In order to avoid the confusion of a double standard and a dual inspection, we deem it advisable to adopt these standards; the said grain standards published in the government service and regulatory announcements are hereby adopted and made part of the North Dakota grades."

The North Dakota law provided for a fee of $10 for each license to be paid to the inspector. No person can purchase wheat in North Dakota, without he obtains the license provided by law, and must promise in his application for such license that he will grade wheat and other grains according to the North Dakota law. The conceded purpose, force, and effect of the state statute is to regulate and control the marketing and distribution of the grain crop of North Dakota. The appellees are the Attorney General of North Dakota, the state inspector of grades, weights and measures, the chief deputy state inspector of grades, weights and measures, and William C. Green, state's attorney of Cass county, N. D. Appellant did not comply with the North Dakota statute, and the revocation of its license and the taking over of its elevator was threatened when this action was brought. The license referred to was obtained by one Gebhart, in the employ of appellant. The appellant refused to pay for dockage or to deliver dockage separated from the grain to the seller.

Three questions of law arise upon the record: (1) Is the purchase of grain in the state of North Dakota for shipment out of the state, as detailed in the evidence, a part of the interstate commerce involved in the shipment? (2) If the foregoing question shall be answered in the affirmative, does chapter 138, Session Laws North Dakota of 1919, impose a direct and unreasonable burden upon that interstate commerce? (3) Is said law in conflict with the United States Grain Standards Act to such an extent as to render it void?

[2] As to the first proposition, the trial court decided that the grain of North Dakota under the facts in the case did not become an article of interstate commerce until actually delivered to the carrier for transportation; that the intention of the owner to transfer the grain to another state, or his appropriation of it for such transportation, did not make it an article of interstate commerce, and therefore the state of North Dakota, under its police power, could lawfully enact the statute complained of—it having only to do with the grain before the commencement of its transfer to another state. With reference to the question of intention, counsel for appellant make no claim that mere intention to transport the grain to another state makes it an article of interstate commerce; but the claim is that, as it appears from

the record that approximately 90 per cent. of the grain annually raised in North Dakota must be and is purchased for shipment out of the state, such course of commerce is a fact, and not a matter of intention; that this course of commerce is a unit, and may not be unreasonably burdened by the state.

There are many decisions of the courts defining the words "commerce" and "interstate commerce"; but it is generally conceded that no arbitrary rule can be laid down as to what is commerce, or interstate commerce, but that each case as it arises must be determined by its own facts. As was said in Public Utilities Comm. v. Landon, 249 U. S. 245, 39 Sup. Ct. 269, 63 L. Ed. 577:

"Interstate commerce is a practical conception, and what falls within it must be determined upon consideration of established facts and known commercial methods. Rearick v. Pennsylvania, 203 U. S. 507, 512; The Pipe Line Cases, 234 U. S. 548, 560."

In the early history of the interpretation of the commerce clause of the Constitution, it was first contended that commerce did not include transportation or navigation, but was confined solely to traffic, buying and selling. This contention, however, was decided to be unsound in Gibbons v. Ogden, 9 Wheat. 229, 6 L. Ed. 23. At this day it seems strange that such a contention was ever made, as now the great and important element in commerce is transportation or navigation. It was next contended that a sale of goods within a state after their transportation into that state was not a part of interstate commerce, but this contention was also decided to be unsound in Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678. In principle it is difficult to conceive any valid distinction between a sale following transportation and a purchase preceding it. It is noteworthy that Mr. Justice Thompson, in his dissenting opinion in Brown v. Maryland, supra, made the same objections in reference to a sale after transportation that is now made in this case to a sale before transportation. In County of Mobile v. Kimball, 102 U. S. 691, 702 (26 L. Ed. 238) it was said:

"Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities."

In Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346, it was said:

"Buying and selling and the transportation incidental thereto constitute commerce."

Not many cases are to be found which have considered the element of purchase in reference to interstate commerce, where a violation of the Constitution was involved.

The Supreme Court has, however, in discussing the application of the Sherman Act (Comp. St. §§ 8820–8823, 8827–8830) and federal pure food legislation (Comp. St. §§ 8717–8728), announced principles which we believe to be applicable to the question now under discus-

sion. In U. S. v. E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, the court said:

"Contracts to buy, sell, or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the states, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce."

Justice Harlan, dissenting from the majority in the above case, concurred in the above statement of law, and further contended that manufacture before shipment was a part of interstate commerce.

In the case of Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, the Supreme Court said:

"As has frequently been said, interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and includes, not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale, and exchange of commodities. Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196–203; Kidd v. Pearson, 128 U. S. 1, 20."

In Swift & Co. v. U. S., 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, it was said:

"Taking up the latter objection first, commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce."

In Oklahoma v. Kansas Natural Gas Co., 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193, the Supreme Court held a statute of Oklahoma to be unconstitutional which prohibited the shipment of natural gas in interstate commerce. The court, in discussing the question there involved, remarked:

"And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one state has it, all states have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that 'in matters of foreign and interstate commerce there are no state lines.' In such commerce, instead of the states, a new power appears, and a new welfare, a welfare which transcends that of any state. But rather let us say it is constituted of the welfare of all of the states, and that of each state is made the greater by a division of its resources, natural and created, with every other state, and those of every other state with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there be a turning backward, it must be done by the authority of another instrumentality than a court."

In U. S. v. Reading Co., 226 U. S. 324, the court said on page 367, 33 Sup. Ct. 90, 102 (57 L. Ed. 243):

"The coal contracts acquired when this proceeding was begun aggregated nearly one-half the tonnage of the independent operators. Much of the coal so bought was sold in Pennsylvania, and all of the contracts were made in

that state, and the coal was also there delivered to the buying defendants. That the defendants were free to sell again within Pennsylvania, or transport and sell beyond the state, is true. That some of the coal was intended for local consumption may also be true. But the general market contemplated was the market at tidewater, and the sales were made upon the basis of the average price at tidewater. The mere fact that the sales and deliveries took place in Pennsylvania is not controlling, when, as here, the expectation was that the coal would, for the most part, fall into and become a part of the well-known current of commerce between the mines and the general consuming markets of other states."

In Pennsylvania Railroad Co. v. Clark Coal Co., 238 U. S. 456, 35 Sup. Ct. 896, 59 L. Ed. 1406, it was said:

"In the present case, to repeat, it appears that, for the purpose of filling contracts with purchasers in other states, coal is delivered f. o. b. at the mines for transportation to such purchasers. The movement thus initiated is an interstate movement, and the facilities required are facilities of interstate commerce. A very large part of what in fact is the interstate commerce of the country is conducted upon this basis, and the arrangements that are made between seller and purchaser with respect to the place of taking title to the commodity, or as to the payment of freight, where the actual movement is interstate, does not affect either the power of Congress or the jurisdiction of the Commission which Congress has established."

Section 25, C. J. vol. 12, p. 26, reads as follows:

"That intercourse between citizens and inhabitants of different states which constitutes interstate commerce, and which is subject to federal, but not to state, regulation, includes not only the transportation of persons and property, but also the purchase, sale, and exchange of commodities, the very purpose and motive of that branch of commerce which consists in transportation being that other and consequent act of commerce which consists in the sale or exchange of the commodities transported."

This declaration of law is supported by numerous cases cited in the work referred to. In view of the language of the cases cited under the Sherman Act, it is entirely proper to suppose a combination among all the purchasers of grain in the state of North Dakota for shipment beyond the state to control the price on which the surplus grain of North Dakota should be bought and under the rules in the cases referred to, there scarcely could be a doubt but that the combination would come within the federal Anti-Trust Act. As opposed to the proposition that the purchase of grain in North Dakota under the facts as they appear in the record is not interstate commerce or a part of the transportation, cases involving the right of a state where taxes are regularly levied are cited. Such a case is Coe v. Errol, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715, where it was held that logs cut in New Hampshire were still subject to taxation by that state, although they were being assembled at a station for shipment to Maine, and this because such logs were still a part of the general mass of property within the state, and were therefore subject to taxation in the usual manner in common with other property in the state. In Woodruff v. Parham, 8 Wall. 123, 19 L. Ed. 382, and Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257, it was decided that goods brought into a state, after arriving at their destination, may be taxed by the state in the same manner as other goods in the state, although under the rule of Brown v. Maryland, a state regulation of

the sale of such goods would be void. In Bacon v. Illinois, 227 U. S. 504, 33 Sup. Ct. 299, 57 L. Ed. 615, it was held that grain passing through the city of Chicago and there loaded into an elevator for the purpose of weighing, grading, mixing, etc., became subject to taxation by the state of Illinois. Other cases are cited to the same effect, but in view of what seems to be the established rule that interstate commerce in a case like the one under consideration includes the purchase of goods, we do not think the Supreme Court intended by its decisions in the tax cases to in any way modify the rule which it had established in the cases heretofore cited. Other cases are cited to the effect that the manufacture of goods is not a part of interstate commerce in such goods. There is no occasion in this case to controvert that proposition. Manufacture is a very different element than the purchase of goods for shipment in interstate commerce. The proposition is clearly established by Kidd v. Pearson, supra, U. S. v. E. C. Knight Co., supra, and Addyston Pipe & Steel Co. v. U. S., supra.

One of the cases cited by counsel for appellees is Hammer v. Dagenhart, 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101, 3 A. L. R. 649, Ann. Cas. 1918E, 724. This case arose under the federal child labor statute. It followed the decisions in the Kidd, Knight, and Addyston Pipe & Steel Cases to the effect that manufacture is not commerce. Applying the rule that each case must be decided according to its own facts, we cannot avoid the conclusion that a purchase of grain in North Dakota for shipment and sale at the terminal markets of Minneapolis and Duluth, Minn., taken in connection with the fact that the seller knows that the grain is sold for shipment out of the state, makes the purchase and sale in the state of North Dakota for shipment and sale at the above terminal markets a unit in interstate commerce. There is evidence in the record given by one of the managers of appellant that he would sell the grain purchased wherever he could get the highest price; but the undisputed course of commerce in grain, continued over a period of years, shows beyond a doubt that the above markets are the markets where the highest price can be obtained and that grain is bought with reference to those markets alone.

[3] Having answered the first proposition in the affirmative, we come to the question as to whether chapter 138, supra, imposes a direct burden upon such interstate commerce. If the purchase of grain as detailed in the evidence is a part of the unit of interstate commerce in that grain, it necessarily follows that said chapter 138 does impose a burden on that commerce. In Stuart v. Palmer, 74 N. Y. 183, 188 (30 Am. Rep. 289) Earl, J., said:

"The constitutional validity of law is to be tested, not by what has been done under it, but by what may, by its authority, be done."

In Montana Co. v. St. Louis Mining, etc., Co., 152 U. S. 170, 14 Sup. Ct. 506, 38 L. Ed. 398, the Supreme Court, in quoting this language, declared that the test was accurate, provided, of course, it is limited to what may be rightfully done, and does not extend to that which is wrongfully, though under pretense of the statute, done. In re Lambert, 134 Cal. 626, 66 Pac. 851, 55 L. R. A. 856, 86 Am. St.

Rep. 296; Colon v. Lisk, 153 N. Y. 188, 47 N. E. 302, 60 Am. St. Rep. 609; Hathorn v. National Carbonic Gas Co., 194 N. Y. 326, 87 N. E. 504, 23 L. R. A. (N. S.) 436, 128 Am. St. Rep. 555, 16 Ann. Cas. 989; State v. Williams, 146 N. C. 618, 61 S. E. 61, 17 L. R. A. (N. S.) 299, 14 Ann. Cas. 562; Stout v. State, 36 Okl. 744, 130 Pac. 553, 45 L. R. A. (N. S.) 884, Ann. Cas. 1916E, 858; Sterritt v. Young, 14 Wyo. 146, 82 Pac. 946, 4 L. R. A. (N. S.) 169, 116 Am. St. Rep. 994.

The law of North Dakota gives to the state inspector of grades, weights and measures the power to establish uniform grades for grain, seeds, or other agricultural products for the state of North Dakota, with power to alter and modify such grades. In the order establishing official grades for grain in North Dakota effective June 16, 1919, the inspector said that in order to avoid the confusion of a double standard and a dual inspection he deemed it advisable to adopt the grades established by the federal government for corn and all classes of wheat and oats. The inspector under the law was not obliged to establish these grades. He had the power under the law to establish other grades, and his successor in office may not be of the same opinion as to this duty to establish the federal grades as the grades for North Dakota. So it clearly appears that, although the federal law does not require any inspection and grading of grain in North Dakota, still by virtue of the state law there must be an inspection and grading within the state, and the law gives the power to the inspector to bring about dual inspection and grading. The fact that the present inspector established the federal grade is a mere incident, and does not relieve the law from the charge of creating an additional burden to interstate commerce from those required by the federal law. We think this fact alone is a direct and unreasonable burden upon interstate commerce in grain. The state law further provides that, before any one can purchase a bushel of grain in North Dakota, he must first obtain a license to do so and pay an annual license fee of $10, and he must promise in his application for the license that he will obey and enforce all the provisions of the state law. Can interstate commerce carried on under such conditions be called free? Supposing every state in the Union should pass a similar law, what would become of the United States Grain Standards Act, if in addition to the inspection and grading required thereby each state had an inspection and grading law of its own, to which interstate commerce must be subjected.

The inspection and grading of grain in interstate commerce requires a unit system throughout the United States, and no state has the authority to interfere with such system established by the United States. The state law empowered the state inspector of grades, weights and measures to establish a reasonable margin to be paid by producers of grain, by warehouses, elevators, and mills. The margin as used in the statute means the difference between the Minneapolis or Duluth price for grain and the price paid the producer at the country elevator, with freight from the country elevator to Minneapolis or Duluth added. The power, then, to establish this margin, places the

wheat buyer or elevator in the hands of the inspector. He may establish such a margin as will allow the wheat buyer to make a profit, or he may establish it so that he will make nothing. The inspector for practical purposes controls the price the wheat buyers shall pay for the wheat. It is said the law only empowers the inspector to establish a reasonable margin. This would raise in each particular case, if the wheat buyer was not satisfied with the margin, the question as to what would be reasonable. After a year or two of litigation, the courts might decide what was a reasonable margin; but what would this decision be worth to the wheat buyer with a market continually changing. This is another direct and unreasonable burden upon interstate commerce. The state statute gives the state grain inspector authority to regulate and control the marketing of all grain in North Dakota, including authority to determine the price which must be paid for grain bought in the state. A law which has this effect clearly interferes with interstate commerce. Cooley v. Board of Wardens, 12 How. 299, 319, 13 L. Ed. 996; State Freight Tax, 15 Wall. 232, 21 L. Ed. 146; Hall v. Decuir, 95 U. S. 485, 24 L. Ed. 547; County of Mobile v. Kimball, supra; Gloucester Ferry Co. v. Pennsylvania, supra; In re Schechter (C. C.) 63 Fed. 695; 12 Corpus Juris, p. 12; Haskell v. Cowham, 187 Fed. (8th Circuit) 403, 109 C. C. A. 235; Globe Elevator Co. v. Andrew (C. C.) 144 Fed. 871. In the last case cited a law of Wisconsin requiring all grain sold at Superior in that state to be in accordance with Wisconsin weights and grades was held invalid.

The state law also specifically requires the wheat buyer to pay for the dockage contained in grain at a price to be fixed by the seller, or the return of the dockage itself to the seller, and this the buyer must do or forfeit his license. If the license is canceled, the inspector takes possession of the elevator and operates the same without compensation. The existence of a state power to regulate public warehouses does not establish a state power to directly regulate and control the marketing of grain in interstate commerce, and authorities in support of the power to regulate warehouses are not in point. The two leading cases upon the power to regulate warehouses and the distinction between this power and the power to regulate commerce are Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, and Wabash, etc., Ry. Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244. The principles established by these cases were followed in Budd v. N. Y., 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247; Brass v. Stoeser, 153 U. S. 391, 14 Sup. Ct. 857, 38 L. Ed. 757; Cargill v. Minnesota, 180 U. S. 452, 21 Sup. Ct. 423, 45 L. Ed. 619; Merchants' Exchange v. Missouri, 248 U. S. 365, 39 Sup. Ct. 114, 63 L. Ed. 300. While the state may regulate warehouses, the Supreme Court in the Minnesota Rate Case, 230 U. S. 352, at pages 398, 399, and 400, 33 Sup. Ct. 729, 739, 740 (57 L. Ed. 1511, 48 L. R. A. [N. S.] 1151, Ann. Cas. 1916A, 18), said:

"The general principles governing the exercise of state authority when interstate commerce is affected are well established. The power of Congress to regulate commerce among the several states is supreme and plenary. It is 'complete in itself, may be exercised to its utmost extent, and acknowledges

no limitations other than are prescribed in the Constitution.' Gibbons v. Ogden, 9 Wheat. 1, 196. * * * It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act. * * * The principle, which determines this classification, underlies the doctrine that the states cannot under any guise impose direct burdens upon interstate commerce; for this is but to hold that the states are not permitted directly to regulate or restrain that which from its nature should be under the control of the one authority and be free from restriction, save as it is governed in the manner that the national legislature constitutionally ordains."

It is claimed by counsel for appellees that the case of Merchants' Exchange v. Missouri, supra, compels a decision in their favor in the case at bar. This case arose under a warehouse statute of Missouri. The statute declared that in cities of more than 75,000 inhabitants all buildings used for the storage or transferring of grain of different owners, for a compensation, should be deemed public warehouses, and it prohibited under severe penalties any person, corporation, or association other than a duly authorized and bonded state weigher to issue any weight certificate for grain weighed at any warehouse or elevator in the state where duly appointed and qualified state weighers were stationed or to make any charge for such weighing. The Attorney General of the state instituted a proceeding in the nature of quo warranto against the Merchants' Exchange, a Missouri corporation. The information stated that St. Louis was a city of more than 75,000 inhabitants, that public weighers of grain were maintained there at all public warehouses and elevators in compliance with the Missouri law, and that the Merchants' Exchange in violation thereof and in abuse of their corporate franchise maintained a bureau for weighing grain, granting weight certificates, and making charges therefor. One of the defenses pleaded by the Merchants' Exchange was that the Missouri statute violated the commerce clause of the Constitution. Of course the mere weighing of grain and granting weight certificates had nothing to do with interstate commerce, and the Supreme Court so decided. There was an additional contention made that the Missouri statute regulating the weighing of grain was superseded by the United States Grain Standards Act, referred to in this opinion. The Supreme Court, in answering this contention, stated that the act related exclusively to the establishment by the Secretary of Agriculture of standards of quality and condition; that it did not in any way refer to the weighing of grain. The language quoted above from section 7 of the Grain Standards Act simply provides for the issuance of a license to the state inspector by the Secretary of Agriculture. Congress did not intend by this provision to constitute the state a partner in regulating interstate commerce. The state inspector becomes a United States inspector, but in North Dakota he can do nothing as such. We see nothing in the Merchants' Exchange Case that affects the present case in any way. We do not stop to consider whether the enactment of the state statute was an exercise of the police power or not, as we are of the opin-

ion that the subject-matter as it affects interstate commerce in grain is within the exclusive jurisdiction of the United States.

[4] There remains to be considered the question as to whether the state law conflicts with the United States Grain Standards Act. As we have said with reference to the question as to whether the law is a burden on interstate commerce, so we say now that if the purchase of grain in North Dakota under the evidence in this case, and the shipment thereof to the terminal markets mentioned for sale, is a unit in interstate commerce, then of course any attempt to regulate that commerce by the state of North Dakota is in direct conflict with the Grain Standards Act, wherein Congress sought to establish a uniform system for the inspection and grading of such grain moving in interstate commerce. Both acts ought not to be and cannot be enforced, without confusion and embarrassment as the state inspector declared. Section 4 of the Grain Standards Act, heretofore quoted, makes it unlawful to ship or deliver for shipment in interstate or foreign commerce any such grain which is sold, offered for sale, or consigned for sale by grade, unless the grain shall have been inspected and graded by an inspector licensed under the act. By the second proviso of said section such grain may be shipped or delivered for shipment in interstate or foreign commerce without inspection at point of shipment by an inspector licensed under the act to or through any place at which an inspector licensed under the act is located, subject to be inspected by a licensed inspector at the place to which shipped or at some convenient point through which shipped for inspection, which inspection shall be under such rules and regulations as the Secretary of Agriculture shall prescribe. This proviso, as we understand it, would authorize a shipment of grain in interstate commerce from a point in North Dakota where there was no licensed inspector under the federal act to Minneapolis or Duluth, in Minnesota, to be there inspected by a federal inspector. The state law, however, declares that one may not even buy a bushel of wheat for shipment in interstate commerce without taking out a license to do so and promising to obey all the provisions of the state law and the regulations of the state inspector, and the wheat purchased must be inspected in North Dakota and again at Duluth or Minneapolis. This brings the two laws clearly in conflict, if they both have to do with interstate commerce.

As we have said before, the state law authorizes the state inspector to establish grades for grain and the Secretary of Agriculture by the Grain Standards Act is vested with the same power. These powers are directly in conflict, if they both relate to interstate commerce in grain. The United States Grain Standards Act provides that no person licensed by the Secretary of Agriculture to inspect or grade grain during the term of such license or employment shall be interested, financially or otherwise, directly or indirectly, in any grain elevator or warehouse, or in the merchandising of grain, nor shall he be in the employment of any person or corporation owning or operating any grain elevator or warehouse. The state law provides that the term "deputy inspector of grades, weights and measures," within the meaning of the law, shall mean any firm, person, company, corporation, or association

that buys, weighs, and grades grain, seeds, and other agricultural products who holds a license issued therefor by the state inspector of grades, weights and measures. Thus one law requires that the inspector shall have no interest in the business and the other law requires that he shall. Which law is to prevail? Certainly the federal law, if the business is interstate commerce. It is useless to discuss further the matter of conflict, for the reason that, if both laws relate to the same subject, the state law attempts to regulate something that the state has no power to regulate, and, Congress having acted, the state law is in direct conflict with the federal law.

It is our opinion that the state law is invalid for the reasons stated, and that the decree below should be reversed, and the case remanded, with directions to the court below to issue a permanent injunction, as prayed in the appellant's complaint.

ADAMS et al. v. C. A. SMITH TIMBER CO. et al.

(Circuit Court of Appeals, Ninth Circuit. June 6, 1921.)

No. 3496.

1. **Public lands ⟸27—Evidence held to show patent for placer mine and prior timber patent covering the same land.**
   Evidence as to surveys of public lands *held* to show that a patent for placer mine and a timber patent covered in part the same land, so that the placer patent must yield to the prior timber patent.
2. **Mines and minerals ⟸49—Claimants of placer mine by adverse possession held not to show appropriate use.**
   Plaintiffs, claiming a placer mine by adverse possession, must show appropriate use as a mining ground, and this was not shown by evidence that they had a caretaker on a nearby claim, who had a number of properties to look after, and had a garden on part of the claim, and that cattle belonging to claimant ranged over the placer and other nearby claims.

Appeal from the District Court of the United States for the Second Division of the Northern District of California; Charles M. Bourquin, Judge.

Action by Edson F. Adams and others against the C. A. Smith Timber Company and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

J. P. O'Brien, of San Francisco, Cal., for appellants.

Grant H. Smith, of San Francisco, Cal., for appellees.

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

HUNT, Circuit Judge. Issuance of two patents embracing the same land was the originating cause of this suit to determine a conflict between the Eden placer mine and certain patented timber lands. Appellants Adams and others, owners of the placer claim, brought suit to quiet title against defendants, including Sage Land & Improvement

Company, owners of the patented timber lands. The Eden placer, located in 1886, was patented in 1891, and is situate partly in section 33 and partly in section 34, township 12 north, range 1 east, Humboldt meridian, California. Defendants claim through patent to the S. W. ¼ of section 34, issued in 1887.

The District Court quieted title in the plaintiff to that portion of the N. W. ¼ of section 34 which included a part of the Eden placer mine, but decided that plaintiffs had no right or interest in that part of the Eden placer mine which lies within the S. W. ¼ of section 34, and made a decree accordingly. Plaintiffs appealed from only that part of the decree which related to the conflicting area in the S. W. ¼ of section 34.

Surveys made in 1873, when township 12 was unsurveyed ground, established a monument at the southeast corner of the Pioneer mine, which was also the northeast corner of the Union Gold Bluff placer. In 1878 United States Deputy Mineral Surveyor Reilly surveyed township 10, and ran the Humboldt meridian line through townships 10, 11, 12, and 13, and put corner and quarter corner posts along the entire distance, including the northwest corner and southwest corner of section 34. These section corners fixed by Reilly were found and adopted by later United States surveyors. Haughn, who made a survey of township 11 in 1882, adopted them; so did Forman, who surveyed township 12 in 1882; so did Gilchrist, who surveyed township 13 in 1886; so did Hurlburt, who retraced Reilly's line in 1903 and corrected the Forman plat. The detailed notes of the surveys were in evidence, and Judge Bourquin made the following references to them:

"In 1882 Haughn surveyed township 11 north. He began at Reilly's established northeast corner of township 10; thence he established the northeast corner of township 11; thence he ran due west for the north boundary of township 11 (also to serve as the south boundary of township 12 north), establishing corners to and including the southeast corner of this section 34; thence his notes say he ran due west 80.07 chains to the 'established corner' (Reilly's meridian corner) at the southwest corner of this section 34; thence his notes further say he ran due west 56.90 chains to intersection with placer survey 38, of date 1873, where he set a post and a duly marked stone for the 'corner to fractional sections 5, 32' (in fact, 4 and 33), from which the northeast corner, duly marked, of placer survey 38, bears north 9¾ degrees east, 57 chains. Two links from said northeast corner of placer survey 38 is an iron mineral monument of 1873, but Haughn does not mention it.

"Haughn's notes also say that from the southeast corner of section 4, township 11, he ran due north 80.10 chains to the established corner (Reilly's meridian corner) at the southwest corner of this section 34. Haughn's errors, omissions, and frauds are obvious, when it is pointed out that he assumes to arrive at and depart from Reilly's meridian southwest corner of this section 34 on a due west course; but his corners, still existing, east of said southwest corner and on his own township line, viz. southeast corner of section 34, of 35, and of 36, are some 1,200 to 1,300 feet south of said course; that he locates the northeast corner of placer survey 38 some 3,700 feet north of said course, whereas in fact it is only about 300 feet north thereof; that from his southeast corner of this section 34 to Reilly's meridian southwest corner of section 34 the course is about north 76 degrees west, and from said meridian corner to 57 chains south of the northeast corner of placer survey 38 the course is about south 50 degrees west, but he gives them west; that he failed to find Reilly's meridian southeast corner of section 4, township 11, though it was and yet is there, established a new corner, yet there,

some 963 feet south of it, and says thence he ran north 80.10 chains to the established southwest corner (Reilly's meridian corner) of section 34, whereas the distance is some 94 chains.

"Also in 1882 Forman surveyed this township 12. His survey purports to conform and tie to Reilly's meridian corners and to Haughn's corners between townships 11 and 12. Forman's notes say he commenced this survey at Haughn's northeast corner of section 2, township 11; thence north to the north boundary of township 12, but surveying interior section lines east in his progress; then he commenced at Haughn's northeast corner of section 3, township 11; thence likewise north (and east) to the north boundary of township 12; then he commenced at Reilly's meridian southwest corner of this section 34 (theretofore incorporated as such in Haughn's survey); thence likewise north (and east) to the north boundary of township 12; then he surveyed interior section lines west from Reilly's meridian to placer surveys that along the ocean render fractional all sections west of said meridian.

"Of this section 34, Forman's notes state that he surveyed the east boundary by running north 80 chains from Haughn's southeast corner of the section, where Forman established the northeast corner of section 34; that he surveyed the north boundary by running east 80.09 chains from Reilly's meridian northwest corner of section 34 (it and also Reilly's southwest corner incorporated as such by Forman in his survey), to Forman's established northeast corner of the section. He concludes his notes by references to placer survey 38 and other placers adjoining, wherein he perpetuates Haughn's error by locating the northeast corner of said survey (38), 57.50 chains north 9¾ degrees east of the corner (Haughn's) of fractional sections 4 and 33 on the east boundary of said placer survey and the south boundary of township 12. He likewise fails to mention the aforesaid mineral monument.

"That Forman, too, committed errors, omissions, and frauds is to be inferred in that he did not discover, but perpetuated, Haughn's, and added to them; he assumed to find Haughn's southeast corner of section 34, 80 chains south of Forman's northeast corner of section 34 (by him established due east of Reilly's meridian northwest corner of said section), whereas it is some 94 chains south thereof; and subsequent rather indefinite official and other search for Forman's subdivisional work in township 12 disclosed few traces thereof.

"From these surveys of Reilly, Haughn, and Forman the official plat of township 12 was made and filed in the land office in 1883. It delineated section 34 and all other sections east of Reilly's meridian as normal square sections of 640 acres, save that the sections of the north boundary of the township were a few acres less. In February, 1886, all entries in township 12 were suspended. Later in the year Gilchrist surveyed township 13, and ran lines disclosing defects in Haughn's and Forman's surveys.

"Although the suspension aforesaid was not formally revoked until 1892, defendant's patent for the southwest quarter of section 34, issued in 1887, and plaintiff's patent in part for part of said southwest quarter issued in 1891. The conflict was at all material times patently disclosed by the Land Department's records, of which records plaintiffs and all other public land purchasers are charged with notice and knowledge."

Hurlburt, an examiner of surveys, was directed to find what errors, if any, existed in the Haughn and Forman surveys. In going over the work, Hurlburt made no changes in township or section lines, but discovered that Forman had put certain placer patents 57 chains too far north, and that the error traceable to Haughn and Forman was due to the description as from a post set by Haughn near the west end of the township line between townships 11 and 12. The Haughn notes say:

"The N. E. corner of Union Gold Bluff placer mining claim bears N. 9¾° east, 57 chains distant, which is a spruce 10 in. in dia. marked X on N., S., and W. faces."

The fact is the northeast corner of the Union Bluff placer is 270 feet north of the township line, and Haughn's failure to refer to the Pioneer mineral monument, which was two links from the northeast corner post of the Union Bluff placer, is quite strong evidence that he was not upon the ground.

The appellants insist that the field notes of the Haughn and Forman surveys show that the line between townships 11 and 12, established by Haughn and Forman in 1882, "is about 52 chains, or approximately 3,440 feet, south of where it was placed by Hurlburt in his resurvey in 1903," and that the evidence of Wasson, a government surveyor, discloses no conflict between the Eden placer and the S. W. ¼ of section 34, until Hurlburt's survey in 1903. Wasson testified that, from notes and plats in evidence, the south line of township 12 was about 56 chains further south than as shown on the township maps. Mr. Wasson admitted, however, that all surveyors had found a corner common to sections 27, 28, 33, and 34, the so-called Reilly corner. The deduction of Mr. Wasson is in conflict with the evidence showing that Haughn's, Forman's, and Hurlburt's field notes indicate that the south line of township 12 was correctly fixed by the Surveyor General's office using Haughn's field notes, showing it to be 56 chains north of the line estimated to be correct by Mr. Wasson.

A witness of many years' experience as a timber cruiser testified that he followed westerly on Haughn's township line, using the Haughn field notes and searching for monuments, and that he found many corners as far west as the meridian line at the southwest corner of section 34; but he found no trace of Haughn's survey west of the point where Haughn reported he placed monuments. The witness also said that about 300 feet north of the west end line of the township, which Haughn described as having been run by him, witness discovered the northeast corner of the Union Gold Bluff placer claim, which by Haughn's field notes was located 57 chains further north. Mr. Lentell, a civil engineer of many years' experience in the survey of timber and mining claims in the northern part of California, said that he surveyed the section of country involved in this litigation, and that he found the Reilly corner, but did not find monuments as Haughn describes along the township line running west from the southwest corner of 34. Not finding the monuments reported by Haughn, Mr. Lentell asked the caretaker for one of the appellants to show him where the mineral monument was, and was shown a spruce monument 270 feet north of the west end of the township line. Witness said:

"I think the distance is 270 feet; there I found the monument that he showed me, and the stump of the old spruce tree that was called for in the north, a 10-inch spruce blazed X on three sides. I found the Pioneer monument right there, two links east of it from the spruce."

This spruce tree is what was spoken of by some of the witnesses as a mineral monument, but it was stated that it was merely the northeast corner post of the Gold Bluff placer claim.

What course Haughn followed westward, when he surveyed the township line between 11 and 12, is a subject of dispute; but it is clear

that he found and adopted Reilly's southwest corner of section 34, which corner is common to sections 33 and 34 of township 12 and sections 3 and 4 of township 11, on the meridian line. The course he followed westward is not certain, but there is abundant support for the view of the District Court that Haughn made false calls and gave false measurements, and that the township line was as delineated on Hurlburt's plat.

[1] According to the field notes and patent, the Eden placer is tied to the northwest corner of section 34 and to the Pioneer mineral monument. Reilly, Forman, and Hurlburt describe the post and bearing trees at the northwest corner of section 34; so did Smith, a deputy mineral surveyor, who surveyed the Eden placer for patent. These several ties fix the site of the mining claim in sections 33 and 34, without regard to the posts which Haughn recites were set by him west of the southwest corner of section 34, and without regard to the ties claimed to have been made by Haughn and Forman to the Gold Bluff placer claim. The monument at the southwest corner of section 34, fixed by Reilly in naming the meridian line, and the monument at the southeast corner of section 34, on the township line as fixed by Forman and Haughn, the monument at the northwest corner of section 34, on the meridian line, and the monument at the northeast corner of section 34, fix the locus of section 34 on the ground. Thus we have the Eden placer and section 34 definitely located and in part covering the same land. Under such conditions the conflict must be resolved by requiring the patent for the Eden placer to yield to the timber patent theretofore issued to the predecessors of the appellee.

[2] The issue of title by prescription must also be determined against appellants. It is true appellants paid the taxes, but so did appellees; hence that is of no special moment. The possession, which appellants had, consisted of having a caretaker, who for many years lived on a nearby claim and had a number of properties to look after. A small herd of cattle belonging to appellants ranged over the Eden placer and other nearby claims, and the caretaker had a garden on some of the ground embraced within one of the claims. There was no fence or inclosure about the Eden placer, and there is no proof that any work was done on the claims since 1886, other than the statements concerning necessary improvements recited in the field notes. While inclosure was not at all necessary, yet where plaintiffs allege possession of a placer claim, it is the rule that one claiming by adverse possession must establish that the property is held and used as a mining ground. Appropriate use must be shown. English v. Johnson, 17 Cal. 108, 76 Am. Dec. 574; Coryell v. Cain, 16 Cal. 573; Brumagim v. Bradshaw, 39 Cal. 24.

The decree is affirmed.

UNITED STATES v. PHILADELPHIA KNITTING MILLS CO.

(Circuit Court of Appeals, Third Circuit. June 13, 1921.)

No. 2652.

1. **Internal revenue ⟸9—Salaries of corporation officers not taxable as unreasonable, but taxable if constituting diversion of profits.**
   Under Corporation Excise Tax Act Aug. 5, 1909, § 38, placing a tax on the net income of a corporation, to be ascertained by deducting from its gross income "all ordinary and necessary expenses," the government may not determine whether salary paid corporation officers is a reasonable and fair compensation, but may determine whether it is salary that is paid or whether it constitutes profits diverted to a stockholding officer under guise of salary.
2. **Internal revenue ⟸28—Evidence held to raise fact issue as to diversion of corporation profits to pay officer's salary.**
   Evidence *held* sufficient to raise an issue of fact as to whether part of salary paid a corporation officer was in fact for services actually rendered, or was a diversion of the profits, and as such not deductible from the gross income in determining the amount of the corporation excise tax.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Suit by the United States against the Philadelphia Knitting Mills Company. Judgment in favor of defendant, 268 Fed. 270, and the United States brings error. Reversed, and new trial directed.

T. Henry Walnut and Edward S. Kremp, Sp. U. S. Attys., and Charles D. McAvoy, U. S. Atty., all of Philadelphia, Pa. (Carl A. Mapes, Solicitor of Internal Revenue, and Ellis Manning, both of Washington, D. C., of counsel), for the United States.

Saul, Ewing, Remick & Saul, of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

WOOLLEY, Circuit Judge. In ascertaining taxable net income under the Corporation Excise Tax Act of August 5, 1909 (36 Stat. 112), the Philadelphia Knitting Mills Company, in its returns for the years 1909 to 1912, inclusive, deducted from its gross income, as "ordinary and necessary expenses," salaries paid W. H. Bilyeu, its president, for the year 1909, $12,500, and for each succeeding year, $20,000. Regarding these salaries (in excess of $5,000 per annum) as unreasonable with reference to the services rendered, and therefore not deductible, the Bureau of Internal Revenue demanded payment of the tax thereon and upon refusal the United States brought this suit. At the trial the Government proceeded on a right, which it claimed in itself, to determine what were reasonable salaries for the services rendered and to limit the deductions thereto. Upon an indication by the trial judge that recovery could not be had on this theory but could be had only on evidence which would sustain a finding that payments made ostensibly for salaries were, in whole or in part, distributions of profits,

the government modified its theory of the case and thereafter proceeded on the line indicated. Coming to the motion for a nonsuit, the court, in entering judgment, ruled solely on the latter question. On the motion to take off the nonsuit the Government returned to its original position. This position it urges on this writ of error.

In view of the proceedings below the question involved in the case is somewhat elusive. In our examination of these proceedings we find really two questions, one raised by the Government and seemingly abandoned; the other raised by the court and ruled on.

The question on which the Government seeks the opinion of this court is: Has the Government the right, under the cited provision of the Corporation Excise Tax Act of August 5, 1909, to inquire and determine whether a salary, paid by a corporation and deducted in its return as an "ordinary and necessary" expense, is reasonable and fair compensation for the services rendered, and thereupon to revise the return and limit the deduction to what it considers a reasonable salary; and, in the event of dispute, to have a jury pass upon and decide the same?

Such a power in the Government, if it exists, must have been conferred by the statute. The statute provided for a tax at a named rate upon the net income of a corporation to be ascertained by deducting from its gross income "all ordinary and necessary expenses." (Section 38.) The statute did not specifically make a salary an allowable deduction, though it was so construed by the Bureau of Internal Revenue when the salary is a "reasonable and fair compensation for services rendered regardless of the amount of stock such officer may hold." We are asked to approve this executive construction of the statute as though it were a part of it. In order not to beg the question, we must look to the statute alone to find the power which the Government asserts.

[1] Confining our inquiry to the statute, it appears that the basis on which a salary may be allowed as a valid deduction is that it was in fact an "ordinary and necessary expense (of the corporation) actually paid * * * in the maintenance and operation of its business." To be a necessary expense it must have been paid for services actually rendered. Jacobs & Davies, Inc., v. Anderson, 228 Fed. 505, 506, 143 C. C. A. 87. Whether services were rendered and whether also they were commensurate with the salary paid are matters of judgment and discretion reposed by general law in the board of directors of the corporation. As the board of directors is charged with the duty and clothed with the discretion of fixing the salaries of the corporation's officers, the Government has no right (until expressly granted by statute) to inquire into and determine whether the amounts thereof are proper, that is, whether they are too much or too little. But, while the amount of salary fixed by a board of directors is presumptively valid, it is not conclusively so, because the Government may inquire whether the amount paid is salary or something else. Admittedly the Government has a right to collect taxes on net income of a corporation based on profits after all ordinary and necessary expenses, including

salaries, are paid. It has a right, therefore, to attack the action of a board of directors and show by evidence, not that a given salary is too much, but that, in the circumstances, the whole or some part of it is not salary at all but is profits diverted to a stockholding officer under the guise of salary and as such is subject to taxation.

Of the same opinion was the learned trial judge, though in entering judgment of nonsuit he raised and ruled upon a second question which was, not whether the salaries paid were commensurate with the services rendered but whether there was evidence which would sustain a finding that the sums paid were not all salaries but were part profits.

An inquiry of this kind is directed to a fact; and, as in all cases turning on a fact, the attention of the trial judge is directed to the sufficiency of the evidence to establish the fact. The question of fact here was whether the money paid was all salary or part profits. The presumption arising from the action of the board of directors was that it was all salary. In order to overcome this presumption the burden was on the Government to produce evidence, not necessarily conclusive, but sufficient to raise a valid inference that some definite part of the compensation was not salary but was profits. The evidence which in this respect the trial judge found insufficient was, briefly stated, as follows:

Philadelphia Knitting Mills Company was a close corporation with an outstanding capital of $330,000, of which William H. Bilyeu, its president, owned in stock approximately $240,000; his daughter, Mrs. Richards, $30,000; and Charles Moller, its vice-president, manager and superintendent, $60,000. The business of the corporation was started and its success established by Bilyeu at a time when Moller's connection with the company and his stockholding were small. As Bilyeu advanced in years and his activities in the business decreased, Moller's duties and interests correspondingly increased until, at the time in question, Bilyeu did almost nothing and Moller did almost everything in the management of the corporation's affairs.

In July, 1909,—a month before the Corporation Excise Tax Act was approved,—the Board of Directors increased the annual salary of Moller to $10,000, and in 1913 to $20,000. At the same meeting in 1909, the Board of Directors,—the personnel of which was wholly controlled by Bilyeu's dominating stock ownership,—increased his salary from $7,500 to $20,000 a year, at which figure it has ever since remained. It was testified that Bilyeu, being greatly advanced in years, had nothing to do with the operation of the plant or with the conduct of the business. He would come to the office, open the mail, sign checks, and make deposits, and then would sit around an hour or two reading the newspaper until his chauffeur came to take him home. The only reason for the substantial increase in the salary of the president was given by Bilyeu himself. It was simply to the effect that as Moller's salary was $20,000, he thought his salary should be the same. In the corporation's tax returns both salaries were deducted from gross profits in ascertaining taxable net profits. The Government raised no question about Moller's salary.

[2] On this evidence we think a jury could find that, as the increase

of Bilyeu's salary as president was made without a corresponding increase of service or business responsibility,—in fact, in the face of a progressive decrease of service and responsibility,—the amount paid him was not all for services rendered. Just how much of the annual compensation paid Bilyeu was salary and how much was profits would not be left for the jury to conjecture, for there was evidence of the amount of salaries paid presidents of like concerns of relative output and earnings. This evidence was in no sense conclusive but it was admissible and it had probative value. There was in addition evidence of the salary which the defendant corporation itself paid Bilyeu, its president, before it was increased without any reason except that Bilyeu thought his salary (for decreasing services) should keep apace with Moller's salary for steadily increasing services.

This evidence was, to be sure, only prima facie, and might have been overturned by evidence produced by the defendant corporation showing that its president, because of his position in the trade, his connection with the banks, or otherwise, rendered services to the corporation on which the Board of Directors had exercised a bona fide discretion in voting him this substantial salary. But until some evidence of this character was produced by the defendant, we think the evidence for the Government was sufficient to sustain a finding by fair-minded men that a part, and a definite part, of the compensation paid Bilyeu as salary was profits distributed to him by reason of his stockholding.

We are constrained to reverse the judgment below and direct a new trial.

BANK OF TAIWAN, Limited, v. GORGAS-PIERIE MFG. CO. et al.

(Circuit Court of Appeals, Third Circuit. June 7, 1921.)

No. 2710.

1. **Appeal and error ⇐70(1)—Order of interpleader held final.**
An order of interpleader, which aligns the parties, prescribes the method of procedure, and finally denies to one of the parties the right to assert a contract obligation against another, is a final order within the statute, from which an appeal can be taken.

2. **Interpleader ⇐9—Order requiring holder of draft and customer of drawee to interplead held erroneous.**
Where a bank had issued a letter of credit in behalf of a customer, against which a draft had been drawn and negotiated with a foreign bank by a seller of goods to the customer, and the customer was seeking to have payment of the draft enjoined on the ground that the goods were not shipped within the time required, it was error to order the drawee bank's customer and the foreign bank to interplead as to the right to payment of the draft, since the foreign bank's contractual relations were with the drawee bank and presented a question of law, while the customer had no contractual relations with the foreign bank and was asserting a right in equity, and the foreign bank may have had rights under its contract against the drawee bank, of which it would be deprived, if forced to uphold the contract between the customer and his seller, to which it was neither a party nor a privy.

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

3. Banks and banking ⇐191—Holder of draft issued on letter of credit cannot be limited to rights of seller against buyer of goods.

A foreign bank, which was the holder of a draft against a letter of credit issued by a domestic bank to its customer for goods sold to the customer, cannot be limited in its right to recover on the draft to the rights of the seller to recover against the buyer for the goods sold.

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

Suit by the Gorgas-Pierie Manufacturing Company against the Union National Bank of Philadelphia and the Bank of Taiwan, Limited, to restrain the payment of a draft to the Bank of Taiwan, in which the Union National Bank filed an answer in the nature of a cross-bill, praying for an order that plaintiff and the defendant Bank of Taiwan interplead. From an order directing the plaintiff and the Bank of Taiwan to interplead, the Bank of Taiwan appeals. Reversed.

John Franklin Shields and Frederic L. Clark, both of Philadelphia, Pa. (Franklin H. Mills, of New York City, of counsel), for appellant.

David N. Fell, Jr., and Henry Spalding, both of Philadelphia, Pa., for appellee Gorgas-Pierie Mfg. Co.

John Arthur Brown, of Philadelphia, Pa., for appellee Union Nat. Bank.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

WOOLLEY, Circuit Judge. [1] This appeal is from an order of interpleader. The plaintiff-appellee moves to dismiss the appeal on the ground that the order is not final. The order aligns the parties, prescribes the method of procedure, and—as it will presently be seen—finally denies to one of the parties the right to assert a contract obligation against another. We regard the order as final within the meaning of the statute, and, accordingly, deny the motion to dismiss the appeal. Killian v. Ebbinghaus, 110 U. S. 568, 4 Sup. Ct. 232, 28 L. Ed. 246; Standley v. Roberts, 59 Fed. 836, 8 C. C. A. 305; Hayward & Clark v. McDonald, 192 Fed. 890, 113 C. C. A. 368; McNamara v. Provident Sav. Soc., 114 Fed. 910, 52 C. C. A. 530; Huxley v. Pennsylvania Warehousing & Safe Deposit Co., 184 Fed. (C. C. A. 3d) 705, 106 C. C. A. 659.

The case has not advanced beyond pleadings. The main facts as pleaded are briefly these:

The Gorgas-Pierie Manufacturing Company bought of Nanyo Boyeki Kaisha, a Limited Company of Japan, a specified quantity of copra at a named price "for shipment from the Orient by steamer during September or October, 1920," payment by draft on a bank issuing a "confirmed irrevocable letter of credit" in favor of the seller. Thereupon the Gorgas-Pierie Company procured from the Union National Bank of Philadelphia, and forwarded with the order, a letter of credit, dated August 15, 1920, addressed to the Nanyo Company in Japan. Its relevant parts are the following:

"You are hereby authorized to value at sight on ourselves for account of Messrs. Gorgas-Pierie Mfg. Co., Philadelphia, Penna., for any sum or sums not exceeding in all forty-seven thousand two hundred and fifty dollars ($47,250.00). * * * Drafts to be accompanied by Invoice, Consular Invoice, and full set of Bills of Lading to be dated during September or October, 1920, in an Oriental port, for shipment to Philadelphia. * * *

"This Credit becomes void if not used on or before December 31, 1920."

On authority of this letter of credit the Nanyo Company drew a draft for $42,643.13 in favor of the Bank of Taiwan, Limited, which, with the letter of credit and specified documents attached, that bank purchased for a valuable consideration without knowledge of defects in the documents and presented the same to the Union National Bank for payment. The Union National Bank refused payment at the direction of the Gorgas-Pierie Company on the assertion by the latter that shipment had not been made during September or October, 1920, as required by its contract with the Nanyo Company; that the bills of lading were falsely dated October 30, 1920; that as a matter of fact the vessel purporting to have issued them was not in port on that date; and that the goods were not shipped until November 4, 1920.

After the draft had been presented and payment refused the Gorgas-Pierie Manufacturing Company filed a bill in equity in the District Court against the Union National Bank of Philadelphia, the Bank of Taiwan, Limited, and Nanyo Boyeki Kaisha, Limited, charging the facts recited and praying for an injunction, preliminary and perpetual, restraining the Bank of Taiwan from demanding and the Union National Bank from paying the amount of the draft in question.

The Union National Bank was brought in by service; the Bank of Taiwan appeared gratis. The Nanyo Company was not served with process; neither did it appear.

The Union National Bank filed an answer in the nature of a cross-bill praying for an order that the Gorgas-Pierie Company and the Bank of Taiwan interplead. The Gorgas-Pierie Company, by its answer assented. The Bank of Taiwan, answering both the cross-bill and original bill, carefully preserved its legal status as the bona fide holder of a draft drawn on authority of a letter of credit issued by a bank and raised questions of law as to the sufficiency of the bills. There followed several arguments and opinions culminating in an order that the Gorgas-Pierie Company and the Bank of Taiwan interplead.

The theory on which the court directed the Bank of Taiwan to interplead with the Gorgas-Pierie Company instead of with the Union National Bank appears in the following excerpt from the opinion:

"Accepting the principle, which we do accept, that in cases of drafts drawn in accordance with a letter of credit, the obligation of the issuer of the letter of credit is measured by its terms and not by that of another contract, in pursuance of which the letter of credit issued, nevertheless, the two contracts are so far coupled, with the knowledge of everyone concerned in such transactions, as that under circumstances such as exist in this case, the issuer of the letter of credit possesses the rights of a stakeholder."

From the order of interpleader based on the reason given the Bank of Taiwan brought this appeal, charging errors to the trial court for not disposing of questions of law on the pleadings as well as for en-

tering the order. That bank now asks this court to correct the errors of the trial court by disposing of the controversy on the merits. This, of course, is not possible in the state of the case. We shall therefore limit our discussion and decision to the assignment of error which has to do with the validity of the order of interpleader.

As there are three parties to this suit we have first to determine whether this is a three-sided contest; or,—as the order of interpleader would seem to denote,—whether it is a two-sided contest; and, if so, then to ascertain between which two of the three parties the issue lies.

[2] In a word the case is this: The Gorgas-Pierie Company, the plaintiff, seeks to enjoin the Union National Bank, one defendant, from honoring a draft issued on its letter of credit and held by the Bank of Taiwan, another defendant, because of a breach of a contract between the Gorgas-Pierie Company, the plaintiff, and the Nanyo Company, a concern not appearing in the action. The right of the plaintiff to injunctive relief against the two banks, restraining one from presenting and the other from paying the draft, depends, primarily at least, upon the contractual relations between the two banks. The right which the plaintiff asserts is in equity; the issue between the two banks is in law. The plaintiff's right in equity to stop payment depends upon the obligation of the Union National Bank to honor the draft drawn on faith of its letter of credit. This issue of law must, we surmise, be decided before the plaintiff's right to equitable relief, if any, can be determined. Frey & Son, Inc., v. Sherburne Co. and The National City Bank of New York, 193 App. Div. 849, 184 N. Y. Supp. 661. This issue should be contested by the parties out of whose relation it arose, namely, the one issuing the letter of credit authorizing the draft and the one holding the draft drawn on that authority. Should the Union National Bank prevail, the Gorgas-Pierie Company might be entitled to injunctive relief. Should it not prevail, manifestly, the Gorgas-Pierie Company would not be so entitled. In other words, as it appears to us, until the issue between the two banks is tried and determined, the equitable right of the Gorgas-Pierie Company to injunctive relief, if any, cannot be exercised. Conversely, it is difficult to find an issue between the Bank of Taiwan and the Gorgas-Pierie Company, in view of the fact that as between them there never was any relation, contractual or otherwise. Therefore, we are of opinion that the order directing the Bank of Taiwan to interplead with the Gorgas-Pierie Company was error.

[3] There having been a contractual relation between the two banks out of which a tryable issue has arisen, an order of interpleader,—if found essential or convenient to the trial of this case,—can, we believe, be validly addressed to them, thereby preserving to the Bank of Taiwan in its contest with the Union National Bank every legal advantage which belongs to it by reason of its claimed position as bona fide holder of the draft. We do not regard it to be a matter of legal indifference whether the Bank of Taiwan shall interplead with the party whose obligation it holds or with the party with which it has never had dealings. American Steel Co. v. Irving National Bank (C. C. A.)

266 Fed. 41, 43. We can conceive certain advantages of procedure and of evidence available to it in enforcing payment of the draft against the bank on whose authority it was drawn, of which it would be deprived if it were forced to litigate the contract between the Gorgas-Pierie Company and the Nanyo Company to which it was neither a party nor a privy. American Steel Co. v. Irving National Bank, supra; In Matter of Agra and Masterman's Bank, L. R. 1867 Ch. App. 391; Frey & Son, Inc., v. Sherburne Co., supra.

On the other hand, if the two banks were ordered to interplead, the Bank of Taiwan would plead as though in a suit brought by itself against the Union National Bank on the obligation of the latter alone, and the Union National Bank, being more than a stakeholder, would make such defense on its obligation as it had of its own and such as could be validly supplied it by the Gorgas-Pierie Company, its customer. As to the admissibility of such defense, we, of course, express no opinion.

We are constrained to think that in his earnest desire to level this controversy the learned trial judge required the wrong parties to interplead. We therefore direct that the order of interpleader be reversed.

LEFKOWITZ et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 11, 1921.)

No. 164.

1. **Post office ⟸49—Prosecution may show participation of all parties to scheme to defraud, though some are not defendants.**

In a prosecution for using the mails in carrying out a scheme to defraud, though the evidence was not sufficient to connect some of the defendants with the use of the mails, either in intent or act, and they were dismissed from the case, the prosecution was entitled to show their participation in the scheme to defraud.

2. **Post office ⟸49—Evidence admissible in prosecution for using mails to defraud.**

In a prosecution for using the mails in prosecuting a scheme to defraud, it is competent to show every part of the business or the method of conducting it, calculated to shed light on the intent and purpose of its managers.

3. **Post office ⟸49—Evidence admissible in prosecution for using mails to defraud.**

In a prosecution for using the mails to defraud, by selling stock in a mining corporation organized in Arizona, with large capital stock, but no property of any known value, proof that the laws of Arizona gave no warrant of authority for the business defendants were conducting was competent, relevant, and material.

4. **Criminal law ⟸858(2)—Permitting jury to take books of account in evidence not error.**

Permitting the jury to take with them to their room books of account, which had been introduced in evidence in their entirety, *held* not error.

5. **Criminal law ⟸721(5)—Argument of prosecutor that testimony is uncontradicted held proper.**

In his argument to the jury a prosecuting attorney may properly emphasize the fact that testimony on certain points is uncontradicted, and

such argument cannot be construed as commenting on the fact that defendants failed to take the stand in their own behalf.

6. Criminal law ⇐829(1)—Refusal of requested instructions not error, where their substance is given.

Refusal of requested instructions is not error, where their substance is given, though not in the same language in the charge of the court.

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

Criminal prosecution by the United States against Harry Lefkowitz and Russell V. Stuart, and others. Judgment of conviction, and defendants named bring error. Affirmed.

The plaintiffs in error, together with one Louis Lefkowitz (brother to Harry Lefkowitz, plaintiff in error), William D. Steadman, and the United Magma Mines Company (a corporation of Arizona) were tried under an indictment containing six counts. The first five counts are under Criminal Code, § 215 (Comp. St. § 10385), and set forth a scheme to defraud on the part of all the accused, wherein, for the purpose of executing such scheme, the post office establishment of the United States was used in the manner proscribed by the statute. The sixth count rests on Criminal Code, § 37 (Comp. St. § 10201), and in ordinary form alleges a conspiracy to commit an offense against the United States, viz. the offense denounced by section 215, with due allegations of overt acts.

It is not necessary to describe the details of the scheme alleged and (as we think after perusal of the evidence) amply proven. It was a stock-jobbing fraud of a very common kind. Some of the accused acquired mining rights contiguous to a well known and successful mine. They formed a corporation to take over these rights; the company to issue therefor stock of the nominal or par value of $2,500,000, and the corporation was given a name which not remotely suggested that of the contiguous successful and well-known mine. The defendant company's property was a "prospect" and nothing more. Louis Lefkowitz and Steadman remained in Arizona; Harry Lefkowitz came to New York City, associated himself with Stuart, and entered upon a campaign to sell and "make a market for" the corporate stock created as above set forth.

The evidence as to the character of the representations made, put into writing, and sent through the United States mail was such as to require the submission of the indictment to the jury, if such representations were shown to be part of a scheme and/or the fruit of the conspiracy formed (in respect of the conspiracy count) by a plurality of defendants, and charged in the indictment.

At the close of the prosecution's case the trial court ruled that there was "no direct evidence nor sufficient evidence to connect" Louis Lefkowitz, Steadman, and the corporation "with the intent to mail," and therefore directed a verdict in favor of these three parties, leaving the case to proceed against the present plaintiffs in error. Both were convicted upon all the counts, and they thereupon sued out separate writs of error.

Herbert C. Smyth, of New York City (Frederick W. Bisgood, of New York City, of counsel), for plaintiff in error Lefkowitz.

Phillip C. Samuels, of New York City (Elijah N. Zoline, of New York City, of counsel), for plaintiff in error Stuart.

Francis G. Caffey, U. S. Atty., of New York City (Benjamin P. DeWitt, Sp. Asst. U. S. Atty., of New York City, of counsel), for the United States.

Before ROGERS, HOUGH and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] It is to be noted that there was direct evidence from which any jury could find that all the defendants as originally indicted had formed a scheme or artifice to defraud and had conspired—i. e., agreed together —to devise such scheme or artifice. The trial court apparently felt that the testimony as to Louis Lefkowitz, Steadman, and the corporation failed to meet the requirements of Farmer v. United States, 223 Fed. 903, 139 C. C. A. 341. As to the correctness of this ruling we can express no opinion; but when at the close of the government's case, the indictments were dismissed as to Louis Lefkowitz and Steadman, they ceased to be defendants for every purpose, and it could no longer be said, in respect of this indictment, that they were in danger of giving testimony against themselves.

Yet after such dismissal it remained just as true as it was before that they might have joined in devising the scheme or artifice complained of, while stopping short of the intent or act of using the mails in the execution thereof. The prosecution was entitled to show the formation and apprise the jury of the whole scheme, artifice, or conspiracy. It is not true (as is here substantially contended) that failure to prove either the necessary intent or action in respect of the use of the mail as to some of the defendants eliminated from the conspiracy or fraudulent scheme those who did not happen to go the statutory length of using or causing to be used the postal establishment of the United States in the execution of what all the defendants intended to accomplish, to wit, the defrauding of a portion of the public. Cf. Emanuel v. United States, 196 Fed. 317, 116 C. C. A. 137; Schwarzberg v. United States, 241 Fed. 348, 154 C. C. A. 228.

(1) It is complained that divers persons who, after suspicion had been excited, talked with Steadman and Louis Lefkowitz, were permitted to testify as to what these defendants said, and that after dismissal of indictment as to such defendants the court refused to strike out such testimony. No material or relevant statements of this kind were admitted as against any defendant except the one who had spoken to the witness. We emphasize "material or relevant," for it is always possible to magnify after conviction trivialities to which no one paid attention before the jury. The propriety of refusing to delete the testimony altogether we have sufficiently indicated above.

[2] (2) This scheme was carried on during the World War, and after the United States entered the same. The prosecution was permitted to show that the plaintiffs in error sought to sell some stock by informing the public that the proceeds of sales for a definite time would be given to the American Jewish Relief Committee, thereby hoping to increase sales among some possible purchasers; also that said committee refused the proceeds of such sales, which were not returned to buyers. The complaint made about this is without merit. It was plainly a part of the stock-selling business and that business was itself the very scheme to defraud; it was competent to show every part and parcel of such business, or the method of conducting it, calculated to shed light upon the intent and purpose of its managers.

[3] (3) It is alleged as error that the court below permitted the prosecution to show the compliance or noncompliance of the corporate defendant with the various statutes of Arizona regulating corporations, and especially mining companies. These statutes are of such a nature that it might be urged that the method in which defendants sought to sell this mining stock was a criminal offense under the state law, or at all events would have been such offense if the sales had occurred within the jurisdiction of Arizona.

Both this point and the next preceding one are thought to find support in Marshall v. United States, 197 Fed. 511, 117 C. C. A. 65. We pointed out in Farmer v. United States, supra, 223 Fed. at page 911, 139 C. C. A. 341, that the Marshall Case was "sui generis"; there is nothing in the opinion to indicate that the wholesome practice of showing intent by a party's own acts was to be abrogated. And see Hammer v. United States, 249 Fed. 336, 161 C. C. A. 344. The history of the defendant company, and proof that the laws of its own state gave no warrant of authority for the business defendants were conducting, was competent, relevant, and material.

[4] (4) Certain books of account of the stock-selling business were put in evidence, and the jury was permitted to take them into the jury room. Complaint is now made that some requests for further instructions made by the jury to the court show that the jurymen derived what they conceived to be evidence from parts of or entries in these books, or one of them, upon which counsel for neither the prosecution nor defense had laid any emphasis. We think that this contention rests at best upon a supposition. Neither court nor counsel can know the methods by which a jury functions; we must take only the result.

In many parts of the country, either by practice or positive statute, juries are forbidden to mull over documentary exhibits in the jury room. Such is not the practice in this jurisdiction. The whole book was in evidence, and, assuming that the jury had a right to look at any part of it, they had a perfect right to examine it all, and to draw their own conclusions therefrom. While we cannot perceive in this instance any hardship upon the defendants, the only way to prevent what is said to have happened here is to carefully restrict the parts of the book put in evidence and seal up the portions not offered.

[5] (5) None of the defendants took the witness stand; nor did plaintiffs in error call as witnesses either Louis Lefkowitz or Steadman. The prosecuting attorney in summing up repeatedly said that various matters were uncontradicted. Then he remarked:

"There isn't a shred of evidence, there isn't a word of denial, that Stuart and Lefkowitz were partners. * * * Now, gentlemen, if it is not denied, it is there. Was it denied? It is not; is it?"

And again, on another subject, the attorney said:

"Is Winkelman the best man to testify as to whether the check was made out to R. V. Stuart? * * * Where is the check? The papers were turned over to Stiner. Where is Stiner? * * * Who is Stiner? Where is he?"

On both these occasions counsel for defense interposed objection, one attorney raising it thus:

"He [the district attorney] repeatedly refers to the failure of the defendants to produce evidence, and that is of course objectionable."

It is only objectionable to comment upon the failure of the defendant personally to testify; and if at the close of the whole case any given point stands uncontradicted, such lack of contradiction is a fact, an obvious truth, upon which counsel are entirely at liberty to dwell. We perceive nothing objectionable on the part of this prosecutor.

At another time the district attorney said to the jury, "I would like to ask Louis Lefkowitz what he did with" a certain sum of money. As above pointed out, when this remark was made, Louis Lefkowitz was no longer a defendant; he might have been called by either side, and we perceive neither impropriety nor force in the remark complained of.

[6] (6) Defendants preferred 43 requests to charge, and as to most of them the court refused to charge in the very words of the request, saying in substance that the matter had been covered in the colloquial charge. As was pointed out in Green v. United States, 240 Fed. 951, 153 C. C. A. 635, the court is never required to adopt the language of counsel; he may prefer, and usually does prefer, his own words.

It would not be useful to go over these requests in extenso; many of them, and some now pressed upon our attention, are drawn in the very words of leading cases, with the quotation marks omitted. But the sense and substance of every matter of any importance contained in these requests was either put to the jury as requested or covered in essence and substance by the colloquial charge. The theory of requests (whatever may be the practice) is to aid the jury, and we think that "perhaps the least amount of aid is rendered where the law is delivered in the form of copious extracts from judicial opinions in other cases." Hood v. Hood, 25 Pa. at 422.

The judgment is affirmed.

THE MAHANOY.

Petition of LEHIGH VALLEY TRANSP. CO.

(Circuit Court of Appeals, Second Circuit. May 18, 1921.)

No. 171.

1. Towage ⇐11(9)—Tug held at fault for manner of towing barge with open hatchways in a gale.

A tug, which started with a tow from Jersey City bound for destinations in the East River when a gale of wind was blowing, was at fault for turning into the East River when the hawser boat on the windward side had no hatchway covers, as a result of which she shipped water and sank.

2. Shipping ⇐209(3)—Owner of sunken vessel held to have done all that was possible to buoy the wreck.

On petition by the owners of a tug to limit liability to other vessels injured by collision with a barge sunk through the tug's fault, evidence *held* to show that the owner of the barge, whose statutory duty it

was to buoy the wreck, under Act March 3, 1899, § 15 (Comp. St. § 9920), did all that he possibly could under the circumstances, and was not liable.

3. Navigable waters ⟸26(3)—Owner of obstruction intentionally placed in channel without warning is liable to vessels striking it.

The owner of an obstruction deliberately placed in a navigable channel without any warning thereof being given is responsible to vessels injured thereby while themselves exercising due care.

4. Shipping ⟸209(3)—Evidence held not to show want of care by tug to protect vessels from sunken tow.

On petition to limit liability of owners of a tug whose tow sank in the East River during a gale, because of the tug's fault, evidence *held* to show that the tug's master had no reason to believe the barge, which sank in 30 feet of water, would injure another tug drawing only 7 feet of water, as it did, because the barge's stern was only a few feet below the surface, so that the tug, which was at fault, was not liable for injuries resulting from the sinking of the other tug.

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

Petition by the Lehigh Valley Transportation Company, as owner of the steam tug Mahanoy, for limitation of liability and denying all responsibility. From a decree permitting the limitation of liability, but allowing six claims against the tug, the petitioner appeals. Decree modified, by denying recovery on two of the claims.

Harrington, Bigham & Englar, of New York City (Vine H. Smith, 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 Thomas Bulger.

Lewis C. Boehm, of New York City (Charles E. Wythe, of New York City, of counsel), for Harold D. Boehm.

Mark Ash, Chauncey I. Clark, E. W. Leavenworth and J. E. Morrissey, all of New York City, for various claimants.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. The Lehigh Valley Transportation Company, owner of the tug Mahanoy, filed this libel, asking to limit its liability for claims arising out of the following circumstances and at the same time denying all responsibility:

February 26, 1918, at 6:25 a. m., the tug started with eight coal-laden boats, in two tiers of three each and two in the third tier, from the Packer dock, Jersey City, bound for destinations in the East River. The last of the ebb tide was running in the North River and the first of the flood in the East River. Warnings of a southwest storm moving eastward had been displayed since 3 p. m. of the 25th. Between 6 and 7 a. m. of the 26th the wind blew at the rate of 62 miles an hour, which is a whole gale No. 10 of the Beaufort scale, with a maximum velocity at 6:29 a. m. of 70 miles. As the tug rounded on a starboard helm into the East River, the starboard hawser boat Annie Bulger, which had no hatch covers on, having the wind on her starboard side, began to ship water, which caused her to sink at a point estimated to be about 1,000 feet off the Battery in 30 feet of water. She went down bow first, her stern being raised until she was entirely submerged; but there was

nothing to indicate, what proved to be the fact, that the stern remained but a few feet below the surface of the water.

The boat Burns Bros. No. 21, immediately behind the Bulger, broke loose, and the tug Mutual came to her rescue, and in making fast pulled out a cleat upon her port side. Eventually she towed the boat, together with the ferryboat Griswold tandem back to the Jersey side of the river. The Mahanoy got out another hawser to another boat, and, proceeding with her tow, tied it up at Eleventh street, East River, at about 8:30 a. m. Returning, the tug passed the Battery light at about 10 a. m.

The master of the Bulger, as soon as he landed, went to his owner's office, arriving a little before 10, and went from there with his owner to his attorney's office, who at once called up the Moran Towing & Transportation Company and then the Merritt & Chapman Derrick & Wrecking Company on the telephone, neither of which would agree to go and sweep for the wreck until the weather conditions improved. Application was then made to the United States Lighthouse Board, which at 11 o'clock agreed to send a tug to sweep for the wreck.

At about noon the tug St. Patrick, drawing only 7 feet of water, on her way into the East River, ran afoul of the wreck, striking it so violently that she sank almost immediately, and the master of the English steamer Purvis Castle, Capt. Turnbull, who was a passenger, was drowned. The wind continued to blow even harder from the time the Bulger sank until 1 o'clock p. m.

Claims were filed as follows, all of which Judge Learned Hand allowed at the amounts fixed by the Commissioner, but permitting the libelant to limit its liability:

(1) By Thomas Bulger, for damages due to the sinking of the Annie Bulger, and Capt. Bulger, for loss of effects, $12,356.91.

(2) By Burns Bros., for damages to its barge Burns Bros. No. 21, caused by the original disaster, or by the tug Mutual in making fast to the No. 21 after she broke loose from the Mahanoy's tow, $598.09.

(3) By Timmins, for the value of the services rendered by the tug Mutual to the Burns Bros. No. 21, $900.

(4) By the United States Director General of Railroads, for damage sustained by the D., L. & W. steam lighter Syracuse, as a result of its collision with the submerged barge, Annie Bulger, $3,832.47.

(5) By Shamrock Towing Company, as owner of the steam tug St. Patrick, for the damage to that tug, resulting from its collision with the submerged barge Annie Bulger, $11,322.32.

(6) By the estate of J. Turnbull, who was aboard the tug St. Patrick when it struck the submerged barge, for damages due to his death, $22,426.66.

[1] We agree with the court below in permitting the Transportation Company to limit its liability, and in finding it liable for starting to round the Battery in the weather then prevailing with a starboard hawser boat having no hatch covers in place. For the loss of that boat and cargo, and for the salvage paid by the Burns Bros. No. 21 to the tug Mutual, and for the expense of repairing the damage she sustained in the salvage operation, the libelant was clearly liable.

[2] We also agree with him that the owner of the Bulger whose

statutory duty it was to buoy the wreck (section 15, Act March 3, 1899, 30 Stat. 1152 [Comp. St. § 9920]), did all he possibly could under the circumstances and is not liable.

[3] Whether the Transportation Company is further responsible for the sinking of the St. Patrick and the death of Capt. Turnbull and injury to the Syracuse is a more difficult question. Of course in case of an obstruction deliberately placed in a navigable channel without giving any warning of it the owners will be responsible to owners of vessels injured thereby while themselves exercising due care. Authorities to that effect are cited and approved.

[4] The District Judge held that, because the Transportation Company was responsible for the original sinking it was responsible for all subsequent accidents, no new and independent cause having intervened. To this the libelant replies that the company is liable only for the fairly to be expected consequences of its negligence, and that a barge, whose sides measured but 15 feet, in 30 feet of water, could not have been expected to obstruct a tug drawing only 7 feet. The difficulty lies in applying these well-established principles to the facts of the case. Admitting that after the barge sank, for which sinking it was responsible to the owners, the Transportation Company was under the additional duty to the owners of the St. Patrick, of the steam lighter Syracuse, and to Capt. J. Turnbull of exercising ordinary and reasonable care to protect them from injury, wherein did it fail to perform its duty?

We cannot say that it should have sent a tug to sweep for the wreck in weather which prevented the professional wreckers and the United States Lighthouse Board from doing so. But it is suggested that it might have sent a tug to stand by, which would have warned the St. Patrick and the Syracuse. Such a tug would not have known and could not have told the St. Patrick and the Syracuse where the wreck was lying, nor the very singular position it had taken. Indeed, if a tug had been there, warning might not have been thought necessary to a tug drawing as little water as the St. Patrick did. Upon the whole, we think the Transportation Company was not at fault for want of exercising due and ordinary care, and that the claims of the owners of the St. Patrick and of the owners of the Syracuse and of the administrator of H. Turnbull, deceased, should have been dismissed by the court below.

The decree, to be so modified, without costs of either court against either of these claimants, is affirmed.

TANNER v. BALLARD & BALLARD CO., Inc.

(Circuit Court of Appeals, Second Circuit. May 18, 1921.)

No. 191.

1. Appeal and error ⟸997(3)—Where case is submitted on requests for directed verdict, findings of fact are conclusive.

Where a case is submitted on requests by both parties for directed verdict, all controverted issues of fact are conclusively determined in favor of the party whose motion is granted.

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

2. Sales ⊜174—Contract terminated, where through buyer's default delivery cannot be made within time fixed.

Under the settled rule that time is of the essence of executory commercial contracts, where by prior agreement all contracts for sale of flour by defendant, to be shipped to plaintiff at New York for export, were subject to embargoes by the railroad companies, which, owing to war conditions, refused to accept export shipments unless assured of prompt unloading, and plaintiff was required to make the shipping arrangements, his failure to secure such arrangement for a shipment due under a contract before the time fixed for delivery therein expired, *held* to relieve defendant from further obligation thereunder.

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

Action at law by Wilson P. Tanner against the Ballard & Ballard Company, Incorporated. Judgment for defendant, and plaintiff brings error. Affirmed.

Haight, Sanford & Smith, of New York City (Daniel Day Walton and Lemuel Bannister, both of New York City, of counsel), for plaintiff in error.

Harrington, Bigham & Englar, of New York City (Valentine Taylor, of New York City, of counsel), for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge. [1] At the close of all the evidence both parties moved for a directed verdict. It follows that whatever controverted issues of fact are revealed by the record are for our purposes conclusively determined in favor of the party whose motion was granted. City v. Third Nat. Bank, 221 Fed. 175, 137 C. C. A. 75, certiorari denied 238 U. S. 628, 35 Sup. Ct. 791, 59 L. Ed. 1496. In any usual sense of the phrase, however, there is no controversy over the facts; there is but a difference of opinion as to the inferences to be drawn from uncontradicted evidence.

[2] Plaintiff is a flour merchant in New York; defendant a milling company in Kentucky. This action is to recover damages for defendant's failure to deliver certain flour in accordance with contracts contained in letters and telegrams exchanged between the parties. The contract on which plaintiff rests his first cause of action is expressed in two telegrams, one from Tanner to Ballard, reading:

"Offer four dollars eighty-five cents bulk New York export shipment within thirty days our option (then follows the quantity and description of the flour) subject to your immediate reply by telegram."

The same day Ballard replied to Tanner:

"Will accept four dollars ninety cents shipment from mill week commencing twenty-eighth the best that can be done. Answer by telegraph immediately."

This Tanner did accept by telegraph at once.

Plaintiff's second cause of action arises from a contract that began with a telephonic conversation between the parties, following which Tanner telegraphed to Ballard:

"Confirm telephone purchase [here follows description of flour] four dollars sixty-five cents bulk New York export, four dollars fifty-five cents Newport News delivery seller's option June."

To this message Ballard replied by mail:

"Beg to confirm long-distance 'phone conversation between your good self and the writer, by which we sold you [here quantity and grade of flour are repeated] at four dollars sixty-five cents per barrel bulk New York (export rate), four dollars fifty-five cents Newport News—shipment from mill our option during the last half of June."

By admitted agreement between the parties these times for delivery were extended until July 15, 1916, before which date defendant shipped rather less than one-half of the flour called for by the two contracts and then refused to ship further. Suit is for failure to deliver the balance. It appeared, however, that the dealings in flour between plaintiff and defendant had begun, and had been substantially continuous since, at the latest, January, 1916, and from such letters it appears that Ballard stated in January, "any order taken would be subject to an embargo on flour at the port of New York." To which Tanner replied:

"We have adopted a policy of neither buying nor selling an ounce of flour until we have the freight room engaged."

Thereafter, and before any order was given and accepted, Ballard wrote again:

"Let it be understood that in any trading between us your orders are taken subject to embargoes on the part of the railroad companies entering the port of New York or any other Atlantic and Gulf port."

To which Tanner promptly replied:

"We note that any orders you take from us are subject to embargo. This is satisfactory to us, as embargoes are something we can gain knowledge of from our end, frequently in advance of such embargoes, and we can plan accordingly."

It was after this interchange of letters that several orders were given by Tanner, accepted by Ballard and shipments made accordingly. This suit arises upon the last of the contracts and out of the admitted existence of what in the correspondence is called a "railroad embargo."

By evidence uncontradicted it appeared at trial that the word "embargo" meant, and was known to mean by the parties to this action and by the commercial world, that in the spring and summer of 1916 the movement of freight toward Atlantic seaboard destined for export to a Europe occupied by war was so great that railway lines refused to transport all the goods offered them, and particularly refused to accept freight intended for export, unless assured beforehand that it would be promptly unloaded at the seaboard terminal. This practically meant that shippers were obliged to satisfy land carriers that their ocean freight space was ready and waiting.

The court below held that the contracts in suit were made with this knowledge and on the underlying agreement between the parties: (1) That a railway embargo or refusal to accept was always good reason for not shipping; (2) that it was Tanner's duty under this agreement

to make the shipping arrangements and notify Ballard when and as any embargo on the flour in question was lifted; so that (3) unless Tanner succeeded in procuring the railway carriage before the expiration of the time limit agreed upon, he had committed a breach of the contracts in suit.

In these rulings we think the trial court was right. The Ballard Company proved its willingness to ship, and Tanner admitted that he could get no permit to ship that remainder of the contract quantity in respect of which this action is brought. The proposition of plaintiff in error is that the effect of the railway embargo was but to create an excusable delay in performance and did not work a discharge of obligation; in other words, that, assuming the contract to be subject to embargo, such impediment, when it arose, merely postponed performance, the contract was not terminated, and performance within a reasonable time should be deemed sufficient.

But courts are bound by law to look first at the written language of the contract-making parties, and we have no doubt that the contract between these parties is to be spelled out of the whole series of letters, beginning with those of January, which substantially read the embargo limitation into all the subsequent contracts, to the last written extension, which carried the time of performance to July 15th. Throughout all this correspondence there is nothing to take this contract out of the settled rule that in an executory commercial agreement time is of the essence. Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366; Dorrance v. Barber & Co. (C. C. A). 262 Fed. 489. The time finally fixed was July 15th. Defendant refused to extend that time. The agreement of January (underlying the contracts in suit) was that Tanner should procure the goods to be moved by rail before that date, and to that essential agreement the law holds him.

It is quite true, as proven at trial, that if there were nothing except the telegrams and letters of May, 1916, above referred to, it would have been the duty of the seller to move the goods and deliver them at the named shipping ports; but the January correspondence fixed the preliminary duty of "lifting the embargoes" on Tanner. This he was unable to do in time, and therefore the defendant was relieved of its obligation on July 15th.

Judgment affirmed, with costs.

AKRON-OVERLAND TIRE CO. v. WILLYS-OVERLAND CO.

(Circuit Court of Appeals, Third Circuit. June 13, 1921.)

No. 2628.

1. Trade-marks and trade-names and unfair competition ⇐71—Tire manufacturer has business sufficiently related to automobile maker to entitle latter to prevent appropriation of name.

A corporation engaged in the business of retreading tires for automobiles, though not in direct competition with a manufacturer of automobiles, is engaged in a business so connected with automobiles that the public, in buying the stocks and securities, as well as the tires, of the

tire company, might be misled by the use by the tire company of a distinctive word of the automobile company's name, so that the automobile company can restrain the use of such word, especially where it was shown that third parties had confused the tire company with the automobile company.

2. **Trade-marks and trade-names and unfair competition ⊜71—Choice of name similar to existing business is evidence of belief confusion would thereby result.**

When a corporation, with a practically unlimited field of distinctive names to choose from, chose for the name of its tires the word "Overland," which was then well known by the public in connection with a make of automobiles, when such word had no connection or association with the automobile trade, except that which the maker had given it, that fact in and of itself is evidence of the corporation's belief that its business and that of the automobile manufacturer concerned a common field, and that the adoption of the name was calculated to confuse the public mind, and enable the corporation to draw to itself the good will established by automobile manufacturer.

Appeal from the District Court of the United States for the District of Delaware; Hugh M. Morris, Judge.

Suit by the Willys-Overland Company against the Akron-Overland Tire Company to restrain the use by defendant of the name "Overland" in the transaction of its business. From a decree granting a preliminary injunction (268 Fed. 151), defendant appeals. Affirmed.

John R. Nicholson, of Wilmington, Del. (Warren H. Small, of New York City, of counsel), for appellant.

Robert G. Thach, of New York City, and Andrew C. Gray, of Wilmington, Del., for appellee.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

BUFFINGTON, Circuit Judge. In this case, the court below, on hearing, being of opinion, as recited in its decree, "that the use of the word 'Overland' by the defendant in its name, in the transaction of its business and in the threatened sale of its stock and securities, is calculated to lead the public to believe that the goods, stocks, and securities of the defendant are the goods, stocks, and securities of the complainant, and that thereby the complainant is irreparably injured," and the complainant having given an adequate indemnity bond, issued a preliminary injunction enjoining the defendant from using the word "Overland" pending the further order of the court. The facts of the case and the reasons and adjudged cases in support of the court's action, are set forth in its opinion printed in 268 Fed. 151.

[1] A study of the record shows that in the grant of a preliminary injunction there was no abuse by the court of the discretionary power vested in it upon such a showing of facts and circumstances as is there disclosed. We note the earnest contention of defendant's counsel that the case was one where there could be no unfair competition on the part of the defendant, because the defendant was not in business competition where the parties were not in competition in the same kind of business. In view of this contention we deem it proper to say the

matter has had our serious consideration, and we find no ground to convict the court below of error, either in its use of authorities or in other regards; for, while it may be conceded that the plaintiff company manufactures automobiles and the defendant does not, and while the plaintiff does not make or sell automobile tires, and the defendant retreads and sells tires, and in exact terms the two do not compete in these particular things, yet the fact remains that the business of both is so connected with automobiles that the public, in buying the stocks, securities, and retread tires of the defendant company, by the use of the word "Overland" in connection therewith, will, by such descriptive word, be led to believe it is buying property or articles owned or dealt in by the plaintiff or one of its subsidiary companies. That the plaintiffs had in the word "Overland" a good will of high reputation and great value in connection with automobiles cannot be gainsaid. That the defendants' use of the word "Overland," in connection with the sale of its retread tires and its stocks and securities, would enable it to share in the plaintiff's good will and reputation, also cannot be gainsaid. That such use of the word "Overland" by the defendant would breed confusion and misunderstanding in the minds of the public is foreshadowed by what did happen in the way of third parties confusing and connecting the defendant and its acts with the plaintiff company, and even holding the plaintiff accountable for such acts. Indeed, it is manifest that under the facts of this case the maintenance by the plaintiff of the good will attributed to Overland business and products would, in the future, be determined, not alone by what the plaintiff did to uphold the standard of that good will, but by what the defendant might do by failure to uphold such reputation and maintain such good will.

[2] Moreover, with a practically unlimited field of distinctive names open to it for choice, when the defendant lately entered the automobile industry, the fact that it chose to take a name that had no connection or association with the automobile trade, except the good will and association which the plaintiff had given it, shows conclusively that the name was given to this new venture in the automobile field because of its established high regard in that industry, which had been given it by the plaintiff. We are not misled by suggestions that the name "Overland" had significance from the Overland Trail and affairs of 80 years ago. But we are impressed by the fact that at the present time, and for some years past, the word "Overland" has been closely associated in the public mind, with the plaintiff company's automobile business. Under such conditions, the taking of the name Overland by the defendant, when it went into the automobile business, and its using that name in connection with its automobile business, in and of itself evidences the belief of the defendant that its business and the plaintiff's business concern a common field of business endeavor, and that the public would recognize, by the use of the word "Overland," that the business of both concerned the automobile business.

It will thus be seen that the business of both companies, because they both concerned some phase of automobile activity, were interrelat-

ed, and that since the operations of the plaintiff company in that field were known to, and described by, the public by the business or trade-name of "Overland," it necessarily followed that, when the defendant company sought to also describe its ventures by the trade-name "Overland," it was calculated to confuse the public mind and enabled the defendant to draw to itself, and to draw from the plaintiff, the exclusive trade-name and trade good will which the plaintiff, by a business course of years, had given to the word "Overland" in connection with the automobile industry. Such being the fact, it follows that both the English and American authorities justify the court below in its action, for in fact there was substantial and material competition between these parties.

Taking the case on the whole, we find no abuse of discretion on the part of the court below in the grant of its injunction.

ANDERSON v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. June 6, 1921.)

No. 3635.

1. **Public lands ⇐21—Evidence of character of land shown held admissible to show lands located were not those shown.**
In a prosecution for offering for a consideration to locate a settler upon the public lands, and for misrepresenting to the settler the location of the lands filed, contrary to act Feb. 23, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10226a), evidence as to the location and special character of the lands described by defendant to the settler was admissible, as bearing on the question whether the land pointed out to the settler was that which was entered for him.

2. **Criminal law ⇐829(3)—Instructions prohibiting conviction for misrepresentations as to quality held to cover defendant's requested instructions.**
In a prosecution for making misrepresentations to settlers pertaining to public lands, contrary to act Feb. 23, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10226a), instructions in which the court read the statute and stated the elements necessary to sustain a conviction, and specially instructed that the statute did not make it an offense to misrepresent the quality of the water or of the soil, *held* sufficient to cover instructions requested by defendant on the latter point, so that there was no error in refusing to give the instructions in the defendant's language.

3. **Criminal law ⇐870—Denial of defendant's request for special verdict is not error.**
It is not error for the trial court to refuse defendant's request to submit to the jury a special finding, since it is not the practice of the federal courts in criminal cases to call for special verdicts.

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

T. M. Anderson was convicted of making false representations to settlers pertaining to the public lands of the United States, and he brings error. Affirmed.

Allen, Allen & Swender, of Los Angeles, Cal., for plaintiff in error.
Robert O'Connor, U. S. Atty., and Thomas F. Green, Asst. U. S. Atty., both of Los Angeles, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Anderson was convicted for violation of an act of Congress to punish persons who make false representations to settlers and others pertaining to the public lands of the United States. 39 Stat. c. 115, p. 936 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10226a). The charge is that the defendant, Anderson, for a promise of money, represented to an intending settler and entryman, Rood, that a certain tract of land shown to Rood was public land subject to sale, settlement, and entry, and did undertake to locate Rood on the land, and further represented to Rood that the land was of a particular surveyed description, with intent to deceive Rood, and that Rood was deceived by the representation, and paid Anderson for his services in undertaking to locate him; Anderson well knowing that the land shown was not public land subject to sale and entry, and was not the piece described.

[1] Several assignments of error are based upon admission of testimony as to location and the special character of the lands described and the soil. We see no error in overruling the objections to this evidence. The identity of the lands in question was important; hence the government could properly introduce witnesses to describe the topography and general position of the lands pointed out to Rood. Such evidence directly related to the question whether the land pointed out was or was not the land which Rood entered after the defendant had been with him.

[2] Defendant assigns error upon refusal to give a requested instruction to the effect that any representations made by Anderson as to the "quality" of the land shown or its "nature," or what the land shown would produce, or whether "water for irrigation or domestic use could be developed or found" upon the land shown, is not a representation of the "particular surveyed description" of the land so shown; also upon refusal to charge that, if it was found that the defendant, Anderson, showed Rood the land upon which Anderson "filed him," then defendant is not guilty of violating the act under which the indictment is drawn; also upon refusal of the court to give an instruction requested to the effect that, even if the jury believed that Anderson made false representations to Rood and others as to the quality of their lands, or as to what their lands would produce, or as to the number of acres which were inundated, or as to whether water for irrigation or for domestic use could be produced, if, nevertheless, the jury should believe that the defendant showed Rood and others the lands upon which the defendant located them, then a verdict of not guilty should follow.

Plaintiff in error states in his brief that, although the instructions which the court gave very nearly covered the substance of the requests, nevertheless the instructions given were not clear, and contends that as a result defendant was prejudiced by the refusal to give the re-

quested instructions. In view of the argument, we have carefully examined the whole charge. The court read the statute, and, after indicating the Rood land on a map, stated that Rood testified that Anderson did not show him certain indicated land, but showed him certain other tracts as indicated, and took him to the land office, and had him locate on certain indicated tracts. The court charged that if Anderson showed one tract and took him to the land office, and in reckless disregard of the truth wrote a different description from what would describe the lands shown to Rood on the ground, then Anderson had committed the crime condemned by the statute. But the court specially instructed that the statute does not make it criminal for one to misrepresent the quality of the water or the soil, no matter how wrong it might be for a defendant to say:

"This land here on the desert is as good as this land in Mecca that I showed you."

The court authorized the jury to consider any misrepresentations as to soil or water in weighing the evidence of Rood and of the defendant, but twice instructed that there could be no conviction for such misrepresentations. The material elements of the crime were fully stated, and as the substance of the points included in the requests was covered in the charge given, we cannot see that prejudice could have been done to defendant by refusal to use the language of the request. Kettenbach v. United States, 202 Fed. 377, 120 C. C. A. 505.

[3] It is said that the court erred because it denied defendant's request to submit to the jury a special finding by way of a question whether Anderson took Rood onto the land and showed him the land upon which Anderson "filed him." It is not the practice of the federal courts in criminal cases to call for special verdicts, and we hold that there was no error in refusing to depart from the practice. Mut. A. Association v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60.

The judgment is affirmed.

PUBLIC SERVICE RY. CO. v. McMAHON.

(Circuit Court of Appeals, Third Circuit. June 20, 1921.)

No. 2662.

Appeal and error ⇐864—Rulings applicable to one only of two consolidated cases reviewable only on error to judgment in that case.

Where two actions by different plaintiffs for injuries arising out of the same accident were consolidated for trial, but separate verdicts were rendered and separate judgments entered a ruling on admission of evidence clearly applicable in one case only cannot be assigned as error in proceedings for review of the other judgment.

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

Action at law by Stephen McMahon against the Public Service Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Lefferts S. Hoffman and Joseph Coult, Jr., both of Newark, N. J., for plaintiff in error.

McDermott & Enright, of Jersey City, N. J. (James D. Carpenter, of Jersey City, N. J., of counsel), for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

WOOLLEY, Circuit Judge. This action for damages arose out of a collision between the plaintiff's auto-van and a trolley car of the defendant railway company. The trolley car was traveling on Jersey Avenue in the City of Elizabeth; the auto-van was either entering Jersey Avenue from Farragut Way, an intersecting street, or, it had already entered the avenue and was moving on the car tracks about a block distant from Farragut Way when it was struck in the rear by the trolley car.

The main dispute at the trial, arising from opposite theories of the collision as testified to by witnesses for the respective parties, concerned the precise location of the collision. If at one place, there was negligence on the part of the plaintiff in driving his van out of a side street directly upon and across the trolley tracks on which the trolley car was rapidly approaching; if at the other place, there was negligence on the part of the defendant in causing its rapidly moving trolley car to strike the rear of the plaintiff's auto-van after it had come from the side street, had, in full view, entered upon the railway tracks, straightened its course, and traveled thereon for something like a block. Thus on the place of the collision hung the questions of negligence, primary and contributory. This unusual circumstance, it is conceded, justified the submission of the case to the jury; and by the verdict for the plaintiff, it is also conceded, this question of fact and the related questions of negligence are decided.

The main complaint which the defendant makes on this writ is addressed to error in the charge. After instructing the jury on the law of negligence and contributory negligence in form quite usual and in a manner not excepted to, the plaintiff made three requests which the court charged without modification. They were in substance that, if the defendant's negligence was the proximate cause of the accident the verdict must be for the plaintiff; that it was the duty of the defendant to have its trolley car under such control that it could stop it in time to avoid collision with other vehicles "lawfully in the street"; and that if the plaintiff's auto-van was "lawfully on the car track" before the trolley car approached, then the trolley car had no "lawful right" to run into it.

The defendant's contention is that the charge of the first request (as well as that of the second and third when read in connection with the first) eliminated from the case the issue of contributory negligence. We do not so interpret it, because the court very carefully and quite correctly charged the law on that issue.

With respect to the second and third requests, the defendant construes the expressions "vehicles lawfully in the street" and "lawfully on the car tracks" as merely fixing the status of the vehicles on the

highway,—whether there by right or there as trespassers,—thereby in effect withdrawing from the jury the true question whether or not either or both of the vehicles, though lawfully in the street, were negligently operated. We do not believe the words conveyed this meaning to the jury. The court had clearly indicated in the body of its charge the construction properly to be given to these expressions. There was in the case no question as to whether the trolley car or the auto-van was lawfully on the street in the sense of being there by lawful right. The sole question concerned the operation of the two vehicles at one or the other of the two disputed places in a manner required by the law of negligence. The jury has decided that question under what we conceive to be proper instructions.

Another assignment specifies error in the admission of evidence in proof of a charge made by a hospital for treatment of John McMahon, Jr., the infant son of the plaintiff, who sustained injuries in the accident. This proof consisted merely of the offer and admission of the hospital bill, and is excepted to on the ground that it was hearsay evidence.

There were two cases brought to recover damages for injuries occasioned by the collision; one by Stephen McMahon, the plaintiff below, for injuries to his auto-van; the other by John McMahon, Jr., for injuries to himself. The cases were consolidated and tried together; separate verdicts were rendered and separate judgments entered. It is evident that the evidence excepted to was given in the case of John McMahon, Jr.; not in the instant case of Stephen McMahon, who claimed and recovered damages only for injuries to his auto-van. The Railway Company did not take a writ of error to the judgment in favor of John McMahon, Jr. Obviously, a ruling in that case can not be assigned as error in this case.

We find no errors in the trial of the case before us and therefore direct that the judgment below be

Affirmed.

GOULD & CURRY MINING CO. v. DOUGLASS.

(Circuit Court of Appeals, Ninth Circuit. June 6, 1921. Rehearing Denied August 1, 1921.)

No. 3645.

Appeal and error ⊜262(2), 544(1)—Withdrawal of counterclaims cannot be reviewed, without exception or bill of exceptions.

The action of the trial court in withdrawing from the jury the counterclaim of defendant and that of plaintiff contained in plaintiff's reply cannot be reviewed, where the record does not show whether any evidence was received in support of the counterclaims, or that defendant made any objection to the court's refusal to submit the counterclaims, or took exception to any rulings thereon, since an assignment of error does not dispense with the necessity of exception, and in the absence of bill of exceptions the action of the court in limiting the questions submitted cannot be reviewed.

In Error to the District Court of the United States for the District of Nevada; E. S. Farrington, Judge.

Action by W. G. Douglass against the Gould & Curry Mining Company, in which the defendant sought to recover certain accrued rentals, and plaintiff by reply sought specific performance of an alleged contract for the sale of realty. From a judgment for plaintiff on his original cause of action, after the court withdrew the counterclaims from the jury, defendant brings error. Affirmed.

W. G. Deal, of San Francisco, Cal., for plaintiff in error.

Chas. A. Cantwell and George Springmeyer, both of Reno, Nev., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Writ of error is to review a judgment in favor of Douglass against the Gould & Curry Mining Company. Douglass sued for money due for services rendered under an express contract. The mining company denied the indebtedness, and pleaded destruction by plaintiff of certain property belonging to the mining company, and by way of counterclaim alleged damages due to a fire alleged to have occurred through the negligence of Douglass. Counterclaim was also made for the value of certain lumber removed by Douglass, and by cross-complaint the mining company alleged that Douglass owed certain money for rentals accruing. Douglass replied, and, after alleging ownership of the premises alleged to have been rented under a contract for sale, prayed for specific performance of the contract of sale. There was a verdict for a certain sum in favor of Douglass.

There is no bill of exceptions in the record, nor are the instructions included in the transcript, nor does it appear that there were any exceptions taken to any ruling or order of the court made during the progress of the trial. There appears in the transcript an "extract from transcript of testimony," which only shows that the court asked if there were any "further exceptions or requests for any further instructions." to which counsel for Douglass replied that the plaintiff was satisfied with the instructions. Thereupon the court said:

"I will say, gentlemen, in withdrawing the two counterclaims, the counterclaim of the plaintiff for specific performance and the defendant's counterclaim for the $100 per day rent after the notice was given, if you wish, they may be reserved for further consideration."

To which counsel for the plaintiff below replied:

"I should like to have your honor reserve that now."

The court said:

"I will reserve those matters for further consideration if you wish, but I don't think either is a proper counterclaim in this case."

No request for decision upon any question, or for submission of any issues or instructions, appears to have been made by counsel for the mining company, yet it has assigned as error the action of the court in withdrawing the counterclaim of Douglass and the counterclaim of the mining company from the jury, and refusing to submit the questions and issues raised by the plaintiff's counterclaim and the defendant's counterclaim to the jury. There is nothing to

show whether any evidence was offered or received in support of the issues referred to as withdrawn by the court; nor, as heretofore indicated, does it appear that counsel for the mining company made any objection at all to the action of the court or to the refusal to give its opinion or took any exception to any rulings made. In Kesterson v. La Moine Lbr. & T. Co., 193 Fed. 355, 113 C. C. A. 279, where the court instructed the jury that a certain issue was out of the case and need not be considered further, this court said:

"To the instructions so given no exception was reserved or taken by the defendants, nor did they request any instruction upon that point. We are therefore precluded from considering whether the contract in suit was so concerned with interstate commerce as to free it from the operation of the Oregon statute." Allis v. United States, 155 U. S. 117, 15 Sup. Ct. 36, 39 L. Ed. 91.

It is fundamental that an assignment of error does not dispense with the necessity of exception. Evidently issues were submitted to the jury, and in the absence of a bill of exceptions the apparent action of the court in limiting the questions submitted will not be reviewed by this court.

Judgment affirmed.

BIDERMAN v. COOPER.

(Circuit Court of Appeals, Third Circuit. June 18, 1921.)

No. 2629.

1. **Bankruptcy ⟸229—Trustee may proceed against bankrupt for contempt for violation of order of court.**
   Bankruptcy Act, § 41b (Comp. St. § 9625), prescribing procedure for contempts before a referee, does not apply to a proceeding in contempt against a bankrupt for violation of an order of the court, which may be prosecuted in usual form by his trustee.
2. **Bankruptcy ⟸136(2)—Proceeding against bankrupt held for civil contempt.**
   A proceeding against a bankrupt for contempt, for violation of an order of the court enjoining him from interfering with the assets of the estate, instituted by petition of his trustee, *held* for a civil contempt, and not to warrant the imposition of a prison sentence.

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

Proceeding for contempt by William N. Cooper, trustee in bankruptcy of Louis Biderman, against Louis Biderman. Judgment against respondent, who brings error. Reversed.

Henry H. Wittstein, of Trenton, N. J., for plaintiff in error.

Edwin C. Long, of Trenton, N. J., for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

WOOLLEY, Circuit Judge. After an order restraining the bankrupt from interfering with the assets of the estate, the bankrupt secretly went to a safe deposit box (which he had rented under a ficti-

tious name) and extracted, or otherwise handled, certain of its contents. On discovering this, the trustee filed a petition with the court stating the facts and praying for an order upon the bankrupt to show cause why an attachment for contempt should not issue against him, and asking for such other relief as might be necessary. At the hearing, the court found the bankrupt guilty of contempt—mainly on his own testimony—and sentenced him to prison. Thereupon, the bankrupt sued out this writ of error, raising several questions, only two of which merit consideration.

[1] The first is, whether under Section 41b of the Bankruptcy Act (30 Stat. 544 [Comp. St. § 9625]) the contempt proceeding was defective because it was not instituted upon a certificate of the referee. Section 41a commands obedience to the orders of a referee and forbids misbehavior of parties when before him. Section 41b prescribes the procedure in contempt for violations of the provisions of Section 41a. The thing which the bankrupt did in the instant case was not "any of the things forbidden in this section." It was an alleged violation of an order of the court for which the bankrupt was answerable directly to the court in a proceeding for contempt, whether civil or criminal, there begun otherwise than on a referee's certificate.

[2] The next question is, whether the proceeding was for civil contempt or for criminal contempt; and whether, if for the former, the court erred in imposing a sentence applicable to the latter.

There was no question about the facts, and in the mind of the court there seems to have been little question of the bankrupt's guilt of a contumacious act violative of the court's injunction. The only question before us therefore is the one we have just stated.

We are of opinion that the principles announced by the Supreme Court in Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, extended to proceedings in bankruptcy by the Circuit Court of Appeals for the Second Circuit in Re Kahn, 204 Fed. 581, 123 C. C. A. 107, rule this case, and that, in consequence, the sentence was unlawful.

Judged by its title, the manner in which it was instituted, the character of the relief sought, and the purpose for which the punishment was imposed, the proceeding was for civil contempt; the penalty for criminal contempt. The sentence of imprisonment was not remedial in any sense. Its purpose was not to coerce the performance of an order of the court, but to punish for past disobedience. The punishment was not compensatory to the plaintiff but, being punitive, was imposed to vindicate the court's authority. Therefore, under the cases cited, and particularly under In re Kahn, supra, where the procedural facts were singularly similar to those in this case, we are of opinion that the court fell into error, and that, in consequence, the order imposing the sentence complained of should be annulled, but without prejudice, in any degree, to the institution of appropriate proceedings in the District Court on the original grounds of complaint.

LUTZ v. DOUGLASS et al.

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

No. 176.

Shipping ⇐37—Oral contract to charter not enforced, where libelant introduced variance into form agreed on.

An oral agreement to charter a vessel will not be enforced, where libelant introduced into the form of the charter agreed on a new provision not covered by the oral agreement, and did not waive such provision, but sought to enforce the oral contract as if it contained that provision.

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

Libel by Edward Lutz against Edwin Allen Douglass and others. Decree for respondents (248 Fed. 366), and libelant appeals. Affirmed.

MacFarland, Taylor & Costello, of New York City (Willard U. Taylor and Alfred H. Strickland, both of New York City, of counsel), for appellant.

Burlingham, Veeder, Masten & Fearey, of New York City (Roscoe H. Hupper and Frederick Pennell, both of New York City, of counsel), for appellees.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. This is a libel by Lutz to recover damages for breach by the owners of the schooner Rebecca R. Douglass of an agreement to charter. The master of the schooner orally agreed to charter her to the libelant for three successive voyages to carry lumber from a safe port between Tampa and Gulfport and a safe port in Porto Rico or San Domingo, or on the north side of Cuba, not east of Cay Francis. The principal terms were agreed upon, and it was further agreed that a charter should be executed upon the form used by John A. Merritt & Co., shipbrokers. This form, not being at hand, was subsequently signed by the libelant and sent to the master for signature. It contained a printed clause, (1) "Vessel to be free of all foreign port charges, * * *" and (2) a typewritten clause as follows: "If vessel discharges at Cuba, charges for account of vessel as customary."

Nothing had been said about foreign port charges in the oral negotiations, and it is quite clear that the clause inserted in typewriting was a contradiction of the Merritt form of charter. The master refused to sign the charter for this reason. Judge Hazel dismissed the libel.

The libelant sues upon the oral agreement as if it contained the typewritten clause which the master objected to. It is quite true that the oral contract itself would have been binding, had the libelant waived the new provision. But he did not, and has sued upon it as containing this condition, which he had no right to insert. He relies upon our decision in West India S. S. Co. v. Chicago House Wrecking Co., 249 Fed. 338, 161 C. C. A. 346. In that case the oral contract was en-

forced because the respondent had introduced a variant into the written form. In this case it will not be enforced because the libelant introduced a variant into the written form. These conclusions are entirely consistent.

It is true that the master thought as matter of law that an oral charter was not binding; but this does not deprive the owners of their defense that the libelant was insisting upon a provision which contradicted the form of charter which he agreed to execute.

The decree is affirmed.

McKEE GLASS CO. v. LIBBEY GLASS CO.

LIBBEY GLASS CO. v. McKEE GLASS CO.

(Circuit Court of Appeals, Third Circuit. June 20, 1921.)

Nos. 2656, 2657.

Patents ⇐324(6)—Decree on accounting for infringement modified and affirmed.

Final decree on accounting for infringement of patent for method of fire-polishing blanks for cut glassware modified and affirmed.

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

Suit in equity by the Libbey Glass Company against the McKee Glass Company. Defendant appeals from the final decree, and complainant cross-appeals. Modified and affirmed.

See, also, 216 Fed. 172.

Joseph C. Fraley, of Philadelphia, Pa., and George R. Wallace and Robert D. Totten, both of Pittsburgh, Pa., for McKee Glass Co.

Otto Raymond Barnett, of Chicago, Ill., and Marshall A. Christy, of Pittsburgh, Pa., for Libbey Glass Co.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

WOOLLEY, Circuit Judge. These appeals are the latest phase of litigation on the Owens patent No. 628,027 for a method of fire-polishing blanks preliminary to their manufacture into cut glassware. This litigation dates back to 1906. Its history may be found in the following reports: Blair et al. v. Jeannette-McKee Glass Works (C. C.) 161 Fed. 355; Fry Glass Co. v. McKee Glass Co., 239 Pa. 34, 86 Atl. 644; Libbey Glass Co. v. McKee Glass Co. (D. C.) 216 Fed. 172; McKee Glass Co. v. Libbey Glass Co., 220 Fed. 672, 136 C. C. A. 314; McKee Glass Co. et al. v. H. C. Fry Glass Co., 248 Fed. 125, 160 C. C. A. 265.

The decree from which these appeals were taken was entered by the District Court on exceptions to a master's report covering the whole range of final accounting for the infringement found. These appeals, therefore, bring here the whole accounting, requiring a review of every

disputed item. To the subjects matter of this accounting we have given careful, and, indeed, very laborious consideration. As the result of our labor will be of interest to no one except the litigants, we shall tabulate our conclusions without writing what would necessarily be an opinion of great length. Taking the appeals first separately and then together, we direct that the court below reform its decree in harmony with the following figures: [Omitted from the report on request of the court.]

Items of interest, appearing in our illustrative table, are not to be computed to a new date and included in an aggregate amount newly calculated. It is intended that the reformed decree shall be for the several amounts, separately named in as many paragraphs as in the decree appealed from, each amount to carry its own interest from the date specified.

When thus modified in harmony with the figures in these tables we affirm the decree below with costs of the appeals to be borne by the appellants respectively.

H. N. HARTWELL & SONS, Inc., v. NEPTUNE LINE, Inc.

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

No. 179.

Shipping ⟸141(3)—Evidence held not to show sinking of vessel was due to unusual weather.

Evidence that a barge of coal sank while the tug in charge was deviating to a port of refuge, because of a predicted storm, but that at the time the wind in the vicinity was blowing not to exceed 22 miles an hour, and that the master and crew of the barge were performing their routine duties without any indication of apprehension until shortly before it sank, *held* not to show the sinking was due to unusual weather, so as to be within the exception in the bill of lading of dangers of the sea.

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

Libel by H. N. Hartwell & Sons, Incorporated, against the Neptune Line, Incorporated, to recover the value of a cargo of coal. Decree for libelant, and respondent appeals. Affirmed.

Foley & Martin, of New York City (William J. Martin and George V. A. McCloskey, both of New York City, of counsel), for appellant.

Harrington, Bigham & Englar, of New York City (D. Roger Englar and R. H. Loughran, both of New York City, of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. This libel was filed to recover the value of a cargo of coal on the barge Western Belle, which sank and became a total loss while in tow of the tug Luzon on a voyage from Sewall's Point, Va., to Providence, R. I. The only exception in the bill of lad-

ing was the dangers of the sea, and the sole defense set up in the answer was that the barge sank in consequence of a violent storm. The District Judge entered a decree for the libelant, without an opinion, either oral or written.

The barge certainly did not sink because of any unusual weather. It is true that a northeast storm was predicted on the day the barge sank, and that the tug for that reason was deviating to the Delaware Breakwater as a port of refuge. But between Saturday, September 22, at 11 p. m., and 7:30 p. m. of September 23, when the barge sank, the wind as recorded at Delaware Breakwater, which was about 22 miles north and west of the place of sinking, and at Cape May, further to the north, and at Cape Henry, to the south, indicated only moderate to strong breezes by the Beaufort scale. The master and crew performed their routine duties without any indication of apprehension until immediately before the barge sank, and at no time gave any signal of distress to the tug.

The decree is affirmed.

ARONSTAM v. JAMES et al.

Petition of JAMES et al.

(Circuit Court of Appeals, Second Circuit. April 27, 1921.)

War ⇐12—Foreign petitioners for stay held not to have interest in fund, entitling them to intervene.

In a suit under Trading with the Enemy Act, § 9 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½e), where the fund was in the treasury of the United States awaiting determination of the suit, foreign petitioners in intervention had no lien upon those funds, under Code Civ. Proc. N. Y. § 1405, giving a lien on chattels subject to levy by execution from the time the execution is delivered to the officer, and have no interest in the fund, entitling them to intervene under equity rule 37 (33 Sup. Ct. xxviii), or enabling them as citizens of a foreign court to sue elsewhere than in the District of Columbia.

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

Suit by Charles S. Aronstam against Elizabeth Pratt de Gasquet James and others. On motion by George Pratt de Gasquet James and another, who had petitioned for leave to intervene, for a stay of the order of the court below. Stay of order denied.

See, also, 273 Fed. 545.

J. Noble Hayes, of New York City, for the motion.

Pitkin & Rosensohn, of New York City, for plaintiff.

Frederick Geller, of New York City, for defendant James.

Leroy W. Ross, U. S. Atty., of Brooklyn, N. Y., for defendants Garvan and Burke.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. The affidavits make it clear that the petitioners did finally emerge out of this maelstrom of contradictions with their claims

all passed upon. We think that the judgment in favor of Aronstam was obtained fairly, and that neither he nor counsel for Mrs. James deserve criticism in relation to it.

Aronstam's suit is under section 9 of the Trading with the Enemy Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½e), and the funds of the respondent Mrs. James are in the treasury of the United States awaiting the determination of it. The petitioners had no lien upon these funds under section 1405 of the Code of Civil Procedure of New York, because they are not chattels nor subject to levy by execution.

The District Court is not distributing a fund in which the petitioners have any interest entitling them to intervene under equity rule 37 (33 Sup. Ct. xxviii), or enabling them as citizens of a foreign country to sue elsewhere than in the District of Columbia.

Entertaining these views, we think there is no merit in the motion for a stay, which is accordingly denied.

EHRET MAGNESIA MFG. CO. v. LEDERER, Internal Revenue Collector.

(District Court, E. D. Pennsylvania. May 23, 1921.)

No. 7044.

Internal revenue ⇐7—Excess profits tax statute construed.

Act Oct. 3, 1917, § 201 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 6336⅜b), providing for a graduated excess profits tax equal to "twenty per centum of the amount of the net income in excess of the deduction (determined as hereinafter provided) and not in excess of fifteen per centum of the invested capital for the taxable year; twenty-five per centum of the amount of the net income in excess of fifteen per centum and not in excess of twenty per centum of such capital," etc., construed, and *held* to require the deduction to be taken, not from the entire net income, before the percentages are computed, but wholly from the first graduated percentage, taxable at 20 per cent.

At Law. Action by the Ehret Magnesia Manufacturing Company against Ephraim Lederer, Collector of Internal Revenue. Trial by the court. Judgment for defendant.

M. Hampton Todd, of Philadelphia, Pa., for plaintiff.

T. Henry Walnut, Sp. Asst. U. S. Atty., and Chas. D. McAvoy, U. S. Atty., both of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The plaintiff brought suit to recover the sum of $23,889.84, the amount of taxes alleged to have been unlawfully assessed and collected by the defendant. The taxes were paid under protest, and petition for a refund was rejected by the Commissioner of Internal Revenue. The facts are not in dispute. The tax was assessed upon excess profits under the provisions of section 201 of title 2 of the Act of October 3, 1917 (40 Stat. 303 [Comp. St. 1918,

Comp. St. Ann. Supp. 1919, § 6336¾b]). The applicable provisions of the act are as follows:

"Title II. War Excess Profits Tax."

"*Definitions.* The term 'taxable year' means the twelve months ending December thirty-first."

"The term 'pre-war period' means the calendar years nineteen hundred and eleven, nineteen hundred and twelve, and nineteen hundred and thirteen." Section 200 (section 6336¾a).

"Sec. 201. That in addition to the taxes under existing law and under this act there shall be levied, assessed, collected, and paid for each taxable year upon the income of every corporation, partnership, or individual, a tax (hereinafter in this title referred to as the tax) equal to the following percentages of the net income:

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

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

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

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

"Sixty per centum of the amount of the net income in excess of thirty-three per centum of such capital." Section 6336¾b.

"Sec. 203: That for the purposes of this title the deduction shall be as follows, except as otherwise in this title provided—

"(a) In the case of a domestic corporation, the sum of (1) an amount equal to the same percentage of the invested capital for the taxable year which the average amount of the annual net income of the trade or business during the prewar period was of the invested capital for the prewar period (but not less than seven or more than nine per centum of the invested capital for the taxable year), and (2) $3,000." Section 6336¾d.

There is no dispute that the net income of the plaintiff for the year ending Decmber 31, 1917, was $422,445.58. The invested capital for the taxable year was $672,631.28. The deduction to which the plaintiff was entitled under section 201 was, as ascertained by section 203 (a), 9 per centum of the invested capital representing the highest average profit during the pre-war period allowed by the act, and amounted to $60,536.82, and with the specific deduction of $3,000 to $63,536.82.

A statement showing the items upon which the tax is to be computed is therefore as follows:

Invested capital for the year		$672,631.28
Net income for taxable year		422,445.58
Average profit pre-war period 9 per cent	$60.536.82	
Specific exemption	3,000.00	63,536.82
Net income for taxable year as above		$422,445.58
Deduct total exemption as above		63,536.82
Taxable net income		$358,908.76

The construction placed by the Commissioner of Internal Revenue upon the language of section 201 is that "the amount of the net income in excess of the deduction" means that the first of the graduated percentages of invested capital, namely, 15 per cent., is first to be ascer-

tained, and the deduction is to be made from the amount thereof, and, if the deduction is not in excess of 15 per cent. of the invested capital, the difference between the amount of the deduction and the 15 per cent. of invested capital is to be taxed at 20 per cent.

The construction the plaintiff contends should be put upon the language is that the deduction is to be made from the whole of the net income, and out of the balance of net income remaining an amount, not in excess of 15 per cent. of the invested capital, is to be taxed at 20 per cent.

As the defendant computes the tax, the figures and result are as follows:

Not Over	Taxed Income.	Exemption Deducted.	Balance.	Rate.	Tax.
15% of invested capital	$100,894.69	$63,536.82	$37,357.87	20%	7,471.57
20% " " "	33,631.56	0.00	33,631.56	25%	8,407.89
25% " " "	33,631.56	0.00	33,631.56	35%	11,771.04
33% " " "	53,810.50	0.00	53,810.50	45%	24,214.73
Balance	200,477.27	0.00	200,477.27	60%	120,286.36
	$422,445.58	$63,536.82	$358,908.76		172,151.59

As the plaintiff computes it, the figures and result are as follows:

Not Over	Taxed Income.	Rate.	Tax.
15% of invest. cap.	$100,894.69	20%	$20,178.94
20% " " "	33,631.56	25%	8,407.89
25% " " "	33,631.56	35%	11,771.04
33% " " "	53,810.50	45%	24,214.73
Balance	136,940.45	60%	82,164.27
	$358,908.76		$146,736.87

A comparison of the two methods shows that, by making the deduction from the first item of 15 per cent. of invested capital, the amount taxed at the 20 per cent. rate is diminished by the amount of the deduction, and the amount taxed at the 60 per cent. rate is increased by the amount of the deduction, with the result that the plaintiff has been required to pay the difference between 60 per cent. and 20 per cent., or 40 per cent., tax upon $63,536.82, the amount of the deduction, or $25,414.72, less the normal tax of 2 per cent. and 4 per cent., amounting to $1,534.88, leaving $23,889.84, and that amount the plaintiff claims was unlawfully included in the assessment and unlawfully collected.

The language of section 201 is at first glance somewhat confusing. Plausible arguments have been presented by able counsel on both sides, setting forth their opposing contentions as to the meaning of the section. Does its language mean that the first of the graduated percentages of tax is to be 20 per cent. upon an amount, not in excess of 15 per cent. of the invested capital, out of what remains of the net income after making the deduction? Or does it mean it is to be 20 per cent. of the difference between the deduction and 15 per cent. of the invested capital?

It will be noted that, while the paragraph providing for the 20 per cent. tax places it upon the amount of the net income in excess of the

deduction, and not in excess of 15 per cent. of the invested capital, the remaining clauses contain no provision for the deduction. The Revenue Office supplies that omission by providing in its regulations that, if the 15 per cent. of the invested capital is exceeded by the deduction, the excess of deduction is applied to the next paragraph, and so on through the succeeding provisions for graduated tax. So that, in an illustration set out in the regulations, no tax is charged at all under any of the percentages, except the highest and final rate of 60 per cent. of the net income in excess of 33 per cent. of the capital. That method is attacked by the plaintiff upon the ground that such construction prevents uniformity and equality in the application of the tax, and is therefore in violation of the principles of law governing taxation.

It is asserted that the language in controversy is ambiguous. It is not ambiguous in the sense that it cannot be determined from its language that a tax is to be laid upon incomes in excess of normal prewar profits, and that it is to be based upon certain graduated percentages set out in the act. If it is ambiguous, its ambiguity consists in the fact that it does not make it clear by what method the deduction is to be allowed, whether the amount of the exemption is to be taken first from the total net income, or only from that part of it which does not exceed 15 per cent. of the invested capital.

A large part of the difficulty in construing the 20 per cent. paragraph arises from the fact that the amounts involved are expressed in descriptive terms and not in figures. If the act taxed the amount of the net income in excess of $50,000, and not in excess of $100,000, we would have no difficulty in understanding that the amount to be taxed was the difference between $100,000 and $50,000. We have, however, undisputed in the case, the amount of the net income, the amount of the deduction, and, having the invested capital for the year, we have 15 per cent. of that.

Stating the paragraph with the figures representing the deduction, and those representing 15 per cent. of the invested capital, instead of their equivalent terms, we have 20 per centum of the amount of the net income in excess of $63,536.82, and not in excess of $100,894.69. If the paragraph is so stated, it plainly means that the amount to be taxed at 20 per cent. is the difference between $100,894.69 and $63,536.82. In the next paragraph, substituting in the same manner, we have 25 per centum of the amount of the net income in excess of $100,894.69, and not in excess of $134,526.26.

As the 20 per cent. paragraph is the only one in which the deduction is stated, and in the succeeding paragraph the tax is clearly placed upon the differences in the percentages of invested capital, it is apparent that it was the intention of Congress, by the repeated use of the words "in excess of" and "not in excess of," to have the same meaning apply to those words where used in the first paragraph as where used in the subsequent paragraphs, thus imposing no tax upon the net income up to the amount of the deduction, but imposing the lowest rate of tax upon the difference between the deduction and 15 per cent. of the invested capital, imposing the next tax upon the difference between 15 and 20 per cent. of the invested capital, and so on,

until in the last percentage paragraph the highest rate of 60 per cent. applies to all net income in excess of 33 per cent. of invested capital. If there is any ambiguity in the act, it may affect cases where the deduction exceeds 15 per cent. of the invested capital. In this case that situation is not present. So that the method adopted by the Commissioner of Internal Revenue in such case, in allowing the residue of the deduction not absorbed under the 20 per cent. rate against the next graduated rate, and so on until the entire deduction is absorbed, is not before the court, unless the plaintiff is obliged to pay taxes through lack of equality and uniformity of application of the law which other taxpayers escape.

If the question were presented, it would be open to the contention that, inasmuch as the deduction is only provided for in the clause concerning the 20 per cent. rate, the method adopted by the Revenue Office is a liberal construction in favor of the taxpayer who under a strict construction in favor of the government might be held entitled only to a deduction which did not exceed 15 per centum of invested capital. The tax is imposed, however, not upon stated amounts of income, but by graduated percentage rates upon graduated percentages of income. The tax is laid upon the income in excess of what Congress considered represented a reasonable, normal profit made during the pre-war period, and between minimum and maximum percentages is applied to the invested capital during the taxable year. Under the designated percentages, uniform rules apply to all corporations alike in similar circumstances upon their net income, if in excess of the deduction, whether the invested capital be great or small, and whether the profits be great or small.

In allowing the deduction, Congress has the power to apply it so it will reduce the tax at any of the graduated rates. By reducing the amount of tax to be paid at the lower rates, it increases the amount to be paid at the higher rates, so that the higher rates apply more heavily in proportion to the percentage of profits in excess of the pre-war basis; and that is what Congress evidently intended. I fail to see that in making this distinction Congress has transcended its powers, or that the tax lacks in equality and uniformity among those on whom the percentage taxes, based on percentages of income, and percentages of invested capital, are imposed. Nor am I convinced that the plaintiff suffers under any inequality of burden through having its tax computed under the same rules which apply to all other corporations in the same circumstances.

Judgment may be entered for the defendant, with costs.

Ex parte SICHOFSKY.

(District Court, S. D. California, S. D. May 31, 1921.)

No. 2991.

1. War ⟸33—War-time statute not inoperative until official declaration of peace.
   Act May 22, 1918, § 1 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 7628e), and the executive order issued thereunder, making it unlawful, "when the United States is at war," for an alien to enter the United States without a passport as therein required, *held* not to have become inoperative because of the ending of actual war and prior to an official declaration of peace.

2. War ⟸33—Saving clause in resolution terminating war-time acts saves prosecutions under presidential regulations.
   The saving clause in Joint Resolution of March 3, 1921, terminating war-time acts on that date, that it shall not affect prosecutions for previous violations, applies to violations of executive orders respecting passports, etc., made under Act May 22, 1918, c. 81 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 7628e–7628h), which by express terms of the act are made criminal offenses.

3. Criminal law ⟸1001, 1216(6)—Court does not lose jurisdiction by stay of execution of sentence, but time of stay is counted as time of imprisonment.
   That a federal court, after sentencing a defendant to imprisonment and issuing a commitment to the marshal, stayed execution of the sentence to permit the prisoner to be tried in a state court for an offense against a state law, he remaining meanwhile in custody of the marshal, did not deprive the court of jurisdiction over him, though it entitled him to have the time of the stay counted as part of his term of imprisonment.

On petition of Abram Sichofsky for writ of habeas corpus. Denied.

Cooper, Collings & Shreve, of Los Angeles, Cal., for petitioner.

Robert O'Connor, U. S. Atty., and Thos. F. Green, Asst. U. S. Atty., both of Los Angeles, Cal., for the United States.

BLEDSOE, District Judge. The contentions advanced by petitioner herein as a reason why he should be discharged from his present custody, maintained by the United States marshal in virtue of a commitment heretofore issued out of this court, following his plea of guilty as for a violation of law of the United States, may be briefly stated and determined:

The indictment to which petitioner pleaded guilty charged him, a citizen of Poland, with having, on or about the 23d day of August, 1920, entered and attempted to enter the United States from the republic of Mexico, "without then and there bearing and having in his possession a passport duly viséed in accordance with the terms of section 31 of an executive order dated August 8, 1918, issued pursuant to an act of Congress approved May 22, 1918," etc. (40 Stat. 559 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 7628e–7628h]). There is no specific averment upon the subject, but in the absence thereof, and in view of the fact that he was tried and found guilty before the superior

court of the county of Los Angeles of the crime of grand larceny, committed in the county of Los Angeles "on or about the 18th day of November, 1920," it must be assumed that he did in fact enter the United States, and that the crime committed by him was not merely that of "an attempt to enter."

After this court, on March 22, 1921, had pronounced judgment upon petitioner, by sentencing him to three years' imprisonment in the federal penitentiary, and to pay a fine in the sum of $1,500, upon application made by the district attorney of Los Angeles county, because of an indictment pending in the superior court of that county, an order was made by this court on March 29, 1921, staying the execution of the sentence adjudged therein for the period of 15 days; and it was further ordered that "the United States marshal take the above-named defendant to the Hall of Justice, to the courtroom thereof, in the city of Los Angeles, county of Los Angeles, state of California, at such times as his presence in the proceedings there pending against him under said indictment in the superior court of the state of California in and for said county of Los Angeles shall be required." It was further required in said order that the marshal "keep the said defendant in his custody for the purposes herein stated." Pursuant to such order, and presumably in complete accordance therewith, the petitioner was taken to the superior court of Los Angeles county, there suffered trial, was regularly convicted and sentenced, etc. Since the first order staying execution, pending the hearing and determination of this writ, etc., upon the application or with the consent of petitioner, further stays have been granted, and he is now in consequence thereof still in the custody of the United States marshal in the county jail in Los Angeles.

The first claim advanced is that there is no law justifying the indictment or subsequent proceedings had against petitioner in this court. This is based upon three propositions: First, that the Act of May 22, 1918, hereinabove referred to, was by its terms limited to the period "when the United States is at war," and that in all substantial aspects of the case, the war having ceased and determined, the statute became inoperative and ineffective for any purpose before petitioner came into this country. The second contention is that the statute was repealed by implication in virtue of the Act of November 10, 1919 (41 Stat. 353), purporting to enact a new law upon the identical subject-matter, and which new law, by its own terms, was to continue in force and effect only "until and including the 4th day of March, 1921," a point of time anterior to the plea of guilty and pronouncement of judgment on petitioner herein. The third contention is that the act was expressly repealed by the joint resolution of Congress, adopted March 3, 1921 (section $3115^{14}/_{45}$f, Comp. Stats.), repealing certain designated "war-time acts."

[1] I think it clear that this court may not now say that the war has ended, even within the meaning of that phrase as used in the statute of May 22, 1918. It is common knowledge, of course, that no treaty of peace has been ratified by this government, that no repeal of the declaration of war has been had, and that, subject only to the terms

of an armistice, American troops are still on foreign soil. In such event, as I understand the law, there is no formal state of peace. United States v. Anderson, 9 Wall. 56, 19 L. Ed. 615; Hijo v. United States, 194 U. S. 315, 24 Sup. Ct. 727, 48 L. Ed. 994. Neither may the court say, in my judgment, that substantially and operatively we are at peace, and that therefore the validity possessed by the statute during war-time has failed, and that the reason for its original enactment has ceased. Conceding, under the decision of Hamilton v. Kentucky Distilleries Co., 251 U. S. 146, 40 Sup. Ct. 106, 64 L. Ed. 194, that the court might hold a statute inoperative on the theory that, the reason for the statute having ceased, the statute itself would cease, nevertheless I cannot accept the minor premise of the syllogism necessary to be entertained. The reason has not yet ceased. We have as yet no peace with Germany. Our troops are yet upon her soil. The court may not say, with the completeness and satisfaction that seems to be required, that there is no longer necessity for a watchfulness of the entry of immigrants across our border. Until the court may say that, it must hold that the wisdom of Congress, made manifest by the statute, must control and limit the rule of individual conduct. We do not have here the "clear case" which must exist before the court may thus hold a law of the United States inoperative. Hamilton v. Kentucky Distilleries Co., supra.

[2] The joint resolution repealing the war-time acts, hereinabove referred to, itself constitutes a determination on the part of Congress that, for purposes of construction of relevant statutes, the war "terminated on the date" when that resolution became "effective," to wit, March 3, 1921. The Act of November 10, 1919, by its own terms was to become effective only upon the date when the Act of May 22, 1918, "shall cease to be operative." The last-mentioned act has ceased to be operative, not in virtue of a return to peace, but only in virtue of the provisions of the aforesaid Joint Resolution of March 3, 1921. Therefore the Act of November 10, 1919, had not yet become effective when petitioner entered this country. His action, being in violation of the Act of May 22, 1918, may even now be punished in virtue of the saving clause affixed to the joint resolution repealing that act.

This joint resolution, enacted in the last days of the Sixty-Sixth Congress, repealing certain war-time acts, carried with it a saving clause to the effect that nothing therein contained should be held "to exempt from prosecution or to relieve from punishment" any offense theretofore committed in violation of the acts therein repealed or referred to, etc. In view of the express and positive provisions of section 13 of the Revised Statutes (Comp. St. § 14), this saving clause was hardly necessary. U. S. v. Reisinger, 128 U. S. 398, 9 Sup. Ct. 99, 32 L. Ed. 480. Its insertion, however, makes it clear and indubitable that Congress was intending to make punishment possible for those who had violated the law previous to its repeal.

That it should be given effect in this wise is too plain for argument or extended discussion. Counsel make the point, however, that though, by the terms of the saving clause, the act itself was kept in force and effect, yet nothing in the saving clause served to keep in force and ef-

fect the proclamations or regulations of the President issued under and pursuant to the act, and that in consequence, the offense charged herein being in violation of a regulation or proclamation issued by the President in conformity to the requirements of the act, the saving clause did not operate as a preventive of total and unqualified repeal. There is more of form in this contention, however, than of substance. The Act of May 22, 1918, provides definitely and specifically:

"That when the United States is at war, if the President shall find that the public safety requires that restrictions and prohibitions in addition to those provided otherwise than by this act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful—

"(a) For any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe."

It is obvious, then, that Congress was intending to declare that in virtue of the exigencies brought about by the war, as long as the President deemed it necessary and should make proclamation thereof, it should be unlawful to enter the country, except in virtue of the regulations to be established by him. No entry at all could be lawful, as long as the condition of danger attached, to be determined by the President, except in compliance with his instructions and regulations. This was followed (section 3) by the provision that any person who should willfully "violate any of the provisions of this act, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder," should upon conviction be punished, etc.

Petitioner's argument, in effect, with respect to pending prosecutions, is that, though there was no repeal of the law, because of the saving clause, yet there was a repeal of the presidential proclamations and regulations, because they were not specifically mentioned in and covered by the saving clause. The law possessed no efficacy, however, except as the proclamations or regulations duly promulgated by the President gave it efficacy, and to hold, with respect to prosecutions already begun or violations already had, that the law remained, but that the proclamations and regulations were repealed, would be to retain the shadow and disregard the substance, to keep the incident and destroy the principal. Such cannot be the construction to be accorded to the action taken. The violation charged herein, and for which petitioner must stand for judgment, was not of a proclamation of the President or regulations promulgated by him, but a violation of a law which said that no entry might be had, save under enumerated circumstances. In this wise it is clear that any saving clause which applied to the law itself would suffice to support and justify any prosecution had and maintained under the law.

I conclude, then, that ample authority existed for the rendering of the indictment herein, and that the court had jurisdiction, in virtue of petitioner's plea of guilty, to pronounce the judgment under which he is held.

[3] It is asserted, however, that the court lost all of its jurisdiction thus acquired in virtue of the order made permitting the petitioner, all

the while in custody of the United States marshal, to be tried in the state court as for the crime of grand larceny. It may be true, yet this court, having no concern with the matter, does not express any opinion thereon, that in view of the jurisdiction of this court attaching to the person of the defendant in the behalf and respects hereinabove enumerated and referred to, the superior court of the state of California could and did acquire no jurisdiction to try him, at the time it did, as for an asserted violation of the law of the state of California. If that be so, and if that court lacked jurisdiction, it will be so determined in appropriate tribunals. I discover nothing, however, based either upon reason or authority, from which it may now be adjudged that the action of this court, in temporarily staying the execution of the judgment of this court, served to divest this court of jurisdiction to require petitioner to stand for judgment as for the admitted violation of the federal law. It would be a strange and bold assertion, in my judgment, for this court, possessing the amplest jurisdiction as above referred to, to hold that it had completely divested itself of all jurisdiction in the premises merely by an order staying execution. I see nothing in the decision relied upon by petitioner (In re Jennings [C. C.] 118 Fed. 479) requiring such conclusion.

It is obvious, of course, that as against the protest of the petitioner, which protest must be considered as having been impliedly made, the court could not, by granting a stay of execution, add to the length of time that he should be deprived of his liberty. In that behalf, I am persuaded that petitioner is entitled to have subtracted from the total period of incarceration adjudged against him, the length of time elapsed since the rendering of the judgment herein. In re Jennings, supra.

The order of the court therefore will be that the writ of habeas corpus herein is discharged, and the prisoner is remanded to the custody of the United States marshal, to abide the judgment of this court heretofore delivered herein. The commitment eventuating from that judgment, being a process emanating from this very court, and being still within the control of this court, should now be recalled and amended to conform to the opinion and judgment rendered necessary herein. An order will be entered, therefore, recalling the commitment and decreeing its amendment, to the effect that the term of imprisonment heretofore adjudged upon petitioner will begin to run as from the date of pronouncement of the aforementioned judgment herein.

LOWRY et al. v. HERT.

(District Court, W. D. Kentucky. May 11, 1921.)

No. 88.

1. Removal of causes ⇐19(1)—Cause removable, if one of several causes of action stated arises under laws of United States.

If any one of several causes of action stated in plaintiffs' pleading in a state court arises under the Constitution or laws of the United States, the cause is removable, though joined with other causes not so arising.

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

2. Removal of causes ⟸19(6)—Suit held removable as arising under patent laws.

A suit by the heirs at law of a deceased patentee to set aside a conveyance of the patents by his administrator on the grounds of want of power in the administrator and fraud of defendant, with a prayer that plaintiffs be declared the owners of the patents and recover the value of their use while so withheld, involves title to the patents and rights thereunder, and is removable from a state court as one arising under the patent laws.

In Equity. Suit by Zetta McG. Lowry and others against Alvin T. Hert. On motion to remand to state court. Denied.

J. W. Harlan, of Danville, Ky. (John W. Becker, of Indianapolis, Ind., and George E. Stone, of Danville, Ky., of counsel), for plaintiffs.

Charles G. Middleton, of Louisville, Ky. (Humphrey, Crawford & Middleton, of Louisville, Ky., of counsel), for defendant.

WALTER EVANS, District Judge. The plaintiffs are Zetta McG. Lowry, individually and as guardian of the infant, Jean Bullitt Lowry (under appointment by the county court of Fayette county, Ky., in December, 1920), Margaret Van Werveke, Helen Lowry, and Thomas Lowry. The three last named are citizens of New York, while the two first named are citizens of Kentucky. They are the widow and children of Cuthbert B. Lowry, who died in November, 1908, and who was then the owner of five letters patent issued by the United States, though one Richard Bernhard had a nominal interest in three of them. The defendant is a citizen of Kentucky.

[1] Plaintiffs commenced this action in the Jefferson circuit court on the 6th day of December, 1920. Their petition was framed in accordance with the rules of practice prescribed by the Kentucky Code of Practice, and is of course what we now speak of as their bill of complaint. The defendant in due time and manner filed in the state court his petition for the removal of the action to this court, upon the ground that plaintiffs' causes of action as alleged in their pleading all arose under the Constitution and laws of the United States. The plaintiffs have moved the court to remand the action to the Jefferson circuit court; they insisting that their causes of action as stated in their pleading do not, and that no one of them did, arise under the Constitution or laws of the United States, within the meaning of the Removal Acts (Comp. St. §§ 1010–1021), and thus is presented the one question now to be considered, namely: Do the Constitution and laws of the United States give this court exclusive jurisdiction of any one of the causes of action set up in the three paragraphs of plaintiffs' bill of complaint?

The importance of this question has brought about the necessity for the very careful consideration which the court has given to plaintiffs' motion to remand. In doing this, however, the court has remembered that, if either one of the causes of action set up by plaintiffs in the three paragraphs of their pleading arises under the Constitution or laws of the United States, the jurisdiction of this court of that cause of action cannot be ousted by adding others which do not so arise. Rail-

road Co. v. Mississippi, 102 U. S. 135, 141, 26 L. Ed. 96. This naturally at the outset brings us to the consideration of the cause of action set up in paragraph 1 of the bill.

[2] Without going into greater detail, it may suffice to say that the first paragraph alleges that at the time of the death of Cuthbert B. Lowry, on November 11, 1908, he was the owner of five definitely described letters patent which had theretofore been issued to him in due course by the United States, but that some interest in each or all of them had theretofore been hypothecated by the deceased to the Fletcher American National Bank of Indianapolis to secure certain then existing liabilities, which liabilities, however, were far less than the value of the patents. It is alleged that on the 27th day of November, 1908, the county court of Fayette county, Ky., appointed the Security Trust Company, of Lexington, Ky., administrator of said Cuthbert B. Lowry, deceased, and that thereafter, by the various coercive, deceitful, and fraudulent methods and acts elaborately stated and described in the bill, the defendant secured the transfer of each of said patents to Stoughton A. Fletcher, as trustee for himself and the defendant, and ultimately to the defendant himself, through the medium of other transfers thereof to the Anglo-American Tar Products Company and then to defendant, and that by means of said fraudulent acts the administrator was induced to make and did make the transfer of said five letters patent before it concluded its work as administrator, though, having afterwards completed its work, it was discharged. It is also alleged in the first paragraph of the bill that the plaintiffs were by the same means, and the same coercive, deceitful and fraudulent representations and conduct, induced to and did acquiesce in the said transfers.

Without at present referring to the statements made or the relief sought by the second and third paragraphs of the bill, a question of prime importance to all parties alike is: Does paragraph 1 of the bill of itself state a cause of action under section 24, clause 7 (Comp. St. § 991[7]), and section 28, clause 1 (section 1010), of the Judicial Code? Section 24 of the Code provides that—

"The District Courts shall have original jurisdiction as follows: * * * Seventh. Of all suits at law or in equity arising under the patent * * * laws."

And section 28 provides that—

"Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States * * * of which the District Courts of the United States are given original jurisdiction * * * may be removed by the defendant or defendants therein to the District Court of the United States for the proper district."

With these statutory provisions in mind, it is altogether obvious that the only real question to be now decided is whether the cause of action stated by the plaintiffs in the first or any other paragraph of their bill is one arising under the patent laws, which, under the Constitution of the United States, authorize the issuing of patents to inventors. If

so, the jurisdiction may be in this court; but otherwise it may be in the state court, and not here.

Clause 8, section 8, article 1, of the Constitution, in express terms gives Congress the power to secure to inventors for a limited time the "exclusive right" to their discoveries, and the patent laws provide ways for making this provision effective. No one else can share in this exclusive right without the inventor's consent. It is therefore too clear to require argument that rights given by a patent lawfully granted under those provisions of the Constitution are rights granted by the United States, and that any cause of action based upon the patent itself arises under the patent laws of the United States within the meaning of the Judicial Code. Here the patents were granted by the United States to Cuthbert B. Lowry. He did not, before his death, part with his title thereto; but his administrator, in form, at least, did transfer that title. The plaintiffs bring this action, not upon a contract, but to have what purports to be a contract not made by them held to be void, and that plaintiffs, as heirs of the patentee, be adjudged to be the owners of the patents. And in this connection we may note that section 4884 (8 Comp. Stats. p. 10031) provides that:

"Every patent shall contain a short title or description of the invention or discovery, correctly indicating its nature and design, and a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery throughout the United States, and the territories thereof, referring to the specification for the particulars thereof. A copy of the specification and drawings shall be annexed to the patent and be a part thereof."

After setting out in great detail the facts relied upon as a basis for the relief desired, plaintiffs, at the close of the first paragraph of the bill, pray as follows:

"Wherefore they pray that the said contract and assignment of the letters patent and applications by the administrator to Stoughton A. Fletcher as trustee be set aside and canceled by this court and held for naught, because same was obtained and procured by this defendant through fraud, duress, and coercion, and because there was no consideration therefor, and that for said reasons the said assignment from Fletcher, trustee, to the Anglo-American Tar Products Company and from the Anglo-American Tar Products Company to this defendant, be held void, and that it be now adjudged that these plaintiffs are now the owners of said letters patent and the patents granted upon said applications, and that they be adjudged to recover of this defendant a sum which will reasonably compensate them for the loss of the use of said patents since the 22d day of January, 1909, and for all equitable relief to which they may appear entitled, and for their costs herein expended."

This prayer, when analyzed, may not only throw light on the question of the nature of plaintiffs' first paragraph, but may greatly aid in ascertaining the foundation and purposes of the action. It asks, though somewhat progressively, for four phases of relief, viz.: (1) That the several contracts for the assignments of the letters patent made by others than themselves, and which the bill describes, be set aside and canceled, because they were obtained and procured by fraud, duress, and coercion, and without consideration therefor; (2) that the plaintiffs be adjudged to be the owners of said letters patent and the patents granted upon the applications therefor; (3) that plaintiffs be adjudged

to recover of the defendant a sum which will reasonably compensate them for the loss of the use of the said patents since the 22d day of January, 1909; and (4) for all equitable relief to which they may be entitled.

If we may assume that the first and fourth phases of the relief asked by the plaintiffs do not arise under the patent laws, but have a basis only in general principles of equity, the question still remains whether the other relief asked arises under those laws? We again recall that plaintiffs pray (a) that they be adjudged to be the "owners" of all of said letters patent granted upon the applications therefor; and (b) that they be adjudged a recovery from the defendant of a sum which will reasonably compensate them for the loss of the use of the said patents since the 22d day of January, 1909.

Can the prayer that they be adjudged to be the owners of said patents be based upon anything except that they have the right to the legal title thereto, clouds upon which they in effect claim should be removed, or can a judgment for compensation for use of the patents be based upon anything except "rights" under the patent laws? And again, can the fact be concealed by cautious pleading that the prayer for a judgment for compensation for the use of the patents is based upon a claim of legal title thereto, and the consequent claim that the rights of plaintiffs have been infringed or encroached upon?

It is so well settled as to be elementary that, when the United States grants a patent for a new invention in the arts, it confers upon the patentee an "exclusive" property in the patented invention, which property nobody can appropriate without the patentee's consent. The inventor's right and title thereto are thus altogether based upon the Constitution and laws of the United States, and, as we have intimated, it would seem to follow, as of course, that any right to any judgment that the plaintiffs (who are the heirs of the patentee) are the owners of the patents or any judgment in their favor for the recovery of money for any infringement of or encroachment upon such exclusive right must be based upon a claim of title in the patents themselves.

It would seem, therefore, that any action at law or in equity which seeks to remedy such a situation inevitably and necessarily grows out of and is based upon a right created by and claimed under the patents, and therefore upon a right which arises under the patent laws of the United States. And as has been intimated, if one part of the relief demanded is based upon a claim of title to the patents, it is sufficient, notwithstanding other claims are based upon other grounds. Railroad Co. v. Mississippi, 102 U. S. 141, 26 L. Ed. 96, supra, where it was said:

"That it is not sufficient to exclude the judicial power of the United States from a particular case that it involves questions which do not at all depend on the Constitution or laws of the United States; but when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is within the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."

At this point we may say that in many cases in many courts, state and federal, there have been interpretations of the provisions of the

Judicial Code and of the statutes which preceded it in respect to jurisdiction in "patent cases." It has thereby been made entirely clear that where a contract had been made respecting a patent, and out of which contract a suit arose, or where frauds were perpetrated by the parties to the contract, and one of those parties sought relief on that ground, the state courts have exclusive jurisdiction, except where there was diverse citizenship and a claim exceeding $3,000. Some of the many cases which establish those propositions are Wilson v. Sandford, 10 How. 99, 13 L. Ed. 344; Hartell v. Tilghman, 90 U. S. 547, 25 L. Ed. 357; Dale, etc., Co. v. Hyatt, 125 U. S. 46, 8 Sup. Ct. 756, 31 L. Ed. 683; White v. Rankin, 144 U. S. 628, 12 Sup. Ct. 768, 36 L. Ed. 569; Wade v. Lawder, 165 U. S. 624, 17 Sup. Ct. 425, 41 L. Ed. 851; Briggs v. U. S. Stove Co., 239 U. S. 48, 36 Sup. Ct. 6, 60 L. Ed. 138; Odell v. Farnsworth, etc., Co., 250 U. S. 501, 39 Sup. Ct. 516, 63 L. Ed. 1111.

Equally clearly it has been settled that, where the title to a patent or any claim of infringement thereof is the subject of the suit in any form, the federal courts have exclusive jurisdiction, regardless of the citizenship of the parties, for the reason that such cases arise under the patent laws. Atherton Machine Co. v. Atwood, etc., Co., 102 Fed. 949, 43 C. C. A. 72 (a case which has been treated as very important); Pratt v. Paris Gas Co., 168 U. S. 255, 18 Sup. Ct. 62, 42 L. Ed. 458; Excelsior, etc., Co. v. Pacific Bridge Co., 185 U. S. 282, 285, 294, 22 Sup. Ct. 681, 46 L. Ed. 910; Henry v. Dick, etc., Co., 224 U. S. 1, 13–14, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880; The Fair v. Kohler Die Co., 228 U. S. 21, 25, 26, 33 Sup. Ct. 410, 57 L. Ed. 716; Healy v. Sea Gull, etc., Co., 237 U. S. 479, 480, 35 Sup. Ct. 658, 59 L. Ed. 1056.

In short, where it is certain that a case arises out of a contract or a breach thereof, then, as between the parties to the contract, there is no doubt that the jurisdiction is in the state courts; but where it is clear that the cause of action stated in any case grows out of the patent itself, or any claim of title thereto or rights thereunder otherwise than as stated, the jurisdiction is in the federal courts. Oftentimes there may be doubts as to which of those classifications a suit belongs, but we think any doubts of that character in this instance may be solved.

As tending to make clear our views, we will state at this point certain illustrative propositions:

1. At the outset the plaintiff in a suit is master of the situation in stating his claims and the basis thereof. The Fair v. Kohler Die Co., 228 U. S. 25, 33 Sup. Ct. 410, 57 L. Ed. 716. Consequently the question of jurisdiction may be determined by the character of the remedy the plaintiff invokes. Indeed, the judgment he seeks may often determine whether a suit is one arising under the patent laws, and therefore cognizable in the courts of the United States only, or whether it arises otherwise. Henry v. Dick Co., 224 U. S. 14, 32 Sup. Ct. 366 (56 L. Ed. 645, Ann. Cas. 1913D, 880); where it is said:

"The remedy which the complainant seeks may often determine whether the suit is one arising under the patent law and cognizable only in a court of the United States, or one upon a contract between the patentee and his as-

signs or licensees, and therefore cognizable only in a state court, unless there be diversity of citizenship."

2. Matters set up in an answer cannot affect that situation, although as a defense it may be controlling at the final hearing. The Fair v. Kohler Die Co., 228 U. S. 25, 33 Sup. Ct. 410, 57 L. Ed. 716. Hence, although the defendant has filed an elaborate answer to the bill, vigorously denying every allegation of fraud or wrongdoing, we cannot consider it at this stage of the proceedings, nor regard it as in any way important as affecting the question of jurisdiction—that question, as we have said, depending entirely on plaintiffs' own statement of their case.

3. In Littlefield v. Perry, 21 Wall. 205, 222, 22 L. Ed. 577, the Supreme Court said:

"An action which raises a question of infringement is an action arising 'under the law,' and one who has the right to sue for the infringement may sue in the Circuit Court. Such a suit may involve the construction of a contract, as well as the patent, but that will not oust the court of its jurisdiction. If the patent is involved, it carries with it the whole case."

4. The test of jurisdiction, as shown in Henry v. Dick Co., 224 U. S. 16, 32 Sup. Ct. 367 (56 L. Ed. 645, Ann. Cas. 1913D, 880), is this:

"The test of jurisdiction is this: Does the complainant 'set up some right, title, or interest under the patent laws of the United States, or make it appear that some right or privilege will be defeated by one construction, or sustained by another, of those laws?' Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282; Pratt v. Paris Gaslight & Coke Co., 168 U. S. 255, 259; White v. Rankin, 144 U. S. 628."

5. It may be that any infringement of the patents in this instance was an "indirect infringement"; but, even if that be so, it is nevertheless an "infringement." That is a broad term, as to which Bouvier, in his Law Dictionary, says that in patent law it is—

"A word used to denote the act of trespassing upon the incorporeal rights secured by a patent or copyright. Any person who, without legal permission, shall make, use, or sell to another to be used, the thing which is the subject-matter of any existing patent, is guilty of an infringement, for which damages may be recovered at law by an action on the case, or which may be remedied by a bill in equity for an injunction and an account."

The authorities support this view.

In a plaintiff's pleading, defenses are often anticipated, with an accompanying attempt to nullify in advance such defenses. This would seem clearly to be so in this case. The plaintiffs claim the ownership of the patents as the heirs of the inventor to whom the patents were issued. They seemed to anticipate that a certain defense would be made to the effect that their ancestor, the inventor, had parted with the title thereto by the hypothecation of the patents to Fletcher and other resultant proceedings, and have attempted to forestall it by their allegations of fraud, coercion, etc.; but this mode of pleading could not alter the fact shown by their bill that they claim title to the patents and pray for judgment that they are the owners thereof. Healy v. Sea Gull, etc., Co., 237 U. S. 8, 480, 481, 35 Sup. Ct. 658, 59 L. Ed. 1056.

We now come to paragraph 2 of the bill of complaint. In plain words it alleges:

First. That on the 27th day of November, 1908, the Fayette county court attempted to assume jurisdiction of the settlement of the estate of said Cuthbert B. Lowry, deceased, and attempted to appoint the Security Trust Company, a duly organized Kentucky corporation, as administrator of his estate, and that the latter attempted to qualify as such administrator as required by law, and did take charge of and attempt to administer the estate of said decedent. They aver that—

"The said Lowry, at the time of his death, was the owner of * * * the following described letters patent, which had been granted to him by the patent office of the United States, and of the following described applications for patents, upon which letters patent were subsequently granted, all of which patented processes and devices pertained to and were used in the business of creosoting wood, especially railroad ties."

They then described the patents in terms similar to those used in paragraph 1 of the bill.

Second. That the—

"county court of Fayette county did not have jurisdiction of said estate, or the power or authority to appoint an administrator thereof, and that the appointment of said Security Trust Company as said administrator, because of the fact that the decedent was not a resident of the state of Kentucky, was absolutely null and void, and that the title to said property therefore vested in these plaintiffs, who are the widow and children, respectively, of decedent, subject to the payment of debts against the estate."

Third. That—

"the said purported administrator on the 18th day of January, 1909, made and entered into a contract with Stoughton A. Fletcher, as trustee for himself and this defendant, A. T. Hert, in which it agreed to convey to said trustee all the aforesaid stock and all the letters patent and applications, and to quitclaim and settle all claims which the said estate had against the said Fletcher, this defendant."

And the plaintiffs then repeat their allegations of fraud on the part of the defendant in connection with the others named, except that they make no charge that the Security Trust Company in any wise participated therein.

Fourth. That—

"the county court of Fayette county did not have jurisdiction to appoint an administrator of the estate of Cuthbert B. Lowry, because he was not at the time of his death a resident of Fayette county, Ky., nor own any real estate therein, but was a resident of Cook county, Ill., and that for said reason the order appointing said administrator was null and void and of no effect, and that the acts of said trust company as such administrator were null and void. They state that for said reason the assignment of said administrator to Stoughton A. Fletcher, as trustee for himself and this defendant, of the patents and applications and stock aforesaid, was absolutely null and void, and conveyed no title to said Fletcher, as trustee, and that for said reason, the subsequent conveyances" thereof were and are null and void.

Fifth. They then state that since January 22. 1909, the defendant has continuously used said patents, and upon all of these allegations the plaintiffs pray as follows:

"Wherefore they pray judgment against this defendant for a sum which will reasonably compensate them for the loss of the use of the aforesaid pat-

ents, and applications and patents subsequently issued upon said applications, since January 22, 1909, and that he be required in his answer to disclose the amount of said stock obtained by him, and to account to these plaintiffs and adjudged to pay to them for the reasonable value for his proportion of the aforesaid stock, the amount of which is unknown to these plaintiffs, which was obtained by him under the assignment of said administrator, or to deliver to them in specie the stock which he obtained in exchange therefor in the American Creosoting Company, or its equivalent, with all the dividends arising therefrom since the said time, and for all equitable relief to which they may appear entitled, and for their costs herein."

Shortly stated, this prayer asks, first, for the recovery of money sufficient to reasonably compensate the plaintiffs for the use of all the patents since January 22, 1909; and, second, for a judgment for the reasonable value of the shares of Cuthbert B. Lowry, deceased, in the capital stock of the companies named, or for the delivery of the stock in specie.

The first of these prayers must, we think, be based upon a claim of ownership of the patents and upon infringements thereof, under the definition of that word given above, as well as upon section 4884, R. S. U. S. (Comp. St. § 9428), which, as we have seen, provides that upon the death of a patentee the title passes to his heirs; while the second prayer for the delivery in specie of all shares of the capital stock in those corporations would seem to be based upon a condonement of any wrongs by which they were obtained. However, the second prayer of this paragraph is immaterial at this stage, where only jurisdictional propositions are involved, and where the first of the two prayers seems to aid in the solution of that question, as clearly does also their statement in this paragraph that the title to all the patents was vested in them.

The third paragraph of plaintiffs' bill again alleges that Cuthbert B. Lowry died November 11, 1908, and left plaintiffs as his heirs at law, that the Security Trust Company was appointed his administrator by the county court of Fayette county, and that under the orders of that court it made a sale of all the said patents to Stoughton A. Fletcher, trustee for himself and the defendant, but that this sale was null and void, first, because it was made as a private sale and not at public auction, as required by the laws of Kentucky; and, second, because the administrator had then returned no inventory of the decedent which had come to its hands. The plaintiffs' prayer in this paragraph, stated briefly, is, that they be adjudged a sum which will reasonably compensate them for the loss of the use of said patented and copyrighted devices since January 22, 1909, and during the time the same were used by the defendant.

We need not repeat that this claim is also one for infringement, though carefully not so stated, and if the sale of the patents was null and void under the laws of Kentucky the title thereto did not pass, but would be now vested in the plaintiffs as the heirs of the patentee, and thus might be a sufficient basis for holding that plaintiffs are the owners thereof, and therefore entitled to damages for the infringement.

When, from the standpoint of jurisdiction alone, we consider the bill of complaint in its entirety, and without regard to its elaboration

in details, we find that it clearly alleges (a) that Cuthbert B. Lowry was, at the time of his death, the owner of the five described patents; (b) that, inasmuch as he died intestate, the plaintiffs as his heirs became the owners thereof; (c) that the attempted sale of those patents by the administrator of the decedent was void upon the facts stated in the bill; and (d) that the plaintiffs are now the holders of the legal title thereto. It is upon this claim to the legal title to the patents which the plaintiffs make as the heirs of the patentee that they ask relief as follows: First, that they be adjudged to be the owners of all of the said patents; and, second, that they recover compensation for the long use thereof by the defendant, which prayer, as we have seen, is really for damages for the "infringement" of those patents.

A very elaborate pleading in paragraphs (which latter are not significant under federal equity rules) should not be held to shield plaintiffs from the results of a fair interpretation of their pleading as a whole. Nor should their anticipatory attempt to nullify a possible defense to their action change these conclusions upon the question of jurisdiction, when considered apart from the merits of the case. Without going into further detail of our reasons therefor, we have reached the conclusion that, while some of the claims of the plaintiffs do not arise under the patent laws, others do so arise.

In this situation we must conclude that this court has jurisdiction to hear and determine the questions which arise under the patent laws, and therefore that the motion of the plaintiffs to remand this action to the Jefferson circuit court must be denied and overruled, and an order to that effect will now be entered.

BURKE v. MONUMENTAL DIVISION, NO. 52, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, et al.

(District Court, D. Maryland. August 12, 1919.)

1. **Trade unions ⇐4—Decision on question of jurisdiction of union tribunal is conclusive.**
   A construction by the tribunals of the union of a section of the rules of the union prescribing the division of the union before which charges against a member should be tried is conclusive, since it did not go to any of the fundamental rights of the member.
2. **Removal of causes ⇐106—Objection that some defendants did not reside in district held waived.**
   In a suit removed from a state court by a petition in which all the defendants joined, where plaintiff moved to remand only for the reason that no federal question was involved, both plaintiff and defendants had waived the objection that not all of the defendants resided in the district to which the suit was removed.
3. **Appearance ⇐24(7)—Objection to service by publication is waived by motion to dismiss and answer.**
   The filing of a motion to dismiss the bill on other grounds and the subsequent filing of an answer waives the objection that nonresident defendants served by publication were not properly brought into court, and that point cannot be raised at the final hearing.

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4. **Associations ⇐11—Mandamus ⇐125—Mandamus is not adequate remedy to restore to membership in unincorporated association.**
Mandamus will not issue to restore to membership a member of an unincorporated association who was illegally expelled, though it might issue if the association were incorporated, and therefore an expelled member of an unincorporated association may seek redress in equity.

5. **Beneficial associations ⇐11—Right to recover benefits not adequate remedy for void expulsion.**
The fact that the rights to sick and death benefits, which were lost by the expulsion of a member, could be enforced in an action at law for such benefits after they accrued, if the expulsion was void, does not defeat the member's right to sue in equity to be restored to membership.

6. **Trade unions ⇐9—Benefit associations and brotherhood held proper parties to suit to restore membership in division.**
In a suit to compel the restoration of plaintiff to membership in a division of a trade union, the benefit association of the division, the International Brotherhood of the union, and an incorporated mutual life and accident insurance association, whose privileges were extended only to members of the division, are directly concerned in the question whether the membership should be restored and are therefore proper parties to the bill even though they may not have been necessary parties.

7. **Trade unions ⇐4—Failure to recover does not show dishonesty in bringing suit.**
The fact that a suit brought by a member of a trade union to enjoin a strike called by the officers of that union could not have been maintained does not establish that the suit was dishonestly instituted, and therefore in a subsequent suit to compel the restoration of a membership after expulsion for instituting the suit for injunction, the right to the injunction need not be determined, so long as the contentions made by plaintiff in that suit are not so patently bad as in themselves to suggest they were set up in bad faith.

8. **Trade unions ⇐4—Rule held not to prohibit seeking redress in the courts.**
The rule of a trade union, imposing the penalty of expulsion on any member who by communication to railroad officials or others interfered with a grievance in the hands of a committee, will not be construed to prohibit a member from seeking redress in the courts, since the language does not suggest it had reference to legal proceedings, and an intention to deny access to the courts will not be presumed, but, if it be enforceable at all, must be unmistakably expressed.

9. **Trade unions ⇐4—Seeking injunction against strike held not to violate rule against resort to courts.**
A trade union rule, prohibiting resort to the courts in any controversy arising within the organization for which the laws of the union provide a means of settlement, without having previously exhausted all remedies within the brotherhood, does not prohibit a member from seeking to enjoin a strike which he contended was called by the union officials without authority, where the strike was to begin within a few days, and the only redress within the brotherhood was by appeal to the next convention, which would not meet for 14 months.

10. **Trade unions ⇐4—Expulsion on charge of resort to courts cannot be justified by proof member co-operated with employer to that end.**
Where the only charge presented against the member of a trade union was that he had resorted to the courts to prevent a strike called by the head of the union, which under the rules was not a sufficient ground for expulsion, the expulsion cannot be sustained on the ground that the member had cooperated with the employer in bringing such suit, in view of the union rule that the charges on which the member was brought to trial must be in writing.

In Equity. Suit by Dominic J. Burke against Monumental Division, No. 52, Brotherhood of Locomotive Engineers, and others, to compel defendants to restore plaintiff to membership in the Division. Decree ordered for plaintiff.

F. Howard Smith, of Baltimore, Md., and Cyrus G. Derr, of Reading, Pa., for plaintiff.

Arthur L. Jackson, of Baltimore, Md., for defendants.

ROSE, District Judge. In the year 1896 the plaintiff became a member of the defendant Monumental Division, No. 52, of the Brotherhood of Locomotive Engineers. Affiliated with it, and subject to its control, is the defendant the Mutual Aid & Benefit Association of Monumental Division, No. 52, of the Brotherhood of Locomotive Engineers. The division itself is a branch of the defendant the Grand International Brotherhood of Locomotive Engineers. Each is a voluntary unincorporated association. A fourth defendant, the Locomotive Engineers' Mutual Life & Accident Association, is a corporation of the state of Ohio. It is controlled by the Grand International Brotherhood. No one, not a member of some division of the latter, is eligible to membership in the former. One who ceases to be a member of the Brotherhood automatically at the end of a year is dropped by the Mutual Life & Accident Association.

The four defendants already mentioned will be called the Division, the Benefit Association, the Brotherhood, and the Insurance Association, respectively. The individual defendants are members or officers of one or more of the unincorporated associations, and are sued as representatives of the entire membership, which is numerous and scattered.

For many years plaintiff had been a member of the Benefit and of the Insurance Associations. He had paid considerable sums as dues and assessments. In the event of sickness, disability, accident, or death while a member, he was entitled to payments from them, the aggregate present value of the right, to which the parties agree, is upwards of $3,000. All of this he has lost, if his membership has been taken from him.

In June, 1916, the Brotherhood and the other organizations of train employees, each by an overwhelming vote of its members, authorized their chief executives to call a strike in the event of failure to secure a satisfactory adjustment of a long-standing demand for a basic eight-hour day, with pay at the rate of a time and a half for all overtime. The railroads and the trainmen could not agree, and the executives of their four Brotherhoods united in calling a nation-wide strike, to begin on Labor Day, 1916. Thereupon, at the instance of the President of the United States, Congress passed the Adamson Bill (Comp. St. §§ 8680a–8680d), and the strike order was recalled. The act was to go into effect on the 1st of January, 1917. The railroads claimed that it was unconstitutional, and in the closing days of 1916 filed numerous bills seeking to enjoin its enforcement.

Renewed threats to strike were made. The President again inter-

vened. He told the representatives of the men that he would do all that he could to expedite a final decision of the legal questions involved. For a while they rested satisfied with this assurance. A District Court promptly held the act void, and issued the injunction for which a railroad asked. An immediate appeal to the Supreme Court was taken. The case was there advanced, and was argued on January 8, 1917. The issues involved were of far-reaching importance. Some of them were new, or at least they so appeared to some of the justices, as well as to many of the public. We now know, from the various concurring and dissenting opinions which were ultimately filed, that the members of the court were not of one mind as to the answers which should be given to them. Wilson v. New, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024. Time for consideration was necessarily taken. Railroads, trainmen, shippers, and the general public in the meanwhile were thinking about what would happen if the court should hold the act invalid. In Congress, in the press, and by various individuals and organizations, much was said in favor of making compulsory the arbitration of such differences between the railroads and their employees as might threaten an interruption of interstate transportation. The Brotherhood and its associates were strongly opposed to any legislation of this character. Nothing was done about it by the Sixty-Fourth Congress, which went out of existence on the 4th of March, 1917. The state of our relations with Germany made certain the speedy convening of its successor in extra session.

The defendant Stone, the Grand Chief of the Brotherhood, testifying in this case, explained that the heads of the four organizations of trainmen wanted to force the railroads to concede the basic eight-hour day and the time and a half for overtime, before Congress could get a chance to require the men to accept arbitration. They were of opinion that the authority to call a strike, voted them some nine months before, was still in force, and accordingly, on some day between the 5th and the 16th of March, 1917, they issued a call for a strike to begin on the evening of March 17th.

The plaintiff, who had been one of the small minority of the engineers who had voted against a strike, says he thought it particularly objectionable at the time and under the circumstances then existing. He believed that it would be disastrous to the Brotherhood, as well as to the railroads and the public. He was convinced that the Grand Chief had no right to call it, because in his opinion the power so to do, given by the vote of the preceding June, had expired when, subsequent to the passage of the Adamson Act, the strike ordered for September, 1916, was countermanded.

There is no reason to question that plaintiff truly stated his real views; but, had he been left to his own devices, it is not likely that he would have done more than grumble. As it turned out, he was destined to play a more important rôle. He worked for the Pennsylvania Railroad, which, faced by a strike which would probably involve almost all of its train crews, was seeking some way of warding off the danger.

All of the objections to the strike felt by plaintiff were prominent to the minds of the officers of the railroad. Like him, they had persuaded themselves that in calling a strike Grand Chief Stone was usurping a power which the rules of the Brotherhood withheld from him. They felt that this contention, brought properly before a court of competent jurisdiction, would receive serious consideration. The mischief which such a strike would do would be so great and so irreparable that almost any tribunal would be inclined to exercise its authority to forbid it until the objection could be fully heard and maturely thought over. In the meantime, much might happen.

But obviously the claim that the head of the Brotherhood was doing that which its law forbade would come with most force from one of its members, and it was at least possible that no one else could be heard to make it. The testimony in the case justifies the inference that those subordinate officials of the railroad, who came most closely in contact with the engineers, were instructed to look out for some one of them who was willing to ask that the strike be enjoined. At all events, in the forenoon of March 16, 1917, the plaintiff, while at work on his engine in Baltimore, was approached by his foreman and asked as to how he felt about the strike. He replied that he was opposed to it. In answer to a further question, he said he was ready to go to court to prevent it. He was at once relieved of his task, put upon the 12:05 p. m. train for Philadelphia, and upon his arrival at Broad Street station was taken to the offices of the railroad's legal department. After having been asked and having answered some questions, he was told that the bill of complaint would not be ready before the next morning, at which time he was requested to return. He did so, and on the morning of the 17th signed and swore to a printed bill of complaint, which was at once filed in the clerk's office of the District Court of the United States for the Eastern District of Pennsylvania. By it he prayed that the strike be enjoined.

About dawn on the morning of Monday, March 19th, the representatives of the railroads conceded the demands of the heads of the trainmen's organization. The issues which plaintiff had sought by his bill to raise thus became moot. Some of plaintiff's fellow members of the Division learned from the newspapers what he had done. They in consequence preferred a charge against him. In the end nothing came of this first complaint; subsequently it was renewed, and ended in the expulsion, which the plaintiff seeks to have annulled.

The charge upon which he was expelled was that during the concerted movement for an eight-hour day he had filed a bill in the United States District Court at Philadelphia against members of the Brotherhood, seeking to restrain them from taking part in a strike which had been voted by a majority of the members. It was alleged that such action was in violation of section 35 of the Standing Rules of the Brotherhood, and was conduct unbecoming a member, and was contrary to his obligations. Plaintiff appeared at the time and place fixed for his trial, but said that under section 58 of the Rules of the Brotherhood the Division had no jurisdiction over the offense charged, if it

was an offense, which he denied. The portion of the rules to which he referred provided that whenever a member of the Brotherhood, while out of the jurisdiction of his own division, conducted himself in a manner unbecoming a brother, the division nearest to the point where the offense was committed should put him on trial. If he is convicted, his sentence is certified to his division for execution.

[1] Whether his construction of this section, which does not go to any of his fundamental rights, and is concerned merely with the distribution of jurisdiction among the various tribunals of the Brotherhood, was correct or not, was a question upon which its determination against him is conclusive. He did not stop with refusing to submit to trial, for, while adhering to his position in that respect, he handed in a written statement of the reasons which had led him to bring the Philadelphia suit. As he declined to acknowledge the jurisdiction of the Division, he was directed to leave the room. After he had done so, and in his absence the trial proceeded. He was convicted and sentenced to expulsion. He appealed to the Grand Chief, and from that officer's affirmance of the action of the Division to the next triennial convention of the Brotherhood, which approved all that had been done against him, and added to his punishment the additional penalty of perpetual ineligibility for membership. He, having thus exhausted all possible means within the Brotherhood of securing the redress to which he considered himself to be entitled, brought this suit in the circuit court of Baltimore City, an equity court of the state of Maryland. Process against the Division, the Benefit Association, and such of the individual defendants as were residents of Maryland was issued, served, and returned in the usual way. Against the Brotherhood, the Insurance Association, and Grand Chief Stone an order of publication was prayed and made. Under it publication was had, and, as required by the statutes of Maryland, a copy of the order was actually served upon these defendants in Cleveland, Cuyahoga county, Ohio.

[2] All of the defendants united in a petition to remove the case to this court, on the ground that it arose under the laws of the United States, and it was sent here. The plaintiff asked for a remand, setting up that no federal question in the jurisdictional sense was involved. No objection was made that some of the defendants had been sued in a district in which they did not reside. It was thus waived by the plaintiff, as by their petition for removal it had been by the defendants.

The court, in passing upon the motion to remand, agreed with the plaintiff that the case made by this bill did not really turn upon the construction or application of the various acts of Congress therein referred to; but, as it did allege that the plaintiff had been expelled because he had exercised his constitutional and statutory right to bring suit in a court of the United States, a federal question was presented, whether the defendants would or would not have taken the same action, had he sought the aid of a state court. The remand was consequently denied.

[3] It was at this stage of the proceedings still open to those of the defendants who were nonresidents of Maryland, and who had never

within its limits been served with its process, to claim that they were not in court at all. Instead of so doing, they filed an elaborate motion to dismiss the bill, in which they made many objections to its sufficiency, some of them going to the merits of the plaintiff's case as set up by him; but they said nothing as to lack of due process, and on this matter they were equally silent in the lengthy answer which they subsequently submitted. The point was waived, and the attempt at the final hearing to make it came too late.

In the motion to dismiss the defendants said that the plaintiff had mistaken his remedy. He should have gone to a court of law:

[4] (1) Because, if he wished to be restored to membership, he should have asked for a mandamus. If the Division were incorporated, they might have been right. La Valle v. Société St. Jean Baptiste, 17 R. I. 680, 24 Atl. 467, 16 L. R. A. 392. As it was not, mandamus will not run, and plaintiff must seek redress in equity. Wrightson on Unincorporated Associations, 223; Martin's Modern Law of Labor Unions, § 220; Krause v. Sander, 66 Misc. Rep. 601, 122 N. Y. Supp. 54.

[5] (2) All that the plaintiff loses by his expulsion is the right, when the occasion arises, to sick, accident, or death benefits or pensions. Defendants argue that, if plaintiff's expulsion is void, as he says it is, he has not been hurt. When anything becomes due him or his estate, he or his representatives may sue for it, and the courts will disregard the attempted expulsion. Whether, as against the only defendants which would then be sued, it would be proper to do so, is by no means clear. They did not expel him. They have no jurisdiction to inquire whether he was or was not rightfully expelled, and yet, while he is living and in good health, they have a right to know whether they are entitled to demand dues and assessments from him, and are bound, if he is a member, so to conduct their affairs that they will be ready to pay him when misfortune entitles him to receive something from them. Besides, his rights to ask for anything may not mature for years. By that time, some of those who once knew most about the circumstances of his expulsion may be dead, and the memory of those who survive will be dimmed by time. Equity does not make laches a duty.

[6] The motions to dismiss set up that the Division was the only proper defendant. As it was unincorporated, plaintiff took the usual course of suing some of its officers and members, as representatives of all of them. Whether he was still a member of the Division directly concerned the Benefit Association, the Brotherhood, and the Insurance Association. They were all proper parties, even although it may not have been necessary to join them.

[7] All else relied upon in the motions to dismiss is in effect repeated in the answer, and goes to the merits of the case made, to the consideration of which it is now necessary to pass. From this discussion may be eliminated the greater number of the questions with which the pleadings concern themselves, as, for example, whether the calling of a strike in March, 1917, was brought about by an unlawful combination to which the defendant Stone was a party; that in calling it he violated the rules of the Brotherhood, because, among other reasons, the vote of

June, 1916, was in March, 1917, no longer effective; that the strike order of the latter date was in pursuance of an unlawful conspiracy to frustrate the Adamson Act; that under the Newlands Act of July 15, 1913 (Comp. St. §§ 8666–8676) the Brotherhood should have consented to arbitrate its dispute with the railroads. All these were once important questions. It is possible that some of them, or some very like them, may again become so; but in this case it is unnecessary to give thought to them. They are here because, and only because, plaintiff based his Philadelphia suit upon the answers he says he thought should be given to them. It is to be remembered he is not now seeking to prevent a strike, or to recover for damage done by one. He was not expelled because he refused to join in one.

The law is not such an exact science that either the legal or the moral right of the plaintiff or of any one else to institute legal proceedings is conclusively determined by the result of the litigation, or the judgment of the court upon the issues of law or of fact raised by him. Legal process may be abused. Litigation may be begun by one who does not believe in his case, and who does not expect to win it, but has some ulterior and perhaps sinister purpose to serve by it. Oftentimes it may not be either easy or expedient to punish him for so doing, but that he deserves punishment is clear enough, not because he lost his case, but because he always knew that he should never have brought it. The mere fact that he was unsuccessful does not prove, and has, as men are, very little tendency to prove, that he was dishonest in bringing it. It is true that some contentions may be so clearly frivolous on their face that it is hard to understand how any one could believe in them. Their very nature raises a presumption of bad faith, albeit rarely a conclusive one. Men, ordinarily fair and reasonable, under the pressure of interest or of prejudice are ready enough intensely to believe in propositions which to outsiders seem indefensible or absurd. It is impossible to say that any of the contentions made by the plaintiff in his Philadelphia bill are so patently bad as in themselves to suggest they were set up in bad faith. Farther than is necessary to reach this conclusion, it is unnecessary to go into any of them.

[8] The charge upon which plaintiff was expelled was that in bringing the Philadelphia suit he had violated section 35 of the Standing Rules of the Brotherhood, which imposes the penalty of expulsion upon any member who, by verbal or written communication to railroad officials or others, interferes with a grievance that is in the hands of a committee, or at any other time makes any suggestion to any official that may cause discord in any Division. There is here no mention of legal proceedings. The place in which this section appears among the rules does not suggest that it had reference to them. The language employed does not give the impression that the framer of it had them in mind. An intention to deny all access to the courts of the land will not be presumed. If it be enforceable at all, it must be unmistakably expressed.

[9] At the hearing something was said as to section 54 of the rules. That does prohibit resort to the courts in any controversy aris-

ing within the organization, and for which the laws of the Brotherhood provide a means of settlement, without having previously exhausted all remedies within the Brotherhood. Nothing which plaintiff is charged with having done offends against this rule. The Grand Chief ordered a strike to begin in a few days. The only possible appeal within the order was to the next triennial convention, which would not meet for 14 months. Plaintiff says he believed that in giving such an order the Grand Chief was doing something that under the laws of the Brotherhood he had no right to do. Under the circumstances, there was nothing the plaintiff could do within the order, and there would have been nothing he could do, had he been absolutely right in his contention that the authority given 9 months before was at an end. The rule by the clearest implication sanctions a resort to the courts when a remedy within the Brotherhood does not exist.

[10] The learned and zealous counsel for the defendants at the hearing frankly conceded that one of the recognized limitations upon the very broad powers of discipline over their members, possessed, by voluntary unincorporated societies, is that they may not be exercised to punish one for seeking aid of the courts where the machinery of the organization cannot give it. Yet the only charge upon which the plaintiff was put upon trial was that he had gone into court. This, of course, is admitted. The charge was in writing and speaks for itself.

This would end the case, were it not that the defendants contend that plaintiff was expelled, not for suing, but because he sued at the instance, under the direction, and at the expense of one of the railroads, the opposing parties to the controversy in which the Brotherhood was engaged. There is no charge that in what was done there was aught of champerty or of maintenance. The complaint is not that the railroad, with the assistance of the plaintiff, was interfering in something which did not concern it, but that it, on the other hand, was vitally interested on a side of it upon which plaintiff, had he been a loyal member of the Brotherhood, would not have been found.

Instinctively most men will feel that the plaintiff, by acting as he did in close co-operation with the railroad, put himself in a position in which they would rather not be. It is all well enough to say that—

> "Plaintiff believed in his case. He wanted to prevent the strike, and his grounds for so wishing were, as they presented themselves to his mind, worthy. He was a poor man, or at all events a man of very moderate means. There is nothing to suggest that he had had any experience in litigation. or any knowledge of the best way of acting in such a matter with the speed necessary to any prospect of success. That in whatever other respects he and the railroads may have differed, they were at one in fearing and disliking the proposed strike, and that from their respective standpoints they had good reason to do so. Under such circumstances, what harm was there in their acting together to attain an end which both honestly believed good?"

It might not be easy to point out the flaws in this chain of reasoning, and it is not intended to attempt to do so, other than to call attention to the fact that the demand for an eight-hour day and the accompanying extra pay for overtime was in itself something of which all the members of the Brotherhood, including the plaintiff, approved.

He differed with the officers of the Brotherhood and with the large majority of his fellow members, in that he was opposed to the radical measure by which they sought to attain speedily the common wish. He would doubtless have made them angry if, at his own initiative and at his own expense, he had sought by the aid of the courts to block their purpose. Indeed, when they expelled him, it does not appear that they knew he had not, although it may be taken for granted that they did not believe he had. Now that it is clear that the suspicions which they doubtless always had were well founded, and that the suit was brought at the request of the railroad company in the way its legal advisers had planned, and at its expense, though in his name, it will not be surprising if they feel that he is a traitor to the Brotherhood, and that in time of open war he went over to their adversary.

It is not intended here to intimate any opinion as to whether such a feeling would be justified or not. There can be no question that it would exist. As the record here stands, it is not necessary, and would be perhaps improper, to intimate any opinion as to whether the Division would have been justified in expelling him, had he been charged with acting in co-operation with the railroad to prevent or obstruct the strike, and thus having entered into relations inconsistent with his membership in the Brotherhood, for no such charge was made against him, and he was given no opportunity to present any defense he had to it. All of which he was accused was the bringing of the suit. If that was sufficient ground for expulsion, there could be no defense because the fact was so; but if the gravamen of his offense was his co-operation with the railroad, he should have been told so, in order that he might have made such explanation as he could. No technical precision can be expected or is required in the proceedings of such associations; but they cannot charge a member with something for which in law they may not punish, try him for that of which they have accused him, and then justify themselves for expelling him by showing that he was guilty of something which they did not allege against him. The rules of the Brotherhood themselves require that the charges upon which a member is brought to trial shall be in writing.

It follows that the plaintiff is entitled to the relief for which he asks. No opinion is intimated as to whether it will still be open to the Division to consider and act upon a new charge or charges raising the question of the plaintiff's relations with the officials of the Pennsylvania Railroad at the time and under the circumstances existing prior to March 19, 1917.

The plaintiff, upon due notice to the counsel for the defendants, may present a draft decree.

BANKERS' SERVICE CORPORATION v. LANDIS CHRISTMAS SAVINGS CLUB CO.

(District Court, M. D. Pennsylvania. October Term, 1920.)

No. 269–A.

Patents ⊂=328—1,202,646, for coupon bank deposit book, void for lack of invention.

The Barkley patent, No. 1,202,646, for a coupon bank deposit book, *held* void for lack of patentable novelty and invention.

In Equity. Suit by the Bankers' Service Corporation against the Landis Christmas Savings Club Company. Decree for defendant.

Decree affirmed 273 Fed. 722.

Bartlett & Brownell, of New York City, and R. L. Levy and A. V. Bower, both of Scranton, Pa., for plaintiff.

Jas. A. Watson, of Washington, D. C., and E. E. Beidleman and J. W. Swartz, both of Harrisburg, Pa., for defendant.

WITMER, District Judge. This suit was brought to enjoin infringement and to enforce accounting on letters patent No. 1,202,646, granted to plaintiff corporation, assignee of Merrill B. Barkley. The subject in controversy relates to a so-called improvement in coupon bank deposit books, calculated to facilitate making deposits in banks or other saving institutions. These books are commonly used in groups or series by so-called "clubs" of depositors in connection with a method or system for handling such accounts. Plaintiff's patent application specifies that

"There has developed recently in banking circles a wide demand for various kinds of special savings accounts, known generally as Christmas clubs, vacation accounts, outing savings clubs, and the like, under which each depositor enters into an agreement with the bank whereby specified amounts are due to be deposited at definite times, the bank in its turn at the expiration of the aggregate period, say at Christmas time, paying back a certain amount, usually the principal wholly or in part as may be agreed upon, with interest; the object of such a system being mainly to encourage thrift and regularity on the part of new and prospective patrons in developing the savings habit.

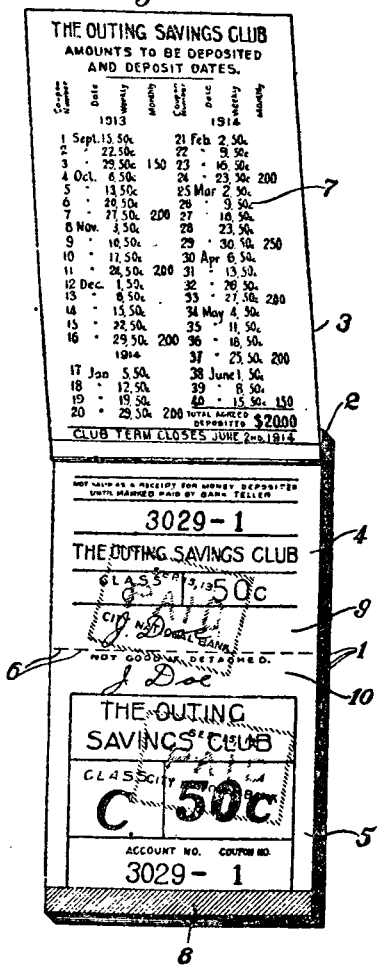
"Although this invention is especially applicable to savings accounts of the character stated, it is not limited thereto, but may be used to advantage for various other purposes wherein a serial or multipartite transaction is involved, notably in connection with installment purchases, and the payment of rents, current service charges of a predeterminable character, and the like. Such a system, in order to be convenient, efficient, and practical, required special means to facilitate accounting and to keep the party carrying the current obligation informed as to the condition of his account and when payments are due.

"The main objects of this invention are to provide an improved system for use in connection with the making of a series of payments or deposits on account from time to time as may be agreed upon; to provide an improved form of receipt book, having provision for indicating the amounts payable

by the holder at certain times, and having provision for the recording of receipts therein; to provide such a book, having coupons adapted when removed to serve as a record for the payee; to provide an improved form of bank deposit book, having means whereby the depositor or a bank clerk, upon inspecting the same, may see at a glance what payments have been made and what payments are coming due, with the dates thereof; to provide in such book a table including pay dates and amounts due, and showing certain group aggregates indicating the totals payable in certain longer periods; and to provide a coupon book of the character specified which, with a deposit, may be mailed under a two-cent stamp.

"An illustrative embodiment of this invention is shown in the accompanying drawings."

Fig. 1



Plaintiff relies on claims 5 and 6 of the patent as embodying the essential features of Barkley's invention, viz.:

"5. A deposit book, adapted to indicate the amounts paid and to be paid by a depositor or a bank's customer, comprising a plurality of sheets and detachable coupons, each coupon and corresponding sheet portion having corresponding imprints to indicate the specific act of payment to be made in connection therewith, the coupons being arranged in arithmetical series and bearing a common designating mark.

"6. A deposit book, adapted to indicate the amounts paid by a depositor or a bank's customer, comprising a plurality of sheets and detachable coupons, the sheets and those coupons which remain attached to be held by the depositor until the account is closed, each of said coupons having an imprint indicating in any desired terms a specific part of an obligation to be carried out or performed at a given time, and each coupon as well as that part of the book retained by the depositor having like designating means."

The defense insists that these claims relied upon by the plaintiff are void for want of patentable novelty and invention.

When Barkley came into the field with his alleged invention, there had already been developed in banking circles a "wide demand for various kinds of special savings accounts known generally as Christmas clubs, vacation accounts, and the like," operated and conducted by a savings system of which Merkel Landis, a banker of Carlisle, Pa., was the orig-

inator. It is without contradiction that in or prior to 1911 Landis conceived and put into operation the idea of creating and operating Christmas savings clubs in connection with banks, for the purpose of promoting the business of the banks and encouraging people to open savings accounts, involving the use of detachable coupons representing deposits, and the first to put such a system or scheme into operation. A copyright was obtained the same year and later the defendant company, the Landis Christmas Savings Club Company, was organized, to which his rights in the letters were assigned and the business of the company prospered to the extent, as stated by Mr. Boll, its president:

"We had about 500 banks as customers in 1911, about 890 banks in 1912, and nearly 1,300 banks in 1913."

The business of the company was to explain to their customers the Landis scheme and to sell to them the coupon sheets and envelopes as here shown.

Keep Your Receipts in this Envelope

No. 900 Class 1

This certifies that the above is a member of the

Christmas Savings Club 1911

subject to the rules and regulations printed below

Union Trust Co. of Pennsylvania
Harrisburg, Pa.

By

Treasurer

RULES AND REGULATIONS

1 Class 1 requires the payment of 1 cents the first week and each week thereafter the weekly deposit is increased by adding to the preceeding week's deposit the amount of the first week's deposit.

2. At the end of 36 weeks the total amount paid in by a member increased by the interest earned thereon at the rate of 3 per cent. per year will be paid to said member.

3. All payments are due on Monday of each week and must be paid before the close of business on Saturday evening of that week.

4. Members neglecting to make their weekly payments will receive only the principal paid in.

5. No withdrawals or transfers will be allowed.

CLASS 1

Amounts to be Paid on

April	3	.01	Aug.	7	.19
	10	.02		14	.20
	17	.03		21	.21
	24	.04		28	.22
May	1	.05	Sept.	4	.23
	8	.06		11	.24
	15	.07		18	.25
	22	.08		25	.26
	29	.09	Oct.	2	.27
June	5	.10		9	.28
	12	.11		16	.29
	19	.12		23	.30
	26	.13		30	.31
July	3	.14	Nov.	6	.32
	10	.15		13	.33
	17	.16		20	.34
	24	.17		27	.35
	31	.18	Dec.	4	.36

One of the defendant's customers was the City National Bank of Holyoke, Mass., which during the winter season of 1912 and 1913 obtained from defendant about 4,500 coupon sheets and envelopes, with other necessary supplies, for a Christmas savings club. Barkley, the

patentee, was associated with the Baker-Vater Company, which was in the business of making record blanks and furnishing supplies for banking houses and similar institutions. As such he was introduced and became acquainted with the Landis system in use at the Holyoke Bank. After some correspondence with his associate, Buchanan, located at Chicago, who expressed a desire to engage in the Christmas club supplies business, Barkley finally wrote, May 13, 1913, to his company at Benton Harbor, Mich., stating that the City National Bank had decided "to adopt the savings system of our design," having reference, no doubt, to the book constituting the subject of the patent under consideration.

What features of the system and design belong to Barkley, and whether anything was supplied by him involving invention, is the matter at issue. Whether the so-called system or scheme disclosed and made use of in furthering and conducting the various kinds of special savings accounts contemplated by Landis and Barkley are patentable need not be decided here, since it is evident that all that Barkley did was to embody the Landis club system as contained in the sheets or stubs, and coupon and accompanying envelope, in book form, and this form of so-styled coupon bank deposit book constitutes the basis of the patent in suit. It was so testified by defendant's witnesses, Landis and Boll, and plaintiff's witness, McDonald, auditor of the Bank of Long Island, admitted that "all information on the [plaintiff's patented] coupon books is also contained in Exhibits 1, 2, and 4," being defendant's coupon sheets and envelope.

As to the physical structure of plaintiff's patented book, "comprising a plurality of sheets and detachable coupons" impressed with the copied information from the Landis scheme, the conclusion reached is that it is neither new, in view of the prior art, nor can it be regarded as rising to the dignity of involving invention. Regarding the former, and passing all the other patents cited, and the practiced art regarding the many forms of stub books used in various ways in carrying on many different kinds of business, where such books are required, the prior Henkel patent, No. 726,058, discloses every feature of the claims here involved. It comprises a plurality of sheets and detachable coupons, arranged in arithmetical order, bearing common designating marks; each coupon and corresponding sheet portion having corresponding imprints to indicate the specific act of payment to be made in connection therewith, and the amount to be paid. The difference is that one is styled a sales check, the other a deposit book. The patentee Barkley, however, calls attention and specifies that, while his book is—

"especially applicable to savings accounts, of the character stated, it is not limited thereto, but may be used to advantage for various other purposes wherein a serial or multipartite transaction is involved, notable in connection with installment purchases, and the payment of rents, current service charges of a predeterminable character and the like."

While not unmindful of the well-known presumption in favor of the validity of the patent, and that in doubtful cases increased utility of a device is usually regarded as determining the question of invention,

it will not be forgotten that the patentee admitted that when he launched his enterprise there had been developed a wide demand for the article his company put upon the market; it having also been shown that the defendant had built up under their system a large business, embracing many hundred banks as customers. While plaintiff seemingly prospered in placing their book upon the market, others have likewise fared as well, no doubt largely in proportion to the business methods and energy employed in pushing the enterprise. However, where as in this case no change of any importance was made in the character of the coupon, stubs, and information used as a means of carrying into effect the scheme of depositing savings, and the expedient of using a passbook in form was used in place of a sheet with stubs accompanied by a suitable envelope, which it is manifest would be adapted by any skillful person having that end in view, the effect of deciding the matter favorable to invention will be withheld. What was accomplished by Barkley, in the language of Justice Matthews, Hollister v. Benedict Manufacturing Co., 113 U. S. 72, 5 Sup. Ct. 724 (28 L. Ed. 901)—

"seems to us not to spring 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, but, on the other hand, to be the suggestion of that common experience, which arose spontaneously and by a necessity of human reasoning, in the minds of those who had become acquainted with the circumstances with which they had to deal."

Plaintiff's bill will be dismissed, with costs; and it accordingly is so ordered.

BANKERS' SERVICE CORPORATION v. LANDIS CHRISTMAS SAVINGS CLUB CO.

(Circuit Court of Appeals, Third Circuit. May 9, 1921.)

No. 2625.

Patents ⇐328—1,202,646, for coupon bank deposit book, void for lack of invention.

The Barkley patent, No. 1,202,646, for an improved coupon bank deposit book, is for an improvement, which would naturally follow the use of the devices preceding it by experienced persons, and discloses no patentable invention.

Appeal from the District Court of the United States for the Middle District of Pennsylvania; Charles B. Witmer, Judge.

Suit in Equity by the Bankers' Service Corporation against the Landis Christmas Savings Club Company. Decree for defendant (273 Fed. 717), and complainant appeals. Affirmed.

John P. Bartlett and Henry B. Brownell, both of New York City, for appellant.

James A. Watson, of Washington, D. C. (E. E. Beidleman and J. W. Swartz, both of Harrisburg, Pa., of counsel), for appellee.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the plaintiff, the owner of patent No. 1,202,646, issued October 24, 1916, to Merrill B. Barkley, for a coupon bank deposit book, brought a suit against defendant, charging infringement thereof. On final hearing, the court held Barkley's patent invalid and entered a decree dismissing the plaintiff's bill, supporting its view by referring to Hollister v. Benedict Manufacturing Co., 113 U. S. 59, 5 Sup. Ct. 724 (28 L. Ed. 901), where, of an alleged invention of a revenue stamp, Mr. Justice Matthews said:

"It is but the display of the expected skill of the calling, and involves only the exercise of the ordinary faculties of reasoning upon the materials supplied by a special knowledge, and the facility of manipulation which results from its habitual and intelligent practice, and is in no sense the creative work of that inventive faculty which it is the purpose of the Constitution and the patent laws to encourage and reward."

Thereupon this appeal was taken.

Our study of the case satisfied us the court below committed no error, and its decree should be affirmed. Its opinion so adequately discusses the case that we restrict ourselves to a brief reference to some of the things which lead us to the same conclusion.

The patent concerns stationery adapted for use in banks receiving Christmas club deposits. The idea of the Christmas club was not original with the patentee; on the contrary, there were large numbers of such clubs, and stationery suitable for receiving and handling deposits, and evidencing both to the bank and to the depositor the fact and the amount of such deposits, were in common use when Barkley entered the field. The patentee, who was in the bank stationery supply business, with the aid of a cashier of a bank which was using the Landis Christmas club system, set about to observe and improve that system, presumably with a view to his company, the present plaintiff, entering into the business of supplying stationery for Christmas clubs. The result of this observation was that Barkley soon saw certain places where the Landis system could be improved, and which, in a general way, may be described as a reversing of that system.

The Landis system consisted in the bank holding a coupon sheet in its hands and delivering to the depositor a coupon detached from such sheet as credit evidence of his deposit, while the coupon detached from the sheet afforded debit evidence to its bookkeepers of the bank's receipt of the deposit. In Barkley's device, the entire outfit was placed in the hands of the depositor in the shape of a compact book of sheets, one half of which sheet was a stub, the other a detachable coupon, showing the amount of the deposit. When the club member deposited his stipulated amount in the bank on the fixed pay day, he delivered the detached coupon with his money to the bank; the coupon was stuck on a hook and gave the bank's bookkeeper the data from which the deposit could be entered at convenience. A single impression of a stamp of the bank, part of which impression went on the stub and part on the coupon to be detached and deposited, authenticated to the bank its receipt of the deposit and to the customer the bank's admission of his making the deposit.

That the Barkley reverse device could be more easily and conveniently handled than the Landis may be conceded; but, like the court below, we are of opinion it did not involve invention. On the contrary, it was the to-be-expected result which would naturally follow the study of men familiar with the banking and stationery business, when they set themselves to study and improve the Christmas Club system, as all bank employees would do. When such a new system was used by the thousands of keen minds, when better detail and further efficiency of such system would be the customary result of the experience that came from use, we would expect improvements, and the ideas such as Barkley worked out are, in our judgment, the steps that would naturally follow use. To take the cleverness of an improver and award the monopoly of an invention thereto would, to our minds, make of the patent law a hindrance, not a help, in the evolution of progress.

In re RUSSELL.

(District Court, E. D. Pennsylvania. June 24, 1921.)

No. 642.

Bankruptcy ⟸212—Fund received by trustee through mistake paid over to lawful owners.

The trustee of a deceased bankrupt joined in a conveyance of real estate and received a share of the proceeds, in the mistaken belief, shared by all the parties, that bankrupt before his death was owner of a vested interest in remainder in the property, whereas his interest was contingent and was terminated by his death prior to that of the life tenant. *Held*, that the mistake, under the law of Pennsylvania, was not one of law only, but of law and fact, and the court, under Bankruptcy Act, § 2, subd. 7 (Comp. St. § 9586), had jurisdiction to order the fund paid over to the lawful owners of the property sold.

In Bankruptcy. In the matter of William F. Russell, bankrupt, deceased. On review of order of referee. Affirmed.

Thomas J. Meagher, of Philadelphia, Pa., for trustee.

Thomas Stokes and Henry, Pepper, Bodine & Stokes, all of Philadelphia, Pa., for claimants.

THOMPSON, District Judge. William F. Russell was adjudicated a bankrupt on June 29, 1900. Upon June 13, 1900, he was duly discharged as such bankrupt and the case was subsequently closed. On March 17, 1909, the bankrupt died. On June 19, 1912, the executor of a creditor filed a petition setting out that it had come to her knowledge that, when the bankrupt filed his petition in bankruptcy and at the time of his death, he was seized of an interest in remainder in certain real estate, which property he had omitted from his schedule of assets, and that the life estate upon which the remainder was expectant had terminated on June 22, 1910. The petitioner prayed that the estate be reopened. On July 16, 1912, upon an agreed statement of facts, the

court entered an order reopening the bankrupt estate and referring it to a referee for further proceedings. The facts are as follows:

Emma L. Evans died testate December 22, 1887. Under her will she placed her residuary estate in trust, and provided that the net income should be paid to her sister, Sarah E. Russell, for life. After the death of the life tenant it was directed that the residuary estate be divided into five parts, two of which were placed in trust to pay and divide the income among six nephews (one of whom was the bankrupt, William F. Russell, and two of whom were Winfield S. and Randolph P. Russell, the petitioners), with further direction after the death of each of the said six nephews to transfer and pay the representative portion of the capital to his children, if any then living, and the issue of any then deceased; and in case there should be no such child or issue of deceased child then living, and if none of such children or issue of deceased children be then living, then over.

Sarah E. Russell, the life tenant, died January 22, 1910, survived by but two of the six nephews, namely Randolph P. and Winfield S. Russell. In Evans Estate, No. 1, 264 Pa. 357, 107 Atl. 731, decided June 21, 1919, it was held that the gift to the six nephews was not vested, but contingent upon their surviving the life tenant. Prior to the above decision, and prior to the petition to reopen, at the adjudication of the first account of the testamentary trustee, it was held that William F. Russell, the bankrupt, had a vested interest in Emma L. Evans' estate. The testatrix died seized of real estate, No. 634 Market street, Philadelphia. The trustee under an orphans' court order sold this property for $135,000, $15,000 in cash and $120,000 secured by mortgage.

A title company having refused to pass title unless the deed was joined in by a trustee of the bankrupt estate of William F. Russell, the proceedings above referred to were taken to reopen the cause in bankruptcy, and Harry S. Mesirov, Esq., was appointed trustee. The trustee, having joined in the deed, received a share of the cash payment representing the supposed interest of the bankrupt therein, and later received a similar representative portion of the $120,000 secured by mortgage and interest. Meanwhile, upon the audit of the second account of the trustee in the orphans' court, the auditing judge held that the nephews did not have a vested interest, but that the interest of each was contingent upon his surviving the life tenant. The court in banc sustained exceptions to this finding, and held that the interest of each of the nephews was vested, payable at the death of the life tenant to those who survived and to the representatives of deceased nephews. That decision of the court in banc was reversed in the case of Evans Estate, No. 1, supra. In Evans Estate, No. 2, 264 Pa. 361, 107 Atl. 732, an award to the trustee in bankruptcy was ordered set aside.

Thereafter, on July 15, 1920, Winfield S. Russell and Randolph P. Russell filed a petition with the referee in bankruptcy for an order upon the trustee in bankruptcy that the money received by him from the sale of the said real estate be paid to the petitioners, for the reason that upon the death of Sarah E. Russell the remainder in the two-fifths share

after her life estate had become vested in them, and the money received from the sale by the trustee in bankruptcy was in fact the money of the petitioners. After hearing upon petition, answer, and proofs, the referee on February 28, 1921, entered an order upon the trustee to pay to the petitioners or their attorneys the sum of $8,676.72, with interest.

This order of the referee is here upon petition and certificate for review. There can be no dispute that the bankrupt never had a vested interest in the real estate sold. His interest was contingent upon his surviving Sarah E. Russell, and, she having survived him, his contingent interest died with him. There having been no title in the bankrupt, no title passed to the original trustee upon his appointment, and no title passed to the present trustee upon his appointment. At the time of the sale and conveyance of the property, and at the time of the distribution of the proceeds the petitioners, Winfield S. and Randolph P. Russell, the trustee in bankruptcy, and the trustee under the will of Emma L. Evans all believed that the bankrupt had a vested interest which had passed to his trustee in bankruptcy. It must be conceded, therefore, that the money paid to the trustee for the interest of the bankrupt was paid to the trustee and received by him in mistake as to the rights of the parties. Under the facts, it appears that whatever interest passed by the joinder of the trustee with Winfield S. and Randolph P. Russell would in fact have passed by their joinder without the trustee.

The petitioners place their right to the fund upon the ground that the money, being in the hands of the trustee, who is an officer of the court, is in custodia legis, and therefore should be in equity and good conscience paid to its rightful owners, who would have received it, but for the mistake. They further urge that the mistake under which the trustee received the money was not a pure mistake of law, but was such a mixed mistake of law and fact as to entitle the injured parties to recover.

The trustee claims the right to retain the fund for the creditors for the bankrupt upon two grounds: First, because the money was paid under mistake of law, and hence is not recoverable; second, that the payment was made and the trustee joined in the deed in order that the sale might be consummated by conveyance of any color of title in the trustee, and that the parties to the sale bought their peace by assenting to a certain part of the purchase price going to the trustee, and that having entered into such an arrangement, and the money having been paid, they are concluded from reversing their previous assent to the trustee being a party to the deed and receiving as an inducement to join in the deed an amount representing the value of the supposed interest of the bankrupt.

If the mistake is a mistake of law only, the rule is not denied that equity will not grant relief as between individuals. That is the well-known settled law of Pennsylvania. Rankin v. Mortimere, 7 Watts, 372; McAninch v. Lauglin, 13 Pa. 371; Gross v. Leber, 47 Pa. 520. The money having been received by the trustee, qua trustee, however, his rights therein are restricted to those conferred upon a trustee in

bankruptcy by statute. When he joined in the deed, it was for the purpose and with the intention on the part of all parties that he should convey to the grantee an undivided interest, which was mistakenly believed to belong to the bankrupt estate, and so far as the record shows the portion of the purchase money received by him was a consideration for that interest, and not for the purpose of clearing a cloud upon the title. All parties were acting under the mistaken supposition that the bankrupt had acquired under the will a vested remainder.

As to the bankrupt's ownership, all parties were mistaken. He had never owned an interest in the estate, except that contingent upon his survival of the life tenant. No title passed to the trustee. A mistake as to ownership of real estate or title thereto has been held with practical unanimity in the Pennsylvania cases to be a mistake of fact, and not purely a mistake of law. Whelen's Appeal, 70 Pa. 410; Goettel v. Sage, 117 Pa. 298, 10 Atl. 889; Wilson v. Ott, 173 Pa. 253, 34 Atl. 23, 51 Am. St. Rep. 767; McKibben v. Doyle, 173 Pa. 579, 34 Atl. 455, 51 Am. St. Rep. 785; Union Trust Co. v. Gilpin, 235 Pa. 524, 84 Atl. 448. The same doctrine is followed in the English cases and by the courts of most of the states of the Union. The fund being in the hands of the trustee, the controversy is incident to the jurisdiction of the court under section 2, subd. 7, of the Bankruptcy Act (Comp. St. § 9586). In re Drayton (D. C.) 135 Fed. 883; In re MacDougall (D. C.) 175 Fed. 400; Murphy v. John Hoffman Co., 211 U. S. 562, 29 Sup. Ct. 154, 53 L. Ed. 327.

The petition for review must be dismissed, and the order of the referee affirmed.

UNITED STATES v. REGAN.

(District Court, D. New Hampshire. June 3, 1921.)

No. 1941.

Criminal law ⇐201—Conviction under state prohibition law not bar to prosecution under National Act.

A conviction in a state court for transporting liquor within the state in violation of a state statute *held* not a bar to a prosecution, based in the same transaction, for transporting liquor without obtaining a permit from the Commissioner of Internal Revenue, as required by National Prohibition Act, tit. 2, § 6, as placing defendant twice in jeopardy.

Criminal prosecution by the United States against Joseph Regan. On plea in abatement. Overruled.

Fred H. Brown, U. S. Atty., of Somersworth, N. H.
Michael O'Brien, of Lawrence, Mass., for defendant.

ALDRICH, District Judge. The respondent in this case pleaded guilty in the state court, and was fined, for unlawfully and criminally transporting a large quantity of spirituous liquor within the limits of New Hampshire. The proceeding and the punishment there was under a distinctly prohibition state law, which existed before the Eighteenth

Amendment, and before the Volstead Act (41 Stat. 305). The case here is against the same man, and is based upon an indictment for unlawfully transporting spirituous liquor from Colebrook, in the district of New Hampshire, to another point in New Hampshire, without having received a permit from the Commissioner of Internal Revenue so to do. The defendant pleads the New Hampshire proceeding in bar.

The allegation in the federal indictment that the transportation was without permission from the Commissioner of Internal Revenue is a substantive one, and therefore would seem to be one which sets forth a different offense, though admittedly it relates to the act which was the foundation for the state prosecution.

Now, without going into the allegations categorically, I assume that the two prosecutions are based upon the same transportation.

Mr. Michael O'Brien, counsel for the defendant, takes the position that the defendant is being punished twice for the same act. He bases his position on the Fifth Amendment to the federal Constitution, in respect to life and limb, which declares against any person being twice put in jeopardy. He gives a very valuable history of cases under this provision, but it must be said that they largely relate to conditions before the Eighteenth Amendment.

The question is an important one, and it is one which will probably have to be ultimately settled by the Supreme Court, because it is a constitutional one, and because there are already two District Court decisions at variance as to the point in question.

Because of this I am not going to attempt an elaborate discussion of the "twice in jeopardy" question. It may be remarked, however, that the case here is not one of life and limb, but rather one involving a misdemeanor, and one which may be influenced, perhaps, by the "concurrent power" provision of the Eighteenth Amendment.

For the purposes of a decision in this case, I am inclined to take the view expressed by Judge Woodrough in United States v. Holt (D. C.) 270 Fed. 639. It may be well enough to supplement Judge Woodrough's reasoning, however, by the idea that a distinctive state prohibitory law and the National Prohibition Act are different laws in substantial respects.

The national law is not only a prohibitory law, but it has revenue features. It is not necessary, however, to analyze and point out the revenue characteristics of the federal law. It is sufficient to say that they are features that enter into it, and its administration is largely under the direction of the Commissioner of Internal Revenue.

Moreover, the Cruikshank Case, 92 U. S. 542, 23 L. Ed. 588, bears upon the question of double prosecution.

The federal decisions do not seem to be put distinctively upon the ground that the federal government may punish a second time, because it is a paramount government, but because the laws of the two jurisdictions are different in given cases.

As is illustrated in the Cruikshank Case, 92 U. S. at page 550, 23 L. Ed. 591, there may be a prosecution in the state court for passing spurious coin because it is a fraud upon him to whom it is passed, and

there may be a prosecution in the federal court because it discredits a medium of exchange which the federal government puts out for public uses. In that case it is said:

"That this does not, however, necessarily imply that the two governments possess powers in common, or that it brings them into conflict with each other."

And in the late case of Gilbert v. Minnesota, 254 U. S. 325, 41 Sup. Ct. 125, 65 L. Ed. ——, it is said, in referring to State v. Holm, 139 Minn. 267, 166 N. W. 181, L. R. A. 1918C, 304:

"Where, after full discussion, the contention was rejected that the Espionage Law * * * abrogated or superseded the statute, the court declaring that the fact that the citizens of the state are also citizens of the United States and owe a duty to the nation, does not absolve them from duty to the state nor preclude a state from enforcing such duty. 'The same act,' it was said, 'may be an offense or transgression of the laws of both' nation and state, and both may punish it without a conflict of their sovereignties."

It was decided some years ago by the Court of Appeals in this circuit (Columb v. Webster Mfg. Co., 84 Fed. 592, 28 C. C. A. 225, 43 L. R. A. 195) that a judgment on the merits in the state court for personal injury on the ground of negligence is a bar to a second action in the federal court by the same plaintiff against the same defendant for the same injury. It is true that in that case the party plaintiff was the same, while in this case the prosecuting parties are different, because they are different governments with different sovereignties, having laws of different characteristics in respect to the same general subjects. The ground of that decision was that the merits were res judicata. That decision doubtless expresses the general rule as to such situations.

I do not decide this question against the defendant without some misgivings, because double punishment is obnoxious to the ordinary conception of right. But under the impulse of the modern philosophy in respect to the Eighteenth Amendment, and the concurrent jurisdiction of the two governments, I am inclined to think that the proper thing for me to do is to overrule the plea in bar and require the defendant to plead further.

And it is so ordered.

HEIL et al. v. UNITED STATES.

(District Court, S. D. New York. June 15, 1921.)

United States ⇐125—Suable for failure to transmit cable message.

Under Tucker Act, § 1, and Judicial Code, § 24 (20), being Comp. St. § 991 (20), authorizing suits against the United States on "all claims * * * founded * * * upon any contract, express or implied, with the government of the United States * * * in respect to which claims the party would be entitled to redress against the United States * * * if the United States were suable," a suit may be maintained against the United States for failure of a cable company, which had been taken over and was being operated by the government, to transmit a message which it had accepted for transmission, and for transmission of which it had been paid.

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

At Law. Action by Alfred W. Heil and Joseph S. Heil, partners as Heil & Co., against the United States. On demurrer to petition. Overruled.

Demurrer to a petition under the Tucker Act for failure to allege any cause of action. The petition alleges the President's seizure of the marine cables of the Commercial Cable Company on November 2, 1918, under the war power, and his consequent operation of them, and that during the time of such operation the plaintiffs paid the proper tolls and delivered to "the Commercial Cable Company," as an "agency" of the United States, a cable message to be sent to London, which "the company" (i. e., the Commercial Cable Company) promised to transmit; that "the respondent" (i. e., the United States) never transmitted the message at all, and because of that failure the plaintiffs lost. The message was for the purchase of £100,000 sterling, and the loss depended upon fluctuations in British exchange.

Henry Amster, of New York City, for petitioners.

J. Julien Sutherland and Peter B. Olney, Jr., of New York City, for the United States.

LEARNED HAND, District Judge. It is conceded that, were these allegations contained in a complaint against the Commercial Cable Company before or after the operation of their property by the President, the demurrer would not lie. The question is whether any similar legal duties or obligations resulted during that period. None such can result, unless the United States has created them by statute, and the only relevant statute is the Tucker Act, which provides for suits upon—

"all claims * * * founded * * * upon any contract, express or implied, with the government of the United States * * * in respect to which claims the party would be entitled to redress against the United States, * * * if the United States were suable." Comp. St. § 991 (20).

So the parties have correctly presented as the sole question whether the claim is founded upon an express or implied contract with the government of the United States.

For procedural purposes the failure to transmit or deliver a telegraph message may be made to sound in contract. The company promises, though not verbally, to transmit the message in consideration of the tolls. But, quite independent of its promise, it is under a duty to accept, transmit, and deliver—a duty arising from the statutes which create it or permit its activities. Ellis v. American Tel. Co., 13 Allen (Mass.) 226, 232; Smith v. Western Union Tel. Co., 83 Ky. 104, 113, 4 Am. St. Rep. 126. That duty makes the promise unnecessary, and indeed would make nudum pactum a true bilateral contract to receive and transmit a message. The sender, having got no promise to do what the company was not independently bound to do, would have received no consideration. Besides, the terms of the promise are not within the company's pleasure. Some things they may reserve; some they may not, depending upon the interpretation of their imposed duties. At best it is merely an obligato, irrelevant to the melody set by specific command.

Nevertheless, after the President took over the cables, he was under no such duty imposed by law to accept messages, nor was the United

States. His decision, or the Postmaster General's, to accept cable messages as before, however imperatively required for the convenience of the public, was necessarily voluntary, and it is quite conceivable that circumstances should have arisen which would have resulted in their total suspension. This applies as much to every message as to all, there being as little duty imposed upon him to send a given message as to send any class. The right to discriminate between messages was indeed freely exercised during the war at the delegated discretion of the public authorities. The situation was therefore quite changed during the period of governmental operation, and there was no right to send or duty to receive cables, except as it arose from the free determination of officers of the United States, in the discharge of their duties.

Of course, the Tucker Act is not to be interpreted verbally; nor should I think the fact in any sense determinative that the sender of a cable message might sue the telegraph company ex contractu. The reason why it seems to me that the act applies here is that, if the United States had not the immunity of a sovereign, there would for the foregoing reasons have been no breach of positive duty ("subtraction"), and there would have been a breach of contract. That is precisely the situation which the act was drawn to meet. Congress meant to assume liability for the acts of such of its agents as had the power in the discharge of their duties to assume or refuse engagements on the faith of which other citizens should rely. It did not mean to assume liability for the proper discharge of duties which it imposed upon those agents by virtue only of positive law.

It was urged at the bar that this result might expose the United States to serious loss and impede it in the discharge of its governmental functions. This is, of course, an irrelevant consideration, when the purpose of the act is clear; but here it is out of place in any event. Whatever be the justification in policy of the sovereign's immunity, the first consideration ought to be this: That in the performance of its voluntary engagements with its citizens it should conform to the same standard of honorable conduct as it exacts of them touching their conduct with each other. Any policy which would exempt the United States from the scrupulous performance of its obligations is base and mean; it serves in the end to bring the United States into contempt, to prejudice it in its dealings when it enters into the common fields of human intercourse, and to arouse the indignation of honorable men. Congress by the Tucker Act meant to avoid such consequences.

The demurrer is overruled.

ORIENTAL TEXTILE MILLS v. THOMPSON WORSTED CO.

(District Court, E. D. Pennsylvania. June 13, 1921.)

No. 5622.

Evidence ⊂=448—Where a written contract, if accepted, was not ambiguous, prior correspondence held irrelevant.

Where the terms of a letter were sufficient to express a contract without ambiguity for the sale and purchase of a commodity, the only issue being as to its acceptance by one party after an alteration made therein by the other, prior correspondence between them *held* properly excluded.

At Law. Action by the Oriental Textile Mills against the Thompson Worsted Company. On motion by plaintiff for new trial. Denied.

See, also, 265 Fed. 794.

Thomas F. Gain, Frank A. Chalmers, and Brown & Williams, all of Philadelphia, Pa., for plaintiff.

Hiram Hathaway, Jr., of Chester, Pa., and W. Roger Fronefield, of Media, Pa., for defendant.

THOMPSON, District Judge. The sole issue at the trial was whether there was a contract between the parties by reason of the acceptance by the plaintiff of the defendant's letter of January 29, 1917, after the latter had changed the terms by erasure of the words "with samples submitted," and inserting in lieu thereof "with that per our invoice November 12, 1915." This issue was clearly defined by Judge Dickinson in his opinions of June 2, 1920, and October 29, 1920, ordering a new trial.

The written terms contained in that paper were sufficient to express a contract without ambiguity, both before and after the plaintiff made the alteration. If there was a contract, there was a breach, because of the defendant's cancellation, and there was no dispute about the measure of damages. The prior correspondence consisted entirely of letters and telegrams between the parties in relation to other contracts and negotiations which led up to the contract of January 29, 1917. The only evidence required to explain its terms, therefore, was such as would fix the identity of the invoice of November 12, 1915, if the plaintiff was in the right, and to fix the identity of the samples submitted by the defendant, if the defendant was in the right. The prior correspondence was, therefore, no part of the contract, and its introduction could but lead to confusion in the minds of the jury, and it was, therefore, properly excluded. The subsequent correspondence was irrelevant to the issue presented.

It is insisted there should have been a directed verdict for the plaintiff, because, in the affidavit of defense, the defendant acknowledged that, on or about January 29, 1917, the plaintiff and defendant entered into a contract whereby the plaintiff agreed to buy and the defendant agreed to sell 100,000 pounds of gray top. That part of the affidavit of defense, however, must be taken in connection with the averment that the contract of January 29, 1917, was changed without warrant from

the defendant, fraudulently and without its knowledge, which, if proven to the satisfaction of the jury, and without ratification after discovery of the alteration, was a sufficient defense.

In the plaintiff's fourth point for charge, the court was asked to instruct the jury to take into consideration "the uncontradicted testimony that a letter dated February 3, 1917, from the plaintiff and addressed to the defendant, was inclosed in the same envelope in which the changed letter was mailed to the defendant." To have so charged would have been to ignore the testimony of the defendant's witness, Goldsworthy, who testified as to opening the envelope in which the altered contract was inclosed, and that there was no such letter with the returned contract. It is therefore held that the point was properly declined.

The plaintiff also assigns error on the part of the trial judge in declining to affirm the plaintiff's seventh point, calling the attention of the jury to the defendant's failure to call as a witness Mr. Walter Thompson, its president, upon the question whether the defendant knew of the change in the contract. While the law as stated in the point—"The failure of a party to produce testimony peculiarly within its own possession or control permits of the inference that, if produced, it would not support the party's contention"—is substantially correct, there was nothing in the case to show that the president of the defendant corporation had anything to do with the opening of the mail or with the letter in question. The trial judge could not assume that such was the case, in the absence of any evidence to that effect.

There being in my opinion no substantial error in the admission or rejection of evidence, nor in the instructions to the jury as contained in the charge, or the rulings upon the points presented, the motion for a new trial is denied.

UNION TRUST CO. OF SAN FRANCISCO et al. v. WARDELL, Internal Revenue Collector.

(District Court, N. D. California, S. D. January 3, 1921.)

No. 16220.

Internal revenue ⊂=8—Estate tax held to apply to property transferred on testamentary trust prior to passage of act.

The provision of Act Sept. 8, 1916, § 202 (Comp. St. § 6336½c [b]), including in property of a deceedent which is subject to the estate tax thereby imposed property "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," *held* not limited to transfers made after passage of the act, but to apply to property previously transferred, where the owner died after passage of the act.

At Law. Action by the Union Trust Company of San Francisco and Albert Lachman, as executor of the will of Henriette S. Lachman, deceased, against Justus S. Wardell, Collector of Internal Revenue. On demurrer to complaint. Demurrer sustained.

Heller, Powers & Ehrman, Isaac Frohman, Edward F. Treadwell, John W. Preston, and Garret W. McEnerney, all of San Francisco, Cal., for plaintiffs.

Annette Abbott Adams, U. S. Atty., and Charles W. Thomas, Jr., Asst. U. S. Atty., both of San Francisco, Cal., and D. M. Kelleher, of Ft. Dodge, Iowa, for defendant.

RUDKIN, District Judge. Section 201 of the Act of September 8, 1916, 39 Stat. 777 (Comp. St. § 6336½b), imposes a tax upon the transfer of the net estate of every decedent dying after the passage of the act, whether a resident or nonresident of the United States. Section 202 (section 6336½c) provides:

"That 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: * * *

"(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."

The value of the net estate is ascertained by making certain authorized deductions from the value of the gross estate.

On the 31st day of May, 1901, Henriette S. Lachman executed a declaration of trust under the terms of which she assigned 7,475 shares of the capital stock of the S. & H. Lachman Estate, of which she was the owner, to her sons Albert Lachman and Henry Lachman, as trustees, to pay the income from the stock to her during her life, and upon her death to deliver the stock to certain relatives named in the trust deed. The grantor in the trust deed died on the 14th day of November, 1916, and the present suit was thereafter brought by her executors to recover the sum of $4,545.50 paid as tax on the above transfer, under protest.

Counsel for plaintiffs contend that the act should not be so construed as to include transfers made prior to its passage, and that, if so construed, the act is unconstitutional and void. Both of these questions were determined adversely to the plaintiffs by the Circuit Court of Appeals for the Eighth Circuit in Schwab, Executor, v. Doyle, 269 Fed. 321. In that case the transfer was made in contemplation of death, whereas in the present case the transfer was intended to take effect in possession or enjoyment at or after death; but manifestly the same rule of construction will apply to both provisions, and the same rule of constitutional validity. I entertain no doubt that the act was intended to operate retrospectively, and a contrary construction could only be justified on the principle that such a construction would render the act unconstitutional. On the question of constitutionality the decision of an appellate court should certainly raise a doubt as to the validity of the act in the mind of a trial court, and without further discussion the demurrer will be sustained.

Let an order be entered accordingly.

CADMAN v. HUDSON.

(Court of Appeals of District of Columbia. Submitted March 22, 1921. Decided May 2, 1921.)

No. 1413.

Patents ⇐90(3)—Facts held to show due diligence by prior inventor in reduction to practice.

Evidence that the prior inventor disclosed the invention by drawings made prior to July, which were checked over during August, and that on September 29 of the same year he ordered a model constructed, which was promply built, shows due diligence by the prior inventor in reducing to practice.

Appeal from the Commissioner of Patents.

Interference proceeding between Addi Benjamin Cadman and Warren R. Hudson. From a decision of the Commissioner of Patents, awarding priority to Hudson, Cadman appeals. Affirmed.

Lincoln B. Smith, of Chicago, Ill., for appellant.

H. A. Toulmin and H. A. Toulmin, Jr., both of Dayton, Ohio, for appellee.

VAN ORSDEL, Associate Justice. This appeal is by the senior party, Cadman, from the decision of the Commissioner of Patents awarding priority of invention to the appellee, Hudson. The invention relates to steering mechanism for four-wheel trailers for auto trucks. It is conceded Hudson was the first to conceive the invention. We think the evidence discloses, as held by the Commissioner and the Board of Examiners, that Cadman reduced to practice about the middle of November, 1916, and that the Hudson reduction occurred a few weeks later. The case turns upon the question of Hudson's diligence when Cadman entered the field.

The date of conception accorded Cadman, August 31, 1916, is supported by the testimony. Hudson discloses drawings illustrating the invention, which were made prior to July, 1916. Work was done in checking over these drawings during August, and, on September 29, 1916, Hudson ordered a trailer constructed. A trailer was promptly built in accordance with the drawings. On this showing, which is fully supported by the record, we find no basis for the charge of lack of diligence on the part of Hudson.

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.

OLNEY et al. v. BUTTE CREEK CONSOL. DREDGING CO.

(Court of Appeals of District of Columbia. Submitted March 8, 1921. Decided May 2, 1921.)

No. 3466.

1. **Equity ⟸273—Amendment in suit for specific performance to seek damages caused by inability to convey held not to state new cause of action.**
In a suit for specific performance of a contract to convey land, with a prayer for damages from the refusal to convey, an amended complaint alleging defendant's inability to convey part of the land and seeking damages therefor, and a supplemental complaint alleging the same facts and further alleging reliance on defendant's representation that she could give title, did not state a new cause of action.

2. **Specific performance ⟸10(1), 129—Court may decree partial performance, with damages for residue, when defendant unable to perform completely.**
Where a party has partially disabled himself from complying with his agreement to convey land, a court of equity may decree that he perform so far as he is still able and allow damages to plaintiff for the residue.

3. **Appearance ⟸9(8)—Defendant held to have appeared generally by directing attorney to prosecute appeal and appear on appeal.**
Where defendants, subsequently denying an attorney's authority to answer amended and supplemental pleadings, which they claimed changed the cause of action, did not challenge the attorney's action or seek to have the decree vacated during the three years intervening between the date of the decree and the date of its affirmance, but instead directed the same attorney to prosecute the appeal and to appear for them on the appeal, this amounted to a general appearance by them.

4. **Appearance ⟸12—Defendants appearing put on notice of subsequent proceedings.**
The appearance of defendants filing a sworn answer put them on notice as to subsequent proceedings.

5. **Attorney and client ⟸88—Client bound by attorney's answer to amended and supplemental pleadings when not induced by opposite party's fraud.**
Where an attorney was authorized to appear for defendants, the jurisdiction over them was so perfected as to bind them with respect to his action in answering amended and supplemental pleadings, which they claimed changed the cause of action, when not induced by the fraud of the adverse party, especially in view of Code Civ. Proc. Cal. § 283, providing that an attorney regularly entering his appearance for a party has authority to bind his client in any of the steps of the action or proceeding.

Appeal from the Supreme Court of the District of Columbia.

Action by the Butte Creek Consolidated Dredging Company against Laura F. Olney and another. From a judgment for plaintiff, defendants appeal. Affirmed.

J. Miller Kenyon and H. B. F. Macfarland, both of Washington, D. C., for appellants.

Elwood P. Morey and Harry G. Kimball, both of Washington, D. C., for appellee.

HITZ, Acting Associate Justice. This is an appeal from a judgment of the Supreme Court of the District of Columbia, where a jury

was waived and the case tried before a justice, coming here upon a bill of exceptions.

On January 3, 1911, the appellee filed in the superior court of Butte county, Cal., an amended complaint, setting up that, prior to April 8, 1907, the appellants were the owners in fee of a certain described tract of land in that county, and that on said day they entered into a written contract for the sale thereof to two individuals, which was subsequently assigned to the appellee; that the appellee had complied fully with its part of said contract, but that the appellants had refused to convey, and the prayers were that they be required to execute and deliver a proper conveyance; that the appellee recover the sum of $5,000 damages sustained by it on account of such refusal; and for general relief. To this the appellants filed an elaborate answer, through a California attorney, duly signed and sworn to by them.

It embodied a counterclaim, under which the appellants demanded the return of a certain certificate of stock, or the sum of $400 as the value thereof, and $100 damages for its detention.

Thereafter issue was joined, and on September 25, 1913, the suit being about to be called for trial, the appellee filed a pleading, styled "Second Amended Complaint," which was in substance identical with the amended complaint, except that it alleged that appellants, at the time of making the contract of sale, had represented their ownership to include a certain parcel of 20 acres, which appellee had discovered that appellants could not convey; that appellee had been prevented from obtaining possession of this parcel, although embraced in the contract of sale, it being held by one Martin, who refused to allow the appellee to continue dredging thereon, by reason whereof, and of the failure of title to the 20 acres, the appellee had been damaged in the sum of $5,000.

On the same day a supplemental complaint was filed to the same effect, with the additional averment that prior to the commencement of the action the appellee had discovered that this portion of the land did not stand of record in the name of Mrs. Olney, but that she had insisted that she could deliver title thereto, which representation the appellee believed, and the same claim of damages were made. Both these last-mentioned pleadings were filed by leave of the superior court.

On said September 25, 1913, the case was tried before the superior court, a jury being waived, and evidence was adduced and arguments made on behalf of both parties. It is to be inferred that the case was taken under advisement by the court, and pending its decision, on October 6, 1913, separate answers were filed to the second amended complaint and to the supplemental complaint, purporting to be the answers of the appellants, both being signed by the California attorney, and in the record before us it is stated that they were "duly verified." On November 26, 1913, the superior court filed its findings of fact and conclusions of law, together with a decree in favor of the appellee for a stated amount, with interest and costs.

Thereafter an appeal was taken by the appellants to the Supreme Court of California, where the recovery was reduced to the sum of

$3,703.15, with interest from November 26, 1913, at 7 per cent. per annum, with which modification the judgment was affirmed. Butte Creek, etc., Co. v. Olney, 173 Cal. 697, 161 Pac. 260. In pursuance of a mandate of said court, the superior court entered a decree for said sum and interest, which is the judgment sued on in the Supreme Court of the District.

The evidence at the trial below was largely documentary, being made up of the proceedings in full as above referred to; the appellants giving evidence tending to show that neither of them was in the state of California at the time the case there was instituted or pending, that they employed the California attorney, but were not advised by him of the amendments of September 25, 1913, until after they had been made and the action tried, nor did they authorize the attorney there to plead to said amendments, or to appear for them after the amendments were made. Mrs. Olney did authorize the appeal to the Supreme Court of California, and the same attorney argued the case there.

The assignment of errors present, when considered together, two contentions: (1) That the filing of the second amended complaint and the supplemental complaint in the superior court of California, had the effect of making a new cause of action. (2) That the California attorney was not authorized by his employment to file an answer to those pleadings, and that the superior court had no jurisdiction over the appellants, or to render the decree on which the judgment below is founded.

The ultimate question, then, for decision here, is whether the record sued on, all the facts being considered, is within the "full faith and credit" provision of the Constitution. There is no dispute but that the superior court had jurisdiction of the subject-matter and of the parties, so far as the amended complaint to which the appellants made answer signed and verified by them.

[1] The Supreme Court of California, to which Mrs. Olney admittedly authorized an appeal, and where she was represented by the same attorney who appeared for the appellants in the superior court, held that the subsequent pleadings did not constitute a new cause of action, and this holding is supported under varying circumstances, but all involving a like principle, by the following cases: Davis v. New York, etc., R. R. Co., 110 N. Y. 646, 17 N. E. 733; Flanders v. Cobb, 51 Am. St. Rep. 416; Stevenson v. Mudgett, 10 N. H. 338, 34 Am. Dec. 155; Howard v. Railway Co., 11 App. D. C. 300; District of Columbia v. Frazer, 21 App. D. C. 154. In the first amended complaint damages were claimed, and as was said by the Supreme Court of California when this case was before it:

"In essence it was still a suit founded upon the written contracts of sale and the failure on the part of the Olneys to perform their part of said agreements."

[2] The principle is familiar that where a party has partially disabled himself from complying with his agreement to convey land, a court of equity may decree that he perform so far as he is still able, and

allow damages to the plaintiff for the residue. Townsend v. Vandewerker, 150 U. S. 171, 16 Sup. Ct. 258, 40 L. Ed. 383.

[3] As to the want of authority on the part of the California attorney, it is to be noted that the appellants, in the long interval between September 25, 1913, the date of the decree in the superior court, and November 23, 1916, when the Supreme Court of California rendered its decision, took no step to challenge the action of their attorney in the lower court, or to have its decree vacated on the grounds now urged, but instead they directed him to prosecute an appeal to the Supreme Court, and to appear for them there.

This was a general appearance, and authority is not wanting for the proposition that, where a judgment is reversed on the ground that the trial court had no jurisdiction of the person of the defendant, a general appearance in his behalf in the appellate court will put the defendant in court without any further step to bring him in. Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 S. W. 364, 34 L. R. A. (N. S.) 1137, 135 Am. St. Rep. 417.

[4, 5] The appearance of the appellants, when they filed their sworn answer, put them on notice as to subsequent proceedings, and, where an attorney is authorized to appear, the jurisdiction over his client is so perfected as to bind him with respect to the subsequent action of the attorney, not induced by the fraud of the adverse party. Tyson v. Santa Anna (Tex. Civ. App.) 154 S. W. 1055; Freeman on Judgments (4th Ed.) § 500; Harshey v. Blackmarr, 20 Iowa, 161, 89 Am. Dec. 520.

By section 283 of the Code of Civil Procedure of California, an attorney regularly entering his appearance for a party has authority:

"To bind his client in any of the steps of an action or proceeding."

Finding no error in the judgment below, it is affirmed, with costs.

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.

J. E. TAYLOR & CO. et al. v. EMPIRE LIGHTING FIXTURE CO., Inc.

(Court of Appeals of District of Columbia. Submitted March 8, 1921. Decided May 2, 1921.)

No. 3425.

1. Trial ⇐260(1)—Refusal of requested charges covered by general charge not error.

Where the prayers of a party are rejected, but the points made are fully and fairly covered by the general charge, no error is committed.

2. Guaranty ⇐6—Facts held to show guaranty was never accepted.

Where the guarantor of bills for lighting fixtures to be shipped to a building contractor for an apartment house contract executed a revised form of guaranty on the seller's suggestion, but the seller, after receiving it, refused to extend credit unless a 60-day note indorsed by the guarantor should be sent, and on the guarantor's declining to do this the seller

failed to ship until the contractor procured from the apartment house owner an acceptance of an order for payment on him, and the guarantor never received any notice of acceptance of the proffered guaranty, nor heard from the seller until about 6 months after such proffer, when payment of the contractor's account was demanded, there was no acceptance of the guaranty, nor was the guaranty the basis of the credit extended to the contractor.

3. **Guaranty ⟸7(1)—Guarantor entitled to notice of acceptance.**
A guarantor is entitled to notice of acceptance of his proffered guaranty.

4. **Appeal and error ⟸1173(1)—Joint judgment not reversed in part, but appellee given an election.**
Where there was a joint verdict and judgment against both appellants, which was erroneous as to one of them, the judgment will be reversed and the case remanded, with directions to set aside such judgment and permit the appellee to elect to become nonsuit against the successful appellant, and take judgment on the verdict against the other appellant, and, if appellee do not so elect, then to set aside the verdict and order a new trial generally.

Smyth, Chief Justice, dissenting.

Appeal from the Supreme Court of the District Court of Columbia.

Action by the Empire Lighting Fixture Company, Incorporated, against J. E. Taylor & Co. and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded, with directions.

Joseph T. Sherier and William Henry White, both of Washington, D. C., for appellants.

Bynum E. Hinton and J. H. Bilbrey, both of Washington, D. C., for appellee.

HITZ, Acting Associate Justice. This is an appeal from a judgment of the Supreme Court of the District of Columbia based on a verdict against the appellants, who unite in the appeal. The declaration is in one count, setting forth the sale of certain material to Taylor & Co., payment for which is claimed to have been guaranteed by Kernodle. All controversy as to the pleadings was eliminated by a stipulation of counsel for the respective parties in the trial court that "all questions of the form and sufficiency of the respective pleadings were waived."

Taylor & Co. had a contract with Mr. Bates Warren to furnish and install electric lighting fixtures in an apartment house then being erected by him. Prior to July 12, 1916, there appear to have been negotiations between the appellee and Taylor & Co. with reference to the purchase from the appellee of the fixtures referred to in the record, and on July 12, 1916, the appellee sent to Taylor & Co. a schedule of goods and prices, requesting an acceptance in which satisfactory arrangements for payment should be made. On July 13, 1916, Taylor & Co. forwarded to appellee a form of guaranty, signed by appellant Kernodle, as follows:

"I hereby guarantee the payment of all bills for goods sold J. E. Taylor & Co. relative to the De Lux Apartment House contract, for fixtures delivered and approved, according to the terms agreed upon."

At the bottom of the letter transmitting this guaranty, Taylor & Co. gave the names of several persons as reference regarding the financial condition of Kernodle, and said:

"We are inclosing herewith a personal agreement and guaranty, signed by our treasurer, Dr. G. W. Kernodle, who you can very easily get a report on."

On July 14, 1916, the appellee sent to Taylor & Co. an agreement to furnish certain enumerated fixtures for $4,756, terms 30 days from date of shipment, payment to be anticipated if account runs beyond $1,500. This was accepted by Taylor & Co., with the statement beneath the signature of the latter, "Subject to minor changes agreeable to both." In the letter inclosing the paper above referred to appellee wrote:

"In reference to the guaranty and terms of payment, the suggestion made by you is not entirely satisfactory. We must have assurance from you that payment will be made, by check, promptly within 30 days from date of shipment, as we cannot afford to finance a job of this size any longer than this period of time. * * * The guaranty is not in good form, and we would request that you have Dr. G. W. Kernodle sign the inclosed form, and return to us promptly."

The preferred form referred to is that sued on, dated July 17, 1916, and addressed to the appellee as follows:

"In consideration of one dollar ($1.00), to me in hand paid, and further consideration of my interest in the J. E. Taylor & Co.'s contract with the De Lux Apartment House, I hereby guarantee the payment of all goods and merchandise ordered from you by J. E. Taylor & Co. for the De Lux Apartment House, according to schedules submitted under this date, for the sum of $4,756. Should J. E. Taylor & Co. fail to make payments according to terms on schedule, I will make such payments, for the account of J. E. Taylor & Co., to the Empire Lighting Fixture Company, the same as if I had purchased the merchandise for my own account."

This was signed by Kernodle and returned to appellee. On August 7, 1916, appellee wrote to Taylor & Co. that the time had come to push the job with all speed; that the information it had been able to obtain about Kernodle's financial condition was not definite enough to warrant extending this large amount of credit, and requesting that a 60-day note indorsed by Kernodle should be sent. This proposition Kernodle declined.

On August 21, 1916, appellee wrote Taylor & Co., asking them to "try to get the financial proposition satisfactorily adjusted," and again, August 29, 1916, stating that progress on the contract had been somewhat delayed for lack of satisfactory arrangements as to payment, and suggesting that Taylor & Co. get Mr. Warren to accept an order upon him for the payments as earned.

There was subsequent correspondence, and on October 2, 1916, the following order was addressed by Taylor & Co. to Mr. Warren:

"In connection with our contract with the Empire Lighting Fixture Company, 224 Centre street, New York City, N. Y., please pay to the order of the Empire Lighting Fixture Company the sum of five thousand ($5,000.00) dollars, and charge same to our contract with you for lighting fixtures at the De Lux Apartment Building, 2029 Conn. Ave. N. W., Washington, D. C."

October 3, 1916, Warren executed the following:

"I hereby accept the above order and agree to pay the same upon delivery of the fixtures at the above-mentioned building and in the manner stated below, and also upon the condition that the fixtures delivered are in accordance with the contract entered into between myself and J. E. Taylor & Co. The amount to be paid to be based upon invoices covering shipments, but each installment of payment to be not less than $1,500; all payments to be made in promissory notes signed by me to the order of the Empire Lighting Fixture Company, payable 30 days after date, and to bear interest at 6 per cent. per annum until paid."

At the bottom of this paper is the following, signed October 4, 1916, by the appellee through its president:

"Accepted, except as the conditions of contract between J. E. Taylor & Co. and Bates Warren, which are not familiar to us."

Delivery of fixtures by appellee began November 4, and continued every few days until December 16, 1916, when it stopped, leaving fixtures and material of the value of $1,541 still in the hands of the appellee, and the jury appears to have taken this situation into account, as the verdict was for the sum of $3,214.25.

No notes were given or payments made by Warren or by Taylor & Co., and no demand was made by the appellee upon Kernodle until after it had failed to get payment from them. On February 17, 1917, appellee wrote Kernodle:

"We regret that in the J. E. Taylor & Co. transaction we must demand that you arrange to pay us for merchandise delivered on contract July 14, 1916, amounting to $3,221.55, payment of which you guaranteed on July 17, 1916."

Kernodle must have replied to this letter, although no such reply appears in the record, for, on February 20, 1917, appellee wrote him as follows:

"Your letter of February 19th to hand. You are mistaken, as at no time did we release you. After we received the guaranty from you, we refused to make shipments unless we received additional security. All correspondence regarding the guaranty and terms of payment on the J. E. Taylor & Co. contract asked for additional security, and the fact that Mr. Bates Warren agreed to make payment to us direct did not in any way relieve you of your responsibility to us."

The assignment of error by the appellant Taylor & Co. is the refusal of the trial court to grant nine instructions, which raise substantially three questions:

(1) That no contract was made between the appellee and Taylor & Co., and that the fixtures were neither sold nor delivered to Taylor & Co.

(2) That if an original contract was made between appellee and Taylor & Co., a new agreement was subsequently made, by which Warren became the purchaser and the debtor; Taylor & Co. being released by the novation.

(3) That there was no sufficient evidence to sustain a verdict for any sum.

So far as Taylor & Co. are concerned, the question as to their liability appears to be purely one of fact. The contract of July 14, 1916,

with the appellee, is not denied, nor is it disputed that Taylor & Co. was under an agreement with Warren to install the lighting fixtures in a building he was then constructing. The fixtures furnished by appellee went into that building and they have never been paid for.

We have examined with care the elaborate charge of the trial justice, and find that all of the matters of defense suggested by the rejected instructions were covered by the charge, so that the jury had before it all of the claims of this appellant, and the issues thus presented were found in favor of the appellee.

[1] The rule is familiar, and needs no citation of authority for its support, that where the prayers of a party are rejected, but the points made are fully and fairly covered by the general charge, no error is committed; and this we find to be the case here.

[2] The assignment of error, so far as the appellant Kernodle is concerned, is the rejection of five prayers offered by him, one of which was for a directed verdict. It is contended here that the correspondence between the appellee, Taylor & Co., and Kernodle touching the guaranty, and the uncontradicted testimony in reference thereto, raised a question of law, and that there was no issue to be submitted to the jury, inasmuch as there was no controversy on the facts.

The guaranty of July 13, 1916, already referred to, was not accepted by appellee, and that of July 17, 1917, prepared by the appellee, is relied upon as the basis of Kernodle's liability. As to this, the appellee on August 7, 1916, wrote to Taylor & Co., in substance, that the information it had been able to obtain touching the financial condition of Kernodle did not warrant extending this large amount of credit, and requesting that a 60-day note signed by Taylor & Co., and indorsed by Kernodle, should be sent. This according to his testimony, as to which there is no denial, Kernodle declined to do. Thereupon came the correspondence suggesting the intervention of Mr. Warren, and, on October 3, 1916, his acceptance of the order for payment, as set forth in the statement of facts.

Prior to Warren's acceptance of the order of Taylor & Co., no shipment of fixtures had been made; but shortly thereafter shipments began, and continued until December 16, 1916. No payments having been received for the goods delivered, on February 17, 1917, appellee demanded payment from Kernodle. It is evident that Kernodle promptly disavowed any responsibility, and, on February 20, 1917, appellee wrote him giving its version of the situation.

Now, from the time that Kernodle declined to give a guaranty in the form of a promissory note at 60 days, which the appellee requested by letter of August 7, 1916, until February 17, 1917, when the appellee demanded payment under the guaranty which it had stated to be insufficient to warrant the credit, the record shows no communication between appellee and Kernodle. There was nothing before the trial court to indicate that the order on Warren was in the nature of additional security, and it is manifest that the fixtures were supplied on the faith thereof.

[3] The validity of the correspondence contained in the record was not contested, and the case, so far as the surety is concerned, resolves itself into the construction to be placed thereon in the light of the uncontradicted facts, and, in our opinion, Kernodle was never accepted as surety, and the guaranty sued on was not the basis of the credit extended to Taylor & Co. Had there been such an acceptance, Kernodle was entitled to notice thereof. Davis Sewing Machine Co. v. Richards, 115 U. S. 524, 6 Sup. Ct. 173, 29 L. Ed. 480.

[4] The conclusion reached leads to an affirmance of the judgment below as to Taylor & Co., and the reversal of that against Kernodle; but, as there was a joint verdict and judgment against both appellants, on the authority of Penna. Railroad Co. v. Jones, 155 U. S. 333, 354, 15 Sup. Ct. 136, 39 L. Ed. 176, and Gas Light Co. v. Lansden, 172 U. S. 534, 556, 19 Sup. Ct. 296, 43 L. Ed. 543, the judgment of the Supreme Court of the District of Columbia is reversed, and the case remanded to that court, with directions to set aside the judgment against the appellants, and to permit the appellee to elect to become nonsuit as against the appellant Kernodle, and take judgment on the verdict against the appellant Taylor & Co., and, if it do not so elect, then to set aside the verdict and order a new trial generally.

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.

SMYTH, Chief Justice (dissenting). I am unable to agree with my Associates that Kernodle should be relieved from liability. He, at the request of the appellee, signed the guaranty for a consideration of $1 and then sent it to the appellee, which must have received it the next day at the latest. This constituted a valid contract between Taylor and the appellee.

"If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract." Davis Sewing Machine Co. v. Richards, 115 U. S. 524, 527, 6 Sup. Ct. 173, 175 (29 L. Ed. 480).

Here the guaranty was drafted by the other party, signed at its request, and then delivered to it. The opinion cites this case, but, strangely enough, does not point out wherein it is not controlling.

The fact that on August 7 the appellee wrote to Taylor & Co. that it was not satisfied with Kernodle's financial condition and desired additional security, which was refused, did not have the effect of setting aside Kernodle's guaranty, which became effective the moment it was delivered to the appellee, some three weeks before.

Unless the Supreme Court of the United States has announced an erroneous principle of law in the quotation given above, which we may not assume, this court has done so in the opinion just handed down.

Even if there was room for doubt concerning the inference to be

drawn from the conceded facts and circumstances, it was for the jury to solve it. This the jury did under a proper instruction. They found that the guaranty was accepted by the appellee. We have no right to disturb that finding.

KELLOGG v. WINCHELL et al.

(Court of Appeals of District of Columbia. Submitted January 6, 1921. Decided June 6, 1921.)

No. 3479.

1. **Attorney and client ⟸75(1)—Party cannot appear personally or substitute another attorney without leave of the court.**
   A party who appeared at the trial by an attorney cannot appear on appeal personally, or substitute another attorney, without the court's permission.
2. **Attorney and client ⟸75(3)—Attorney dismissed without charge of misconduct will be protected by court in granting leave to substitute another attorney.**
   Though permission to substitute an attorney where the former was dismissed for misconduct is usually granted as a matter of course, the court may in its discretion refuse permission to make such substitution, where charges of misconduct are not made, except on such conditions as will protect the rights of the attorney to his compensation for services theretofore rendered.
3. **Attorney and client ⟸192(1)—Attorney under contingent fee contract has interest in cause of action entitling him to intervene.**
   An attorney, who instituted a suit under a contract with his client whereby he was to receive a percentage of the fund recovered, is vested with an interest in the cause of action which entitles him to intervene in the suit to protect it.
4. **Attorney and client ⟸192(2)—Prosecution of appeal by attorney may be considered in equity as intervention to protect contingent interest.**
   In a suit in equity, where forms may be disregarded, an attorney who took an appeal in his client's name may, if he so desires, prosecute the appeal on his own behalf after the client sought to dismiss it, in order to protect his interest in the cause of action arising from his contingent fee contract.

Appeal from the Supreme Court of the District of Columbia.

Suit by Sherman Kellogg against Fred A. Winchell and others for the construction of a will. From a decree dismissing the bill, complainant's attorney appealed in complainant's name. On motion by complainant, through another attorney, to strike the brief and dismiss the appeal. Motion overruled, on condition complainant's former attorney elects to proceed on his own behalf.

Henry E. Davis and Edmond S. Fletcher, both of Washington, D. C., for appellant.

F. J. Hogan, George E. Hamilton, and John J. Hamilton, all of Washington, D. C., for appellees.

SMYTH, Chief Justice. Mr. Sherman Kellogg, the appellant, on April 19, 1919, entered into a written contract with Mr. Edmond C. Fletcher, a practicing attorney, by which the latter was authorized to

commence and prosecute such suits, actions, and proceedings as he might think proper to protect the interests of Kellogg in the estate of his brother, William Pitt Kellogg, who had died in this District some time before, and which provided that Fletcher was to receive for his services a sum equal to 50 per cent. of any amount obtained by his client, either directly or indirectly, through his efforts. It was further provided that he should not be entitled to any fees unless he recovered money or property over and above that to which Kellogg was entitled under the terms of the will. Fletcher pursuant to this contract did certain things, among them being the institution of this suit in the Supreme Court of the District to have construed "the provisions of the will." On motion the bill was dismissed, and thereupon Fletcher took this appeal. Kellogg executed the necessary undertaking on appeal, and paid the surety company for signing it. On December 2 the record was docketed here.

Some days afterwards Kellogg wrote Fletcher a letter, saying he canceled the contract, and directing him to proceed no further in the case. Fletcher refused to concur in the cancellation, saying he expected to recover $46,000 or $50,000 "out of one item" of the will. Kellogg insisted upon the cancellation, but Fletcher refused to recognize his right to cancel, claiming that he had by his contract acquired an interest in the subject of the litigation. On April 13 Fletcher, in association with Mr. Henry E. Davis, another member of our bar, who claims no authority in this matter except as he derives it from Fletcher, filed a brief in support of the appeal. May 2 some of the appellees interposed a motion calling on Fletcher to show by what right he prosecuted the appeal, and demanding, in the event that he failed to show any right, that the brief be stricken out and the appeal dismissed. Two days thereafter Kellogg, acting by Mr. W. C. Clephane, an attorney, filed a paper in which it was stated that Kellogg appeared specially for the purpose only of consenting to the motion to dismiss, that he had never authorized the docketing of the appeal, and that he did not desire that it should be further prosecuted. In answer to this motion Fletcher showed the facts related above, and many others, and moved to strike from the files the so-called special appearance of Kellogg.

[1] We cannot doubt that on the facts disclosed, Fletcher had full authority to docket the appeal, and, as an incident, the power to do all the things necessary to prosecute it. Kellogg had no right to appear personally (Mott v. Foster, 45 Cal. 72), or to substitute Mr. Clephane for Fletcher in the case without the court's permission (Curtis v. Richards, 4 Idaho, 434, 40 Pac. 57, 95 Am. St. Rep. 134; Walton v. Sugg, 61 N. C. 98, 93 Am. Dec. 580; Sloo v. Law, 4 Blatchf. 268, 269, Fed. Cas. No. 12,958; Wilkinson v. Tilden [C. C.] 14 Fed. 778). Orderly procedure requires this.

[2] Where an attorney is dismissed for misconduct, the permission is usually granted as a matter of course; but where, as in the present case, no charge of that kind is made against him, the court may, in its discretion, impose such conditions upon the client as will protect the attorney's interest, especially where his services were to be com-

pensated for only by a percentage of a fund to be created through his efforts, Kappler v. Sumpter, 33 App. D. C. 404; In re Dunn, 205 N. Y. 398, 98 N. E. 914, Ann. Cas. 1913E, 536; Yuengling v. Betz, 58 App. Div. 8, 68 N. Y. Supp. 574; New York Phonograph Co. v. Edison Phonograph Co. (C. C.) 150 Fed. 233; Du Bois v. New York, 134 Fed. 570, 69 C. C. A. 112; In re Herman (D. C.) 50 Fed. 517; Wilkinson v. Tilden, supra; Curtis v. Richards, supra; Silverman v. Pennsylvania Railroad Co. (C. C.) 141 Fed. 382; Ronald v. Mutual Reserve Fund Life Ass'n (C. C.) 30 Fed. 228.

In Kappler v. Sumpter, supra, we said:

"Where it is possible, under the circumstances of a particular case, to protect the former counsel by imposing some condition for that purpose, it seems that courts usually exercise their discretion to do so."

Circuit Judge Wallace, in the Wilkinson Case, supra, ruled that where a litigant seeks to dismiss his attorney—

"the court will hold the client to fair dealing, and will refuse its assistance to any attempt to take an unfair advantage of one of its officers. In this behalf courts have frequently and usually required the client to discharge the attorney's claim for services in the suit as a condition of substitution. * * * Ordinarily, when there is an agreement that the attorney shall get his fees out of the fund in suit, there is an implied condition that he is to be continued in charge until an available fund is realized."

As we understand the decision of the Supreme Court of the United States in Re Paschal, 10 Wall. 483, 19 L. Ed. 992, it does not conflict with these views. The client there was the state of Texas. The opinion proceeded upon the theory that public policy required that the state should have a right, without condition, to substitute one attorney for another, but it was careful to declare that the rule announced was not one of universal application. It said:

"Whether in any case, in virtue of an agreement made, an attorney may successfully resist an application of his client to substitute another in his place, we need not stop to inquire."

In the recent case of Barnes v. Alexander, 232 U. S. 117, 34 Sup. Ct. 276, 58 L. Ed. 530, the court held that an attorney, acting under a contingent fee contract, had a lien upon the fund created through his effort, and intimated that the lien attached to the right vested in the attorney "to earn a fee contingent upon success." The trend of the modern decisions of the court is to protect the right of the attorney to receive compensation for his services. Ingersoll v. Coram, 211 U. S. 335, 365–368, 29 Sup. Ct. 92, 53 L. Ed. 208; McGowan v. Parish, 237 U. S. 285, 35 Sup. Ct. 543, 59 L. Ed. 955.

[3] Fletcher by his return to the rule shows that he has performed much service under the contract, for which he is entitled to compensation. It was undoubtedly the intention of the parties that he should be permitted to prosecute the case to a final determination. Only by this means could he earn the fees contemplated by the contract. While there are no words of grant in the contract, it is a "principle even of the common law that words of covenant may be construed as a grant when they concern a present right." Barnes v. Alexander, supra,

232 U. S. 121, 34 Sup. Ct. 276, 58 L. Ed. 530; Sharington v. Strotton, Plowden, 298, 308; Hogan v. Barry, 143 Mass. 538, 10 N. E. 253; Ladd v. Boston, 151 Mass. 585, 588, 24 N. E. 858, 21 Am. St. Rep. 481. Fletcher was given a present right "to try to earn a fee contingent upon success." Barnes v. Alexander, supra. Hence he was vested with an interest in the cause of action. Gulf, Colorado & Santa Fé Railway Co. v. Miller, 21 Tex. Civ. App. 609, 53 S. W. 709. Having this interest, he may, in accordance with the principle announced in Sullivan v. Tobin, 42 App. D. C. 430, intervene in the suit to protect it.

[4] This is a proceeding in equity, where forms may be disregarded. He may, therefore, if he desires, prosecute the appeal, the same as if he had formally intervened, for the purpose of having his interest in the litigation determined. Whatever he does, however, must be done on his own account, for he has no longer any right to represent Kellogg. That right was terminated by the latter's letter revoking his authority. Wilkinson v. Tilden, supra; Kappler v. Sumpter, 33 App. D. C. 404. To say that Kellogg had a right to put an end to his authority to represent him is quite different from saying that the court is not required to aid Kellogg in doing so. The brief filed on behalf of Kellogg may be considered from now on as Fletcher's brief. If Fletcher elects to proceed as just indicated, he must signify his intention to do so by a writing filed within 10 days from the handing down of this opinion. If he does so elect, the motion of the appellees to dismiss will be overruled; if he does not, the motion will be sustained, and the appeal dismissed, without further action of the court, at appellant's cost.

LIPSCHUTZ et al. v. PHILLIPS et al.

(Court of Appeals of District of Columbia. Submitted May 4, 1921. Decided June 6, 1921.)

No. 3483.

1. **Vendor and purchaser ⟸37(1)—Purchaser cannot rely on representation that other party was agent, when he signed as owner.**
   In a suit to cancel a contract for the purchase of real estate, the purchaser cannot rely on misrepresentation by the vendor that he was the agent for the owner, and not the owner, where the contract provided it was to be approved by the owner, and it was so approved by the vendor, who also executed it as agent.

2. **Vendor and purchaser ⟸37(6)—Misrepresentation by owner that he was agent for owner does not injure purchaser.**
   A misrepresentation by the owner of the property sold that he was the agent for the owner does not injure the purchaser, and does not invalidate the contract.

3. **Vendor and purchaser ⟸37(5)—Misrepresentation of value avoids contract, only if known to be false.**
   A misrepresentation by the vendor as to the value of the property sold is fraud, invalidating the contract, only if the vendor knew the representation was false when he made it, so that a bill to cancel the

contract for fraud must allege knowledge of the falsity of such representation.

4. **Vendor and purchaser ⊂=37(4)—Purchasers having opportunity to examine cannot rely on misrepresentations as to value.**
Where purchasers lived in the same place in which the property was located, and had full opportunity to examine it and ascertain its value, they cannot rely on misrepresentations by the vendor as to its value.

5. **Mortgages ⊂=338—Denial of injunction against sale under purchaser's trust deed, after dismissal of suit to cancel, held proper.**
Where the purchasers sued to cancel the contract for the purchase of the property, and asked that the trustees under a trust deed given by them be restrained from selling the property pending the determination of the suit, the purchasers cannot complain of the denial of the injunction against the trustees, after the court had properly dismissed the bill for want of equity.

6. **Trial ⊂=11(3)—Suit to cancel for fraud, dismissed for want of equity, need not be transferred to law side.**
Where the court held that a bill to cancel a contract for the purchase of realty on the ground of fraud did not state a cause for equitable relief, it was not necessary to transfer the case to the law docket, which is required by Trial Court Law, rule 76, only when the suit would otherwise be dismissed on the ground it had been brought on the wrong side of the court.

7. **Appeal and error ⊂=1043(1)—Refusal to cite for contempt trustees alleged to be prejudiced held harmless.**
Refusal of the trial court to cite for contempt trustees under a deed given by the purchaser, who sold the property pending the purchasers' suit to cancel the contract for fraud, was not prejudicial to the purchasers, where the cancellation of the contract was refused, and there was no prayer for the removal of the trustees, though there was an allegation that they were prejudiced against the purchasers.

Appeal from the Supreme Court of the District of Columbia.

Suit by John E. Lipschutz and another against William S. Phillips and others to cancel a contract for the purchase of real estate. Decree for defendants, and complainants appeal. Affirmed.

R. M. Hudson, of Washington, D. C., for appellants.

J. D. Eason, Jr., of Washington, D. C., for appellees.

SMYTH, Chief Justice. The appellants, husband and wife, brought suit in the Supreme Court of the District to cancel a contract for the sale and purchase of real estate, and for other relief. From a decision against them, they bring the case here for review.

Their bill alleges that by a written contract, dated May 11, 1920, Phillips, as agent, agreed to sell, and they agreed to purchase, a certain piece of real estate located in the District for $8,750; the purchasers to pay part of the consideration in cash, give promissory notes for part secured by a trust deed, and assume trust deeds then on the property. The contract was made "subject to approval of owner." The same day on which the contract was signed, Phillips O. K.'d it as owner. The bill further alleges that, on the 18th day of May, Phillips conveyed the property to the appellants, as joint tenants, and took back from them a deed of trust running to the appellees Todd and Michael, as trustees, to secure the payment of promissory notes for $2,700,

and that appellants paid $1,000 in cash to Phillips on account of the purchase price. It also alleges that Phillips, in his negotiations with the appellants, held himself out as the agent of the owner of the property, when in fact he was the owner; that he assured them that the property was worth more than $8,750, although it was worth from $2,000 to $2,500 less than that amount; that they relied upon Phillips' representations, and would not have purchased, if they had not believed them to be true.

About three months thereafter, so the bill says, having ascertained that the representations made by Phillips, both as to agency and value, were wholly false, they offered to rescind all the papers which had passed between them and Phillips, demanded a return of the money which they had paid and the notes which they had given, and offered to reconvey to him the property, but Phillips declined the offer and refused the demand.

Phillips moved to dismiss the bill. Pending the disposition of the motion, appellants filed an amended bill, in which they set up that the trustees, Todd and Michael, had advertised the property for sale under the deed of trust which they had given, and would sell it unless restrained, and that thereby they had committed a contempt of court; that the trustee Michael was prejudiced against the plaintiffs; that Todd was an employee of Phillips; and that the trustees by reason of these facts would not impartially protect the interest of the plaintiffs.

[1, 2] We do not think the appellants have any ground for complaint on the score that Phillips had falsely represented that he was an agent and not the owner. They knew he was the owner when they signed the contract, because he O. K.'d it as owner. With that knowledge they accepted the contract. They will not now be heard to say they were induced to make the contract in the belief he was not the owner. But whether he was the agent or the owner is immaterial. They do not claim he was their agent. On the contrary, they make it manifest he was not, but that he claimed to be the agent of the owner. Whether the agent or owner, he was the other party to the contract, and dealt with them as such. The fact that he was, as alleged, a licensed real estate broker makes no difference. That did not place upon him any other duty to the appellants than would be his as the owner. Appellants cite authorities dealing with the duty of an agent to his principal, where the latter hires him to find a purchaser for a piece of real estate. Clearly they have no application to this case. Phillips, as we have said, was not employed by the appellants.

[3] The case, then, turns on whether or not Phillips, by misrepresenting the value [we must take the allegations of the bill as true] violated any legal duty which he owed to the appellants. It will be observed that there is no charge in the bill to the effect that Phillips when he stated the value knew that he was speaking falsely. This is a fatal omission.

"The rule that no one is liable for an expression of an opinion is applicable only when the opinion stands by itself as a distinct thing. If it is given in bad faith, with knowledge of its untruthfulness, to defraud others, the person making it is liable. * * *" Williams v. State, 77 Ohio St. 468,

472, 83 N. E. 802, 803 (14 L. R. A. [N. S.] 1197). See also the cases cited therein.

Usually the mere expression of an opinion relative to value is not regarded as a statement of a fact which, if untrue, could be made the basis of a suit for false representations, unless the person giving the opinion knew at the time it was untrue. If he knew this, he is said to have knowingly misrepresented the condition of his own mind, which condition is a fact. Olston v. Oregon Water Power & Railway Co., 52 Or. 343, 96 Pac. 1095, 97 Pac. 538, 20 L. R. A. (N. S.) 915; Spead v. Tomlinson, 73 N. H. 46, 59 Atl. 376, 68 L. R. A. 432; Montgomery Southern Railway Co. v. Matthews, 77 Ala. 357, 54 Am. Rep. 60; 12 R. C. L. 249.

[4] But in the circumstances of this case, even if Phillips knew the true value, appellants would not have a cause of action. The property is located in the District. Appellants had every opportunity to examine it and ascertain its value before signing the contract. They were not justified in relying upon what Phillips said. In Slaughter's Administrator v. Gerson, 13 Wall. 379, 383 (20 L. Ed. 627) we read:

"Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by overconfidence in the statements of another."

This is approved in Farnsworth v. Duffner, 142 U. S. 43, 47, 12 Sup. Ct. 164, 35 L. Ed. 931. That principle, when applied to this case, is decisive of it. There was no equity in plaintiffs' bill, and it was rightly dismissed.

[5] Nor is there any error in the refusal of the court to enjoin the sale. The request was that it stay the sale until "the rights of the parties are established by the court." The court did not deny the injunction until after their rights had been established. Thus all that plaintiffs sought to accomplish by the injunction was done without it. No application, let it be observed, was made to restrain the sale pending this appeal, and, that being so, the court, of course, did not err in failing to forbid it.

[6] It is claimed that when the court held the bill did not state a cause for equitable relief, it should have transferred the case to the law docket. Just why this should have been done we are not told. The court did not dismiss the suit on the ground that it had been brought on the wrong side of the court. It is only when so brought that a suit may be transferred. Trial Court law rule 76; Tuckerman v. Mearns, 49 App. D. C. 153, 158, 262 Fed. 607.

[7] The failure of the court to cite the trustees for contempt did not prejudice appellants, and they have therefore no cause for complaint on that footing. While it was alleged in the amended bill that the trustees in making the sale would not impartially protect the interest of

the plaintiffs, the court was not asked to remove them, or to grant any other relief because of that. There is, consequently, nothing for us to review in that regard.

Because there is no error in the record, the decree is affirmed, with costs.

Affirmed.

HARRIMAN v. RICHARDSON.

(Court of Appeals of District of Columbia. Submitted March 7, 1921. Decided June 6, 1921.)

No. 3445.

1. **Sales ⊂=390—Recovery of advance payments on rescission for noncompliance with conditions is not an action on a sealed instrument.**
   An action by the buyer against the seller of goods not yet manufactured to recover the advance payment after buyer had properly refused to receive the goods because they did not conform with the requirements of the contract which was under seal, is an action for money had and received on the theory that contract had been rescinded, and not an action on a sealed instrument, and therefore recovery may be had on the common counts.
2. **Sales ⊂=178(2)—Buyer need not return goods which do not conform to contract.**
   When buyer rightfully rejects goods because they do not conform to the contract requirements, he is under no obligation to return them to seller, but may simply refuse to regard them as his.
3. **Attachment ⊂=63—May be levied on defendant's goods in plaintiff's possession.**
   Under Code of Law, §§ 445, 446, authorizing attachment of chattels of defendant, and section 452, providing that attachment may be levied on the chattels of defendant, whether in defendant's or third person's possession, the provision of the latter section was intended to authorize attachment of chattels in possession of a stranger, and does not impliedly prohibit the levy of attachment on defendant's chattels, which are in plaintiff's possession.

Appeal from the Supreme Court of the District of Columbia.

Action by Frank T. Richardson against Frank H. Harriman, trading under the firm name and style of the Harriman Motors Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Percy H. Marshall, of Washington, D. C., for appellant.

H. B. Moulton, W. W. Millan, and R. E. L. Smith, all of Washington, D. C., for appellee.

BAILEY, Acting Associate Justice. Frank H. Harriman, trading under the name and style of the Harriman Motors Company, the appellant, sold to Frank T. Richardson, the appellee, by a contract of conditional sale under seal, two airplane motors at the price of $3,600, payable $1,000 cash and the remainder in installments. In the face of the contract the purchaser acknowledged the receipt of two airplane motors, of 100 horse power each, but as a matter of fact the motors were not delivered until some time after the execution of the contract.

Appellee, the purchaser, claimed that when tested the motors would not develop more than about 60 horse power each, and were otherwise defective; that thereupon he wrote the seller that he would make no more payments, tendered the motors to the seller, and demanded the return of the $1,000 which he had paid, which was refused; and thereupon the appellee placed the motors in storage. He then brought this action by original attachment levied upon the motors as the property of the appellant, upon the ground that appellant was a nonresident of the District of Columbia.

The appellant appeared specially, and moved to dismiss the attachment, and also to require the marshal to amend and correct his return upon the attachment, to show that the appellee was in possession of the property attached. Both motions were overruled.

The declaration was in assumpsit on the common counts. The defendant below pleaded the general issues in debt and assumpsit, and issue was found thereon. Appellant again moved to dismiss the attachment, to release the levy, and release the forthcoming bond. All these motions were overruled.

Proof was then offered by each party before the jury, and thereafter appellant moved the court to direct a verdict in his favor, first, because no recovery could be had upon the common counts for breach of warranty of a special contract; second, because no recovery could be had in an action of assumpsit for breach of warranty under seal. He also renewed his motion to dismiss the attachment and discharge the bond. These motions were overruled. The court charged the jury that the case was one of implied warranty of the horse power of the motors, and the jury returned a conditional verdict for the appellee in the sum of $1,000, if the court should be of the opinion that he ought to recover.

The court ordered judgment in favor of the appellee, from which the appellant has appealed.

[1] As to appellee's right to recover on the common counts, this is not an action upon a sealed instrument for a breach thereof, but is an action for money had and received, upon the theory that the contract has been rescinded. As stated in Pope v. Allis, 115 U. S. 363, 6 Sup. Ct. 69, 29 L. Ed. 393:

"When the subject-matter of a sale is not in existence or not ascertained at the time of the contract, an undertaking that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the vendee under the contract, because the existence of those qualities being part of the description of the thing sold becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted [citing authorities].

"So, in a recent case decided by this court, it was said by Mr. Justice Gray: 'A statement' in a mercantile contract 'descriptive of the subject-matter or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract.' * * *

"The authorities cited sustain this proposition, that when a vendor sells goods of a specified quality, but not in existence or ascertained, and un-

dertakes to ship them to a distant buyer, when made or ascertained, and delivers them to the carrier for the purchaser, the latter is not bound to accept them without examination. The mere delivery of the goods by the vendor to the carrier does not bind the vendee to accept them. On their arrival he has the right to inspect them to ascertain whether they conform to the contract, and the right to inspect implies the right to reject them if they are not of the quality required by the contract. The rulings of the Circuit Court were in accordance with these views. * * *

"The cases we have cited are conclusive against the contention of the plaintiffs in error. The jury has found that the iron was not of the quality which the contract required, and on that ground the defendant in error, at the first opportunity, rejected it, as he had a right to do. His suit to recover the price was therefore well brought."

In this case the motors were shipped to the purchaser at Washington, and the verdict of the jury is in favor of appellee's contention that, when tested, they failed to show the requisite horse power.

[2] "When the buyer rejects goods because they are not what the contract requires, he is under no obligation to return them; he may simply refuse to regard them as his." 3 Williston on Contracts, § 1463. In the instant case the purchaser notified the seller that he had rescinded the sale; and, if the motors sold were not of the character and quality specified in the contract, he had the right to recover the money already paid.

This is not an action upon a sealed instrument, but one in which a sealed instrument is merely used as evidence. It follows that there was no error in the failure of the court to direct a verdict in favor of the appellant.

[3] The validity of the attachment is contested upon the ground that the writ cannot legally be levied upon property in the possession of the plaintiff. Section 445, Code D. C., provides that the clerk shall issue a writ of attachment "to be levied upon so much of the lands, tenements, goods, chattels, and credits of the defendant as may be necessary to satisfy the claim of the plaintiff." There is no limitation here as to the location of the property. Section 446 requires "the marshal to serve notice on the defendant, if he be found in the District, and on any person in whose possession any property or credits of the defendant may be attached to appear in said court, * * * and show cause * * * why the property so attached should not be condemned." Apart from the case where the defendant is within the District, one purpose of this section is evidently to protect the rights of third parties in whose possession the property may be. Section 452 provides that the attachment may be levied upon the personal chattels of defendant, whether in defendants' or a third person's possession.

Appellant contends that this provision is exclusive, and forbids a levy upon property in the hands of the plaintiff. We cannot agree with this contention. We find nothing in the statute to show an intention to deprive the plaintiff of this means of satisfying a just claim against a nonresident of the District for the reason merely that the defendant's property may be in his (the plaintiff's) possession. We think the intent of section 446 is to make it clear that the property of the defendant may be attached even if in the hands of third persons, as well as in the defendant's, and does not limit the right to such cases. In our opinion

the attachment in this case was properly levied, and the court did not err in refusing to quash it.

There was no error in the action of the lower court, and the judgment will be affirmed, with costs.

Mr. Justice BAILEY, 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.

COCA-COLA CO. v. CHERO-COLA CO.

(Court of Appeals of District of Columbia. Submitted May 9, 1921. Decided June 6, 1921.)

No. 1393.

1. **Trade-marks and trade-names and unfair competition ⇐43—Right to register trade-mark depends on whether it would tend to confuse or deceive purchasers.**
   Under the Trade-Mark Act (Comp. St. § 9490), the test of the right to register a trade-mark, opposed by the owner of a trade-mark applying to goods of the same descriptive property, is whether or not the marks are so similar as to be likely to cause confusion in the public mind or to deceive purchasers.

2. **Trade-marks and trade-names and unfair competition ⇐43—Arguable differences do not defeat opposition to trade-mark registration.**
   The fact that applicant's and opposer's marks do not sound quite alike, and have a different number of letters in each, are only arguable differences, which are not enough to defeat the opposition, since the second applicant, having an almost limitless field to choose from, should select a mark clearly distinguished from the existing mark.

3. **Trade-marks and trade-names and unfair competition ⇐43—"Chero-Cola" held likely to confuse purchasers desiring "Coca-Cola."**
   Applicant's trade-mark of "Chero-Cola" is sufficiently similar to the opposer's mark, "Coca-Cola," to be apt to confuse an ordinary purchaser, who generally does not have more than a faint impression of the trade-mark and acts quickly on a general glance, so that the opposition to the registration of the trade-mark will be sustained, especially where witnesses testified to numerous instances of actual confusion produced by applicant's mark, and applicant's own counsel in the examination of witnesses several times confused the two marks.

4. **Trade-marks and trade-names and unfair competition ⇐44—Doubts as to right to register must be resolved in favor of opposer.**
   Doubts as to the right of an applicant to register a trade-mark against the opposition of the owner of a mark for goods of the same descriptive properties must be resolved in favor of the opposer.

Appeal from the Commissioner of Patents.

Application by the Chero-Cola Company for the registration of a trade-mark, opposed by the Coca-Cola Company. From a decision of the Commissioner of Patents, overruling the opposition, the opposer appeals. Reversed.

Edward S. Rogers, of Chicago, Ill., Harold Hirsch, of Atlanta, Ga., and Nelson J. Jewett, of Washington, D. C., for appellant.

C. L. Parker and Melville Church, both of Washington, D. C., for appellee.

SMYTH, Chief Justice. Appellee made application to have registered in the Patent Office the words "Chero-Cola" as a trade-mark for "Cola," a soft drink. The application was opposed by the appellant on the ground that it (the appellant) was the owner of the registered mark "Coca-Cola," which is applied by it to the same kind of a drink. The Examiner of Interferences sustained the opposition, but was reversed by the Commissioner of Patents.

[1] Opposer has been using its mark since 1886, while applicant did not adopt its mark until 1911. It is conceded that the goods of the parties have the same descriptive properties, and therefore there is but one matter for our decision, namely, whether or not the marks are so similar as to be likely to cause confusion in the public mind or to deceive purchasers. 33 Stat. L. 725 (Comp. St. § 9490).

Nearly 3,000 pages of testimony were taken, and elaborate briefs have been filed. Many decisions by courts in this country and in England are cited, and, besides, we are invited to listen to the teaching of psychology on the subject. None the less the question in dispute is a simple one, and the principles by which its solution may be reached have been often declared and applied by this court.

[2] It is true that, if we analyze the two marks, differences will be found. They do not sound quite alike, and the number of letters in each is not the same; but these are only arguable differences, which are not enough to defeat the opposition. William Waltke & Co. v. Geo. H. Schafer & Co., 49 App. D. C. 254, 256, 263 Fed. 650, and cases cited; Thos. Manufacturing Co. v. Æolian Co., 47 App. D. C. 376, 379.

[3] Each of the marks embraces two hyphenated words. "C" is the first letter in each mark, and "Cola" the last word in each. The image which one mark paints upon the mind is not clearly different from that made by the other mark. To require that the line which separates marks should be well defined is not to ask too much, since the field from which a person may select a mark is almost limitless. Florence Manufacturing Co. v. Dowd & Co., 178 Fed. 73, 75, 101 C. C. A. 565; Waltke & Co. v. Schafer & Co., supra; Thos. Manufacturing Co. v. Æolian Co., supra, 47 App. D. C. 378. If he is not content with a word to be found in a dictionary, he may coin one.

Of course, if the two marks were placed together, or if a person's attention was in some other way directed to them, there would be no difficulty in apprehending the difference between them. This, however, is not the way to make the test. Ordinarily the prospective purchaser does not carry more than a faint impression of the mark he is looking for. If the article offered to him bears a mark having any resemblance to the one he is thinking of, he is likely to accept it. He acts quickly. He is governed by a general glance. The law does not require more of him. Patton Paint Co. v. Orr's Zinc White, 48 App. D. C. 221.

Many witnesses testified to numerous instances of actual confusion produced by applicant's mark. Even counsel for applicant, in the

cross-examination of witnesses, several times confused "Coca-Cola" with "Chero-Cola." The statute does not require proof of actual confusion, but when there is such proof it is not easy to escape the conclusion that the assailed mark, if registered, would be likely to do that which it has done.

Opposer, as we have seen, adopted its mark in 1886, and has been using it ever since, so that "the mark for years has acquired a secondary significance, and has indicated the plaintiff's [opposer's] product alone." Coca-Cola Co. v. Koke Co. of America, 254 U. S. 143, 41 Sup. Ct. 113, 65 L. Ed. ——. Millions have been spent by it for advertising its goods under the mark. During the time that it has used the mark it has been doing business in Atlanta, Ga. Applicant's place of business is in a nearby town—Columbus, Ga. It, as we have said, did not commence to use its mark until 1911, 25 years after opposer had put into use its mark. Why was this mark selected by it, since it had so many others from which to choose? Is not its action open to the inference that the purpose was to appropriate some of opposer's business, by producing confusion in the minds of the purchasing public? Whatever the purpose may have been, it is quite undeniable that mistakes have resulted from the use of applicant's mark.

[4] Even if we doubted with respect to the proper solution of the question before us, it would be our duty to resolve the doubt against the applicant. Lambert Pharmacal Co. v. Mentho-Listine Co., 47 App. D. C. 197; William Waltke & Co. v. Geo. H. Schafer & Co., supra.

Considering the matter in the light of the statute, the record, and our previous decisions, we are constrained to hold that the opposition should be sustained, and hence the decision of the Commissioner of Patents must be, and it is, reversed.

Reversed.

CLEMENT v. ROBERTS.

(Court of Appeals of District of Columbia. Submitted March 23, 1921. Decided June 6, 1921.)

No. 1421.

1. **Patents ⟸90(3)—Perfecting improvement not required by the issue in interference is not diligence.**
   The time spent by an applicant after conception of the invention in developing an improvement, so as to make the operation fully automatic, does not constitute diligence on his part, where the issue did not call for automatic operation, and was fully met by his disclosure without the improvement.

2. **Patents ⟸106(2)—Issue in interference held not to cover improvements on which applicant was working.**
   A count in interference for an invention in automatic telephone exchange system, involving means to make and break the metallic circuit, *held*, when given the broadest interpretation of which it reasonably admits, not to require automatic operation of the make and break, so that the attempt to develop an automatic make and break operation was not due diligence in the development of the invention.

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

Appeal from the Commissioner of Patents.

Interference proceeding between Edward E. Clement and John G. Roberts. From a decision of the Commissioner of Patents, awarding priority of invention to Roberts, Clement appeals. Reversed.

Horace A. Dodge, of Washington, D. C., and William G. McKnight, of New York City, for appellant.

E. W. Adams and G. Willard Rich, both of New York City, for appellee.

VAN ORSDEL, Associate Justice. This appeal is from the decision of the Commissioner of Patents awarding priority of invention to appellee, Roberts, the junior party. The interference is in seven counts, of which count 1 is illustrative:

"1. In an automatic telephone exchange system a plurality of subscribers' stations and metallic circuit lines extending thence to a central office, automatic switching apparatus for interconnecting the lines at the central office, a source of current connected in the metallic circuit of a subscriber's line, means at the substation to make and break the said metallic circuit at will, the makes and the breaks being of varying but predetermined duration and means at the central office responsive to such makes and brakes in the metallic circuit to actuate, control and release the automatic switching apparatus and also to ring the wanted subscriber, substantially as described."

Roberts is conceded to have been the first to conceive the invention; hence the case turns upon his diligence at or just before Clement came into the field. The dates are not controverted. Roberts is awarded January 24, 1905, for disclosure, based upon his blueprint Exhibit 3 of that date, upon which the counts of the interference may be clearly read. He filed March 10, 1906.

We agree with the Board of Examiners in Chief that Clement constructively reduced the invention to practice in an application for patent filed August 31, 1905. His present application was filed December 9, 1905, but the former application disclosed the invention here in interference.

The Clement application relied upon for disclosure required the intervention of an operator at the central station to connect the call with an automatic first selector switch, through which the call could be extended automatically to the number desired.

Roberts, on the other hand, contends that his system required a special form of interrupter, in order that the impulses could be accurately timed. A drawing disclosing the interrupter was completed September 7, 1905. It is upon this that Roberts claimed the exercise of diligence at and prior to Clement's entrance into the field; but we find nothing in the claims limiting them to a full automatic system, or requiring a direct automatic connection between the calling party and the first selector switch. On this point the Board of Examiners in Chief said:

"We do not find anything in the issues that limits them to a full automatic system or to a direct connection to the subscriber's line with the first selector switch. The claims cover only a means for controlling a series of automatic switches for extending a call over a metallic or two-wire circuit from the calling subscriber to the called subscriber, and when the central operator plugs in the operation of the switches is exactly as specified in the issues. We

regard the issues as covering specific means of operating the switches and extending the call, whether it is used in a semiautomatic or a full automatic system."

[1] Roberts had the invention of the issue complete in January, 1905, and the time he consumed until September of the same year was in perfecting an improvement not required by the present issue. This conduct on the part of an inventor does not constitute diligence. In Lotterhand v. Hanson, 23 App. D. C. 372, this court, considering a similar situation, said:

"The excuse given by him [Lotterhand] or for him is that he desired to invent a new typewriter wherein to introduce his invention, and thereby to avoid the necessity of using any of the existing typewriters. In other words, having made one invention, complete in itself and ready to be patented, if he did actually make it, or have a conception of it, he deliberately waited for a year or two years, until he should have time to make another invention to combine with it, and wherein to use it to the best advantage for himself. But this excuse cannot be accepted under any of the authorities as explaining the absence of diligence, while another man was actively in the field of invention at the same time. To delay one invention for the sake of another projected invention to be used in connection with it, and which might never be realized, cannot be construed in the patent law as an exercise of due diligence."

[2] Following the policy of this court in giving the claims the broadest interpretation of which they will reasonably admit (Miel v. Young, 29 App. D. C. 481; Kirby v. Clements, 44 App. D. C. 12; Monte v. Dunkley, 46 App. D. C. 70), we are not at liberty to inject the limitation contended for by Roberts into the claims to meet the exigencies of his case.

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.

In re BRASELTON.

(Court of Appeals of District of Columbia. Submitted May 10, 1921. Decided June 6, 1921.)

No. 1396.

Patents ⊜27(2)—Process for coating shoes, such as was already used for coating other articles, not patentable.

A process of coating or impregnating shoes with metal, by heating the metal to a liquid and blowing it in the form of a spray by a blast of gas against the parts of the shoe, is not patentable, where the same process has previously been applied in coating metal, paper, fabric, glass, and other substances, as an old process applied to a new use is not patentable, when it performs substantially the same functions.

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

Appeal from a Decision of the Commissioner of Patents.

Application by Chester H. Braselton for a patent. From a decision of the Commissioner of Patents, allowing certain of the claims and disallowing others, the applicant appeals. Affirmed.

E. B. Whitcomb, of Toledo, Ohio, for appellant.

T. A. Hostetler, of Washington, D. C., for Commissioner of Patents.

SMYTH, Chief Justice. Braselton applied for a patent on an improvement in shoes and a process for making shoes. There were 28 claims in his application. All were allowed, except 1, 2, 4 to 11, inclusive, 25, and 26; the last two being numbered in the record 16 and 17. Claims 1, 4, and 11 are typical. They are:

'1. The process of making shoes which consists in coating certain parts of the shoe with metal by heating the metal to a liquid and blowing the same in the form of a spray by a blast of gas against the said parts.

4. The process of making shoes which consists in coating the bottom of a shoe above the sole, before the sole is attached, with a film of metal, by heating the metal into a liquid and blowing the same by a blast of gas into the form of a spray and against the then exposed lower surface of the shoe.

11. The process of making shoes which consists in applying a continuous flexible film of metal over the sole and welt and impregnating said sole and welt with said metal.

The appealed claims were rejected on a patent to Schoop, dated February 9, 1915, and on one to Morf, on the same date.

Under the process covered by the claims a film of metal is applied to a portion of the article dealt with. Some of the claims say that the film is flexible, and impregnates the material of the article; that it is continuous, and is applied by a blast of gas in the form of a spray. From the references it is clear that the method of the claims is old. Appellant utilizes the processes of Schoop and Morf, the only difference being that he applies it to shoes, while Schoop used it to coat metal, paper, fabric, and the like, and Morf to coat glass and other substances. When the matter was before the Examiners in Chief it was said of the present claims that they—

"are drawn to a process of making shoes, but involve nothing more than coating the shoe by the old method after the shoe is complete. This is not a method of making shoes, and the method is not patentable as novel merely because the coating is applied to a different object, unless the result of the operation is different and unobvious. In this case the result of the process is the production of a coating and nothing more."

This we approve. There is no warrant for holding that an old process applied to a new use is patentable, when it performs substantially the same functions. The Supreme Court of the United States, in Brown et al. v. Piper, 91 U. S. 37, 23 L. Ed. 200, refused to hold that a process for preserving fish and other articles in a close chamber by freezing was patentable, in view of methods for freezing ice cream and for preserving a corpse. It was contended that the process had never been used before for preserving fish, but the court disposed of the contention by saying:

"The answer is that this was simply the application by the patentee of an old process to a new subject, without any exercise of the inventive faculty, and without the development of any idea which can be deemed new or original in the sense of the patent law."

Other decisions bearing directly on the point are Lovell Manufacturing Co. v. Cary, 147 U. S. 623, 13 Sup. Ct. 472, 37 L. Ed. 307, and Arlington Manufacturing Co. v. Celluloid Co., 97 Fed. 91, 38 C. C. A. 60. In concluding his opinion in this case the Assistant Commissioner said:

"To my mind nothing could be more evident to one knowing the prior art and having a conception of a metal-coated shoe than that an ordinary shoe could be coated by the prior art processes to produce appellant's patented article."

Indisputably this must be correct.

There is nothing in the cases cited by appellant which conflicts with the views here expressed. Thayer & Chandler v. Wold (C. C.) 142 Fed. 776, at first reading seems to give his contention some support. A closer examination, however, shows that it does not. It was there argued that an air brush, consisting of a combination device whereby liquid colors may be atomized by a blare of compressed air and blown upon a suitable surface, so as to form any desired representation, such as a picture, according to the will and skill of the manipulator, was anticipated by two patents showing concentric color and steam nozzles, a needle valve in the color tube, as well as a coincident delivery of oil and steam, for the purpose of atomizing the oil supply. Both of them pertained to furnaces in the industrial art. The court, in holding that there was no anticipation, said:

"It is indeed possible to reason from a Corlis engine to a watch spring, but the journey will lead the mind over an unchartered highway and across unbridged waters. So, here, the adaptation of the idea of the oil-distributing device to the pencil-sized air brush seems to me to involve several inventive steps."

The court then points out the steps. The distance between the methods of the references and the method of the applicant is not great, and no inventive steps would be necessary to make the journey. We think the Commissioner of Patents was right, and his decision is affirmed.

Affirmed.

UNITED STATES ex rel. GRAND TRUNK WESTERN RY. CO. v. MELLON, Secretary of the Treasury.

(Court of Appeals of District of Columbia. Submitted February 8, 1921. Decided June 6, 1921.)

No. 3488.

Appeal and error ⊂⊃1138—After case has become moot, court can affirm judgment, if that is most consonant with justice.

Where a petition for mandamus to compel the Secretary of the Treasury to make payments to a railroad on the Interstate Commerce Commission's certificate, before the total amount due the railway was ascertained, had become moot by reason of the amendment to Transportation Act Feb. 28, 1920, by Act Feb. 26, 1921, by adding section 212, expressly providing for such payment, the Court of Appeals has the right, without considering the merits, to do what is most consonant to justice, and can affirm the judgment dismissing the petition.

Appeal from the Supreme Court of the District of Columbia.

Petition for mandamus by the United States, on the relation of the Grand Trunk Western Railway Company, against Andrew William Mellon, Secretary of the Treasury of the United States. From a judgment dismissing the petition, relator appeals. Affirmed.

J. Harry Covington, Spencer Gordon, and Alfred P. Thom, all of Washington, D. C., for appellant.

J. E. Laskey, of Washington, D. C., for appellee.

SMYTH, Chief Justice. The appellant railway company petitioned the Supreme Court of the District for a mandamus to compel the Secretary of the Treasury to draw a warrant in its favor upon the certificate of the Interstate Commerce Commission, framed, as alleged, pursuant to section 209 of the Transportation Act of February 28, 1920 (41 Stat. 464, c. 91). A rule to show cause was issued. The Secretary filed his answer thereto, to which a demurrer was interposed by the railway company. An order overruling the demurrer was entered. The railway company elected to stand on the demurrer, and the court entered judgment dismissing the petition. From this action the railway company brought the case here, alleging error.

The Transportation Act provided certain guaranties by the United States for the carriers mentioned therein. According to the act the amount necessary to make good the guaranty to each carrier is to be ascertained by the Interstate Commerce Commission, and paid by the Secretary of the Treasury upon a certificate issued by the Commission. Assuming to act in harmony with the statute, the Commission issued a certificate to the railway company for $500,000, and stated therein that there might be upon further investigation additional amounts due to it and, if it should be found that there were, they would be certified to the Secretary of the Treasury. The Secretary contended that a correct interpretation of the act required that the exact total amount due the railway company must be ascertained before any certificate could be issued by the Interstate Commerce Commission, and as that

was not done in the present case he refused to honor the certificate. The court below held that he was right. Thus was raised the question upon which this appeal turns.

After the cause was submitted here the Congress, by the Act of February 26, 1921 (41 Stat. 1145, c. 72), amended the Transportation Act, so as to provide that, if the Commission is not able at the time of making a certificate finally to determine the whole amount due to a carrier, it "may make its certificate for any amount definitely ascertained by it to be due, and may thereafter in the same manner make further certificates, until the whole amount due has been certified." The amendatory act also provides that warrants drawn pursuant to its terms are to be paid by the Secretary of the Treasury in the manner prescribed therein. It is manifest, without more, that by the amendatory act the Secretary of the Treasury is directed to do in effect what this action was instituted to compel him to do. It is now clear that under that act a certificate for less than the whole amount due is valid and should be paid; therefore there is no occasion for the issuance of the writ. State v. Associated Press, 159 Mo. 410, 60 S. W. 91, 51 L. R. A. 151, 81 Am. St. Rep. 368. Besides, the case has become moot. United States v. Hamburg-American Co., 239 U. S. 466, 36 Sup. Ct. 212, 60 L. Ed. 387. In such a situation we have the right, without considering the merits, to do what is "most consonant to justice" (Hamburg-American Co. Case, supra; see, also, Heitmuller v. Stokes, 255 U. S. —, 41 Sup. Ct. 522, 65 L. Ed. —, and therefore we affirm the judgment, 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.

LEHKER v. JOYCE.

(Court of Appeals of District of Columbia. Submitted February 10, 1921. Decided June 6, 1921.)

No. 3436.

1. **Appeal and error ⇐171(1)—Case determined without reference to statute of which neither party claimed benefits below.**
   In proceedings by a landlord to recover possession of the premises from a tenant, in which neither party claimed the benefit of the Ball Act, but each proceeded irrespective of it, and in the assignment of errors it was not claimed that the court erred in not applying that act, the case must be disposed of on appeal without reference to the act.
2. **Landlord and tenant ⇐303(5)—Delay in filing affidavit of merits defeats landlord's right to summary relief.**
   Rule 19 supplies a summary remedy, and he who seeks its benefit must comply with its terms, so that an affidavit of merits, not filed until after the expiration of 10 days after the cause was docketed and summons served, does not entitle the landlord to the benefit of the rule.

Appeal from the Supreme Court of the District of Columbia.

Action by Elizabeth Moore Joyce, begun in the municipal court, to recover from Mrs. G. H. Lehker possession of certain described premises. From a judgment of the Supreme Court, after appeal to that court, for the landlord, the tenant appeals. Reversed and remanded, with directions to grant a new trial.

Bruce L. Casteel, of Washington, D. C., for appellant.

George A. Maddox, of Washington, D. C., for appellee.

SMYTH, Chief Justice. Joyce instituted an action in the municipal court to recover from Lehker possession of certain described premises and obtained a judgment awarding her what she sought. Lehker brought the case to the Supreme Court of the District for a trial de novo, docketing it and causing summons to be served on Joyce on the 12th of March. Joyce, attempting to avail herself of the nineteenth rule, filed her affidavit of merit on the 25th of March, and prayed for judgment. The affidavit states, among other things, that Lehker in the municipal court challenged the sufficiency of the notice to quit and that this challenge was the only thing offered by way of defense. It further says that she "suggested reference to the Rent Commission on the sufficiency and accuracy of the 30 days' notice," but that counsel for Lehker opposed the reference, and then that the trial proceeded.

In her affidavit of defense Lehker objected to the entry of judgment under rule 19, for the reason that Joyce's affidavit was not filed in time, denied that notice to quit was served upon her, denied that Joyce bona fide desired the premises for her own use, and asserted that she was advised that she was not required to controvert what was said in the affidavit of merit concerning the evidence given in the municipal court. Affidavits in support of Joyce's affidavit of merit were filed by her. Lehker moved to strike those affidavits, on the ground that they were not proper, under rule 19. No action was taken on this motion, but leave was granted Joyce to file a supplemental affidavit of merit and to amend her motion for judgment. Then Lehker, in pursuance of leave granted filed a supplemental affidavit of defense. Ruling that the Lehker affidavits of defense were not sufficient, the court entered judgment for Joyce.

In no place did either party claim the benefit of the Ball Act. Act Oct. 22, 1919, c. 80, 41 Stat. 298. Each proceeded irrespective of it. In the assignment of errors it is not claimed that the court erred in not applying that act. Therefore the case must be disposed of without reference to the act.

Rule 19 supplies a summary remedy, and he who seeks its benefit must comply with its terms. The affidavit of merit was not filed until 13 days after the case was docketed and summons served. The rule says it must be filed within 10 days after the doing of these things. The objection that it was not filed in time to give Joyce the benefit of the rule was properly made. It should have been sustained, and Joyce's motion for judgment overruled. For this error the judgment must be

reversed, at the cost of Joyce, and the case remanded, with directions to grant a new trial; and it is so ordered.

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.

HUMES v. GRAHAM.

(Court of Appeals of District of Columbia. Submitted May 4, 1921. Decided June 6, 1921.)

No. 3462.

Judgment ⊂=828(2)—Invalid entry of default judgment by clerk does not terminate jurisdiction by personal service.

Where the state court rendering judgment had obtained jurisdiction of the defendant by personal service, such jurisdiction was not defeated by a pretended judgment entered by the clerk, which was a mere nullity under the laws of the state as construed by its courts, so that the judgment subsequently entered by the court is entitled to full faith and credit.

Appeal from the Supreme Court of the District of Columbia.

Action by Elsa P. Humes against Lorimer C. Graham to recover on a foreign judgment. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Wilton J. Lambert and Rudolf H. Yeatman, both of Washington, D. C., for appellant.

Dan Thew Wright and Philip Ershler, both of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. This is a suit on a foreign judgment, the validity of which is challenged upon jurisdictional grounds.

It appears that appellant, plaintiff below, procured a divorce from defendant in the courts of Nevada. She then brought suit in the Supreme Court of New York to compel defendant to contribute to the support of their minor children. Personal service was secured, and a default judgment entered against defendant by the clerk of the court. Subsequently plaintiff, without further notice to defendant, by affidavit called the attention of the court to the entry of judgment by the clerk, and suggested "that this case is one where the better practice is to obtain judgment by application to the court." The court accordingly vacated the order of the clerk and entered a judgment for the amount found to be due.

It is upon this judgment that suit was instituted in the Supreme Court of the District. Defendant demurred to the declaration, on the ground that the New York court "was without power or jurisdiction to render the judgment sued on, and the same is void and of no effect." The

demurrer was sustained, and, plaintiff electing to stand upon her declaration, judgment was entered, from which this appeal is prosecuted.

The only question presented is the validity of the New York judgment. It is urged by counsel for defendant that the court was without jurisdiction to vacate the judgment of the clerk and enter a second judgment, without further service upon defendant. Where it appears that there was jurisdiction of the person and subject-matter of the litigation, the courts of a sister state will not refuse to accord full faith and credit to a judgment based upon such jurisdiction. Here the court secured jurisdiction of defendant by legal service, and defendant was in court for all purposes until the court had exhausted its jurisdiction by the entry of a final judgment. The jurisdiction of the court over defendant was not lost by the action of the clerk in assuming the prerogatives of the court. The pretended judgment entered by the clerk was a mere nullity, binding on no one, and defendant was charged with knowledge of that fact.

The effect of the action of the clerk is disposed of by the Appellate Division of the Supreme Court of New York in Bouker Construction Co. v. Neale, 161 App. Div. 617, 620, 146 N. Y. Supp., 894, 896, as follows:

"The clerk was without power to act. Sections 1212 and 1213, Code of Civil Procedure. His act was not an irregularity; it was a nullity. It was not a mere deviation from a method authoritatively prescribed; it was nude of authority. The judgment of the court was not pronounced by an officer authorized to pronounce it. It was baseless and void and should have been vacated."

The action of the clerk, being a mere nullity, did not even interrupt the jurisdiction of the court over defendant, and the only proper judgment in New York is the one here sued upon.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

Reversed and remanded.

WAHL v. WRIGHT.

(Court of Appeals of District of Columbia. Submitted May 9, 1921. Decided June 6, 1921.)

No. 1394.

1. **Patents ⇐113(7)—Decision of Patent Office not reversed, unless error clearly appears.**
   Where the claims of interference relate to a complicated mechanism, error must clearly appear to warrant a reversal of the decision of the Patent Office.

2. **Patents ⇐106(2)—Limitation of counts, so as not to read on prior application, is reasonable.**
   Where the counts in interference called for a follower whose position is determined by the level of the cam tracks, and a construction of those counts liberal enough to read on the disclosure of one of the applicants,

who had two followers, would also read on a prior application of the other applicant, the limitation of the counts to exclude such construction is not arbitrary, and the decision of the Patent Office in making such limitation is not clearly wrong.

Appeal from the Commissioner of Patents.

Interference proceedings between John C. Wahl and Walter Wright. From a decision of the Commissioner of Patents awarding priority as to one count to Wahl and as to the other three counts to Wright, Wahl appeals. Affirmed.

See, also, 50 App. D. C. 391, 273 Fed. 355.

Joseph H. Milans and Calvin T. Milans, both of Washington, D. C., for appellant.

Barnham C. Stickney and William L. Morris, both of New York City, for appellee.

ROBB, Associate Justice. Appeal from a decision of the Patent Office in an interference proceeding awarding priority of invention to the junior party, Wright.

The invention is based upon practically the same structure as was involved in the prior interference, No. 1346, but is narrower in scope. It originally contained four counts. The Examiner of Interferences, being of the view that the question as to Wahl's right to make the claims had been foreclosed by a prior decision of the Examiners in Chief, awarded priority to him without considering that question. The Examiners in Chief found that this was a misconception of their former decision, and, considering the question de novo, ruled that Wahl was not entitled to make the claims. They therefore awarded priority to Wright. The Commissioner sustained the Board, except as to count 3, and accordingly awarded priority as to that count to Wahl, and priority as to counts 1, 2 and 4 to Wright.

[1, 2] These claims relate to a complicated mechanism, and under our rule error must clearly appear to warrant a reversal of the Patent Office. The counts call for a follower whose position is positively determined by the level of the cam tracks. Wahl has two followers, and the Commissioner points out that, if the claims be so liberally construed as to read on his disclosure, a similar liberal construction would read on a prior application of Wright. We cannot say, therefore, that the limitation is an arbitrary one, and, not being clearly convinced that the Patent Office has erred, we affirm the decision.

Affirmed.

ANDERSEN v. LATTIG et al.

(Court of Appeals of District of Columbia. Submitted May 9, 1921. Decided June 6, 1921.)

No. 1389.

Patents ⇐91(4)—Proof held to show reduction to practice prior to adversary's application.

Evidence that an applicant for a patent had installed an experimental apparatus responding to the count of issue in interference, relating to an automatic telephone system, which was operated by a number of persons making several hundred connections, with failure to establish connection in only a few instances, accounted for by faulty adjustment of a switch, shows a reduction to practice which entitles that applicant to priority over an interfering applicant, who established no date for invention earlier than his application, which was subsequent to the experimental test.

Appeal from the Commissioner of Patents.

Interference proceeding between Albert Andersen and J. W. Lattig and another. From a decision of the Commissioner of Patents, awarding priority to Lattig and another, Anderson appeals. Affirmed.

C. C. Bulkley, of Chicago, Ill., for appellant.

J. G. Roberts and G. W. Rich, both of New York City, for appellees.

PER CURIAM. Appeal from a decision of the Commissioner of Patents, sustaining a decision of the Board of Examiners in Chief and awarding priority of invention to Lattig and Goodrum, the appellees herein.

Appellant has taken no testimony and therefore is restricted to his filing date. The Examiner of Interferences found that, prior to the filing date of appellant, the appellees, through the American Telephone & Telegraph Company in Boston, Mass., installed an experimental apparatus responding to the four counts of this issue, which relate to an automatic telephone system in which a coin is deposited to permit the beginning of a conversation, and additional coins deposited at intervals to permit the continuation of the conversation. "This apparatus," according to the finding of the Examiner of Interferences, "was subjected to a thorough test, being operated by a number of persons, some of whom made several hundred connections. It failed to establish the required connection only in one or two instances, and these were accounted for by a faulty adjustment of a switch." Notwithstanding this finding, the Examiner expressed a doubt as to whether reduction to practice had been established. The Board and the Commissioner, entertaining no doubt on this point, reversed the Examiner, and awarded priority to Lattig and Goodrum.

We have given careful consideration to the brief and argument in behalf of Andersen, but are so convinced of the correctness of the conclusion of the Patent Office that we affirm the decision, for the reasons stated by the Commissioner and Board.

Affirmed.

BYRON et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. June 6, 1921. Rehearing Denied August 1, 1921.)

No. 3606.

1. **Post office ⇐48(4)—Indictment held to charge use of mails to carry out scheme to defraud.**
   An indictment under Penal Code, § 215 (Comp. St. § 10385), sufficiently charged use of the mails in execution of a scheme to defraud by collecting money under pretense defendant could secure title to reserved parts of public domain for the person defrauded, which, after setting out the scheme, charged that defendant did willfully and for the purpose of carrying out the scheme mail a writing, styled an appeal, though the paper mailed might not on its face indicate intention to defraud.

2. **Post office ⇐35—Elements of use of mails in executing scheme to defraud stated.**
   The mails are used in execution of scheme to defraud, contrary to Penal Code, § 215 (Comp. St. § 10385), if one with corrupt intent has devised a scheme to defraud by getting money from the people through deceit and misrepresentations, and for the purpose of carrying out such scheme puts a writing in the mails, whether or not the writing is valid.

3. **Post office ⇐48(4)—Indictment for use of mails to defraud held not defective, as showing impossibility of execution of the scheme alleged through the means charged.**
   An indictment, under Penal Code, § 215 (Comp. St. § 10385), for use of mails to defraud by securing money from people by promising to secure rights to reserved public lands by means of applications made through defendants, *held* not defective as showing on its face that there was an intrinsic impossibility of bringing the prosecution of the claims within the scope of the fraudulent scheme alleged.

4. **Post office ⇐35—Erroneous statement of law may constitute part of scheme for fraudulent use of mails.**
   An erroneous statement of law, if willfully made, may constitute part of scheme to use the mails to defraud in obtaining money from people by promising to secure rights to certain reserved public lands by application therefor made through defendants.

5. **Post office ⇐50—Modification of instruction in prosecution for fraudulent use of mails held properly denied.**
   Modification of instruction in prosecution for fraudulent use of mails *held* properly denied.

6. **Post office ⇐49—Evidence of statements by defendant to person defrauded by use of mails held admissible.**
   In a prosecution for fraudulent use of mails, it was not error to permit a witness to testify to statements made in his presence by defendant to a person sought to be defrauded, though such person was not called as a witness.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Carlos L. Byron and Edward M. Comyns were convicted under an indictment charging violation of and conspiracy to violate Penal Code, § 215, and they bring error. Affirmed.

Plaintiffs in error Byron and Comyns were convicted under 46 counts of an indictment, 45 charging violation of section 215 of the Penal Code (Comp. St. § 10385) and 1 count charging conspiracy to violate that section (section 37 of the Penal Code [Comp. St. § 10201]). Writ of error was sued out.

The scheme alleged pertained to lands in Washington and was as follows:

Certain lands forming part of the public domain had been withdrawn from entry and application to purchase under the Timber and Stone Act and were put within the limits of the Olympic National Forest by presidential proclamation; certain lands had been selected by the state as school indemnity selection, which selections had been approved by the Secretary of the Interior, who was without authority to convey such land; certain other lands were included in lieu selections made under the act of Congress approved June 4, 1897 (the Forest Lieu Land Act [30 Stat. 36]), which said selections were pending before the Department of the Interior, and while so pending were not subject to application or entry under the Timber and Stone Act; certain other lands were embraced within school indemnity selections of the state, which had been allowed by the register and receiver and were pending before the Department of the Interior, and while such selections were so pending no rights to the lands could be acquired by application to purchase under the timber and stone laws.

It is alleged that the defendants falsely pretended to certain "victims" that preference rights and patents to said lands could be secured by means of applications to enter presented through defendants, and defendants promised that upon payment of certain sums to them title to said lands could be obtained through the Department of the Interior within periods of time varying from a few months to two years, and that in the event of failure to obtain titles defendants would repay to the victims the money they had paid; whereas defendants knew no rights or preferences could be secured through the Department of the Interior by virtue of such applications under the Timber and Stone Act, and defendants knew the victims would receive nothing of value for what they were induced to pay to defendants, and defendants had no intention of repaying any money, but it was a part of the scheme to induce the victim by false statements and representations upon which the victims relied, to part with their money by making them promises of repayment in the event title could not be secured. It is alleged that defendants also represented that it was not necessary that the victim should personally visit and inspect the land before making application, and that title could be secured for the nominal sum of $2.50 per acre and no more; whereas, defendants knew the lands, if subject at all to sale, would first be appraised by the Department of the Interior and sold at their appraised value, and not necessarily at the sum of $2.50 per acre, and knew that applications under the Timber and Stone Laws would not be allowed or recognized unless there had been a previous personal examination of the lands by the intending purchaser.

Further allegation is that the defendants falsely represented that while the applications would probably be rejected by the local land office, pursuant to regulations of the Department of the Interior, said regulations were void, and that defendants by their long experience would secure the annulment of said regulations by appeals to the Commissioner of the General Land Office and Secretary of the Interior, or in some other manner, and that in the meantime the applications would be kept alive by appeals or proceedings pretended to be known to the defendants, so that the victims would be awarded first right of entry in any event; whereas, defendants well knew they could not secure annulment of the regulations referred to, and well knew that no rights to the lands could be secured by such applications, or any appeals in support thereof.

It is alleged that defendants falsely pretended to the victims that defendants had associates in Washington through whom advance information would be obtained concerning cancellation of pending entries; whereas defendants had no means of securing such information that was not possessed by the public at large. It is charged that the purpose was to defraud and to misrepresent, and to induce victims to pay money which defendants intended to appropriate and did approriate to their own use. Specific acts are charged

to have been unlawfully and feloniously done for the purpose of executing the scheme. For example, intending to defraud Emma V. Christensen, defendants at Seattle placed or caused to be placed in the mail, addressed to the Commissioner of Public Lands of the state of Washington, a paper filed in the United States land office, styled an appeal to the Commissioner of the General Land Office at Washington, D. C., from the decision of the local land officers rejecting an application of Emma V. Christensen made through defendants to purchase certain described tracts under the timber and stone acts.

The conspiracy count elaborately charges a combination to devise a scheme to defraud certain people and the public generally by means of the post office establishment by a plan such as has been already outlined. Many overt acts are alleged to have been done in furtherance of the conspiracy and to effect the object thereof. Among other acts pleaded it is alleged that papers called appeals from the decision of the local land officers were mailed, letters containing copies of decisions by the Interior Department officials were received wherein the decision of the Commissioner of the General Land Office was affirmed. Letters from defendant Comyns to one Shull, named as a "victim," are set forth, wherein Comyns advises Shull that, while his application has not been allowed, hearing upon the case has been set, and that he would never lose a cent in the matter, and that the land is still government land; that title has not passed.

The bill of exceptions does not include all the evidence, but by stipulation it appears that defendants used the mails at the times and places charged in the indictment; that witnesses for the government testified that applications for lands under the timber and stone act on which they had been located by the defendants were promptly rejected in the local land office; that some of the witnesses for the government testified that defendants represented that by filing applications in the land office they could obtain title to the lands, and that nothing was said about the necessity of going into court to secure their rights. Further stipulation is that the United States adduced oral and written testimony in proof and support of and tending to prove and establish the 46 counts of the indictment under which conviction was had.

P. V. Davis and S. H. Piles, both of Seattle, Wash., and C. A. Keigwin, of Washington, D. C., for plaintiffs 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.

HUNT, Circuit Judge (after stating the facts as above). [1, 2] The defendants contend that the indictment is fatally defective, because it fails to charge any use of the mails in the execution of the scheme alleged as one to defraud; but after setting forth the scheme and its purpose there are allegations that defendants, "having devised the scheme or artifice hereinbefore fully described, and intending so to do, to defraud Emma V. Christensen, the defendant * * * did willfully, * * * and for the purpose of executing the aforesaid scheme or artifice to defraud," mail a writing styled an appeal, etc. That is sufficient. Of course, it cannot be said that on its face the paper called notice of appeal indicated any intention to defraud or was in execution of such an intention. But if one with corrupt intent has devised a scheme to defraud by getting money from people through deceit and misrepresentation, and for the purpose of carrying out a described scheme or artifice puts a writing in the mails, it is not material

whether the writing is valid. The mailing of any letter or writing for the purpose of executing the fraudulent scheme is what the statute (section 215) makes an element of the offense. United States v. Young, 232 U. S. 155, 34 Sup. Ct. 303, 58 L. Ed. 548. As said by the Supreme Court in Durland v. United States, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709, "The significant fact is the intent and purpose." They are questions for the jury.

[3] Nor is the pleading defective on the ground that it is manifest from the indictment that there was an "intrinsic impossibility" of bringing the prosecution of the claims within the scope of the fraudulent scheme alleged. If, as alleged, defendant falsely pretended to certain persons that preference rights to any of the lands described could be had through the Interior Department, by means of applications made through defendants and moneys paid to them, and if it was promised that moneys paid would be refunded if there was failure to get title within a certain time, whereas in fact, as defendants well knew, no preference rights could be secured from the Department of the Interior by virtue of such applications, and defendants knew the applicants would receive nothing of value for the money paid to defendants, and defendants had no intention of repaying the money which applicants were induced to pay to defendants, the scheme was clearly within the scope of the main allegations of the indictment. The statute does not make the guilt or innocence of one who devises such a scheme dependent upon its actual success.

It is wholly unsound to say that the court should hold that the land law was so firmly established that the representations made by defendants were "braggings," and would be unavailing to deceive any one and would be censurable merely because they were silly. The court cannot say the plan was absurd in its outline or contemplated steps. Schemes to defraud are often devised and carried out by designing men, who make representations which seem transparent to some people; yet it is astonishing how many credulous ones are induced to believe in the alluring promises of wealth and part with money upon the faith of the representations.

[4] Plaintiffs in error argue that an erroneous statement concerning a point of law is not indictable. If such a statement is honestly made, of course, no criminal charge will stand; but if there is a willful misstatement, made deliberately and with intent to deceive, and with a purpose to perpetrate a fraud, it is plain the statement may become an essential element in crime. It is a misunderstanding of the indictment to argue that it should be read as a charge that defendants considered that in point of law the regulations of the Land Office were unwarranted, and that defendants showed confidence that the courts would declare the law as defendants construed it. No construction of the pleading can ignore the elements of criminal intent and false representations and deceit which are the significant things alleged. The Department of the Interior may have been in error in respect to its regulations concerning applications for some classes of the lands described, and it may have been entirely lawful for defendants to decline to follow the regulations of the department, yet if defendants with

corrupt intent made the misrepresentations alleged, and with the evil purpose set forth devised the scheme to defraud, well knowing that preference rights could not be obtained through the Interior Department to acquire the lands referred to, they were guilty, provided always they used the mails as alleged. United States v. Comyns, 248 U. S. 349, 39 Sup. Ct. 98, 63 L. Ed. 287; Byron v. United States, 259 Fed. 371, 170 C. C. A. 347.

[5] Error is assigned to an instruction to the jury wherein the court commented upon the decision in Hoover v. Salling, 110 Fed. 43, 49 C. C. A. 26, decided in 1901, by saying that it had been there held that the rules and regulations of the Department of the Interior as applied in that case were contrary to law, but that a filing had been accepted by the Land Office and the applicant therefor had initiated a right, and when that right was subsequently denied by the Land Office and a patent was granted to another person the fact that his application had been accepted gave him a standing in a court of equity, and that in that case he was the only party who had such a right, and that in a court of equity it was held that under all the circumstances the ruling was inoperative as against his claim. The contention is that the court should have granted the request to modify the instruction by stating that, if the application is made, whether or not allowed by the department, if under the law it should be allowed and is rejected, the successful applicant may bring an action in court as though his application were allowed in the first instance. Modification was denied, and in denying it we find no error.

The instructions explained the general character of the rules of the Interior Department, and the difference between a department rule to be enforced by the department and a penal statute to be enforced by the courts, and the court charged that under the rules of the Land Department applicants referred to in this case could not obtain preferential or vested rights to the lands applied for by filing their applications for the purchase of the same in the local land office, and that such applicants could not and did not thereby acquire any right to institute suits in equity to set aside patents which might be issued to other persons for the lands which the applicants applied for, and have the holders of such patents declared trustees for them; that under the department rules applicants for timber and stone entries had to inspect land applied for personally before filing; and that with the question of the reasonableness of such a rule the jury had no concern, for the rule had the force of law until set aside or annulled. Inasmuch as there was no proof of any right in the defendant to get title through the Interior Department, modification was properly refused. The case was tried under an allegation of the indictment that defendants represented that they would obtain title to these lands from the Department of the Interior, not that they had obtained title for the applicants.

[6] A witness, Canfield, was permitted to testify over objection of defendants to certain representations made in his presence by defendants to one Shull, named as one of the "victims" in the indictment, concerning land Shull had applied for. The testimony was competent, even though Shull was not called.

It is unnecessary to go further into detail. The more important points are sufficiently covered by what we have said, and upon consideration of the whole record we are led to the conclusion that the case is free from error of law and that the verdict of the jury must be sustained.

Affirmed.

GLOBE & RUTGERS FIRE INS. CO. v. HINES, Agent.

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

No. 212.

1. **Insurance ⇐606(3)—Marine underwriter is subrogated by law to rights of insured in regard to loss.**
   An underwriter of marine insurance, who had paid the loss resulting from a collision between the insured vessel and another, is subrogated by operation of law to the rights of the insured owner of the vessel against the other vessel in regard to the loss, and no assignment of such rights is necessary.

2. **Insurance ⇐606(3)—Marine underwriter has no greater rights than insured to recover for loss.**
   The underwriter of marine insurance stands in no better position than the insured, and cannot recover against third persons for the loss sustained, unless the insured could have recovered.

3. **Insurance ⇐606(3)—Underwriter can claim no subrogation, if both vessels in collision have same owner.**
   There can be no right of subrogation in favor of a marine insurance underwriter for loss paid on a ship injured by collision, if the ship which was injured and that which committed the injury are owned by the same party.

4. **Subrogation ⇐33(2)—Surety gets no rights by subrogation greater than rights of principal.**
   It is a general principle in the law of subrogation that a surety paying off a debt can acquire no greater rights than the creditor had at the time of payment.

5. **Action ⇐15—Same person cannot be plaintiff and defendant, though acting in different capacities.**
   The same person cannot be both plaintiff and defendant at the same time in the same action even though he appears in different capacities.

6. **Parties ⇐1—Jurisdiction of court depends on party to record, not on beneficial parties.**
   The jurisdiction of the court over the parties depends on the character of the parties to the record, and not on those who may have an equitable interest in the suit.

7. **Railroads ⇐5½, New, vol. 6A Key-No. Series—Federal control created single system.**
   The Director General of Railroads, while operating the railroads under federal control assumed by the President under Act Aug 29, 1916, and the Federal Control Act of March 21, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115¾a–3115¾p), operated the railroads as a single national system of transportation under a unified head or control, and not as separate companies or systems.

8. **Railroads ⇐5½, New, vol. 6A Key-No. Series—Provision of Federal Control Act for suits nullified by executive order.**
   The provision of the Federal Railroad Control Act of March 21, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115¾a–3115¾p), that

actions at law or suits in equity might be brought against such carriers, except in so far as might be inconsistent with the provisions of the act or the orders of the President, was nullified by the order of the Director General, which was in effect the order of the President, requiring actions and suits to be brought against the Director General, and not against the carriers.

9. Railroads ⇐5½, New, vol. 6A Key-No. Series—Director General represented government, and not companies.

While the railroads were under federal control, the Director General of Railroads represented the United States, and was the carrier against whom suits might be brought, under the Federal Control Act of March 21, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115¾a–3115¾p).

10. Railroads ⇐5½, New, vol. 6A Key-No. Series—Director General not entitled to recover for injuries to railroad barge, inflicted by another railroad's barge.

Since the Director General of Railroads operated all railroads as the instrumentality of the federal government, and not as the representative of the railroad companies, though it was the practice to refer to him as the Director General operating a specific railroad, he could not recover in admiralty for injuries to a barge owned by one railroad company and operated by him, occasioned by the negligence of another barge owned by a different company and also operated by him, and therefore the insurer of the injured barge is not subrogated to any right to recover against the barge inflicting the injury.

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

Libel by the Globe & Rutgers Fire Insurance Company against Walker D. Hines, as Agent of the United States Railroad Administration. Decree for respondent, and libelant appeals. Affirmed.

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

Harrington, Bigham & Englar, of New York City (Leonard J. Matteson, of New York City, of counsel), for appellee.

Burlingham, Veeder, Masten & Fearey, of New York City (Chauncey I. Clark and Homer H. Breland, both of New York City, of counsel), for Pennsylvania R. Co.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge. This is a suit in admiralty, brought by the libelant, as insurer of the Central Railroad Company of New Jersey float No. 47, and on behalf of the owner and operator of said float, against Walker D. Hines, as agent of the United States Railroad Administration, operator of the New York Central steam tug No. 27 in a cause of collision, civil and maritime.

The libel alleges that libelant insured the United States Railroad Administration, as operator of the Central Railroad Company of New Jersey float No. 47 against loss or damage, that it has paid the loss for which it was liable as such insurer, has become subrogated to the rights of the owner and operator of the float arising out of the collision which occasioned the loss insured against, and that the action is brought on behalf of itself as such insurer and on behalf of the owner and operator of float No. 47, and it is alleged in the libel that on August

24, 1918, a collision occurred between float No. 47 and the New York Central Railroad's steam tug No. 27, off the Battery in the East River, and that at that time the railroad and its equipment, together with the steam tug No. 27, were maintained, operated, and controlled by the United States Railroad Administration, and that respondent Hines was the agent of the said Administration, having been duly appointed as such by the President of the United States pursuant to the acts of Congress. The libel also sets forth the circumstances of the collision, and that the collision and the resulting damage were not caused by any negligence on the libelant's part, or on the part of those in charge of float No. 47, but were caused through the negligence of the New York Central tug No. 27.

The respondent, as the agent duly appointed under the Transportation Act of February 28, 1920 (41 Stat. 456), against whom suits may be brought for matters arising out of the operation and control of the various railroads by the United States Railroad Administration, duly appeared and excepted to the libel on two grounds. The substance of the first is that the cause of action, if any, which arose out of the collision, can only be against the Railroad Administration (otherwise, the Director General of Railroads), and that, as libelant's assured was the Railroad Administration itself, no cause of action accrued to libelant's assured, inasmuch as there could be no right of action by the United States Railroad Administration against itself, and that for this reason, no cause of action having ever accrued to libelant's assured, the libelant could take by subrogation no greater rights than its assured possessed, and is therefore no more able in its own name to sue the United States Railroad Administration than the Railroad Administration would be able to sue itself.

The libelant also claims to recover on behalf of its assured the portion of the damage sustained by reason of this collision which was not covered by the insurance. The second exception is based on the fact that libelant is not entitled to sue on behalf of its assured for those items, and further that the reasoning under the first exception applies with equal force to any claim set up on behalf of the Railroad Administration against itself.

The court below, after argument, sustained the exceptions and dismissed the libel.

[1] It is, of course, conceded that an underwriter of marine insurance, by payment of a loss, becomes by operation of law and without assignment subrogated to all the rights of the insured in regard to that loss. Phœnix Insurance Co. v. Erie Transportation Co., 117 U. S. 312, 320, 321, 6 Sup. Ct. 750, 29 L. Ed. 873; Kaltenbach v. Mackenzie, 4 Aspin. 39; The Sydney (C. C.) 27 Fed. 119; Hogan v. Manselly, Fed. Cas. No. 6,584. It has even been held that the fact that the underwriter might have successfully resisted payment under the policy does not affect his right to subrogation upon payment of the loss. Nord-Deutscher Lloyd v. Insurance Co. of North America, 110 Fed. 420, 49 C. C. A. 1.

[2] But the general rule is that the underwriter stands in no better position than the insured, and can have no recovery against third persons, except such as could have been had by the insured. Simson v. Thompson, 3 App. Cas. 279, 3 Aspin. 567; The Catskill (D. C.) 95 Fed. 700; The Livingstone (D. C.) 104 Fed. 918. In Joyce on Insurance, vol. 5, § 3538, p. 5883, the rule is correctly stated as follows:

"The insurer stands in no relation of contract or of privity with such persons. His title arises out of the contract of insurance, and is derived from the assured alone, and can only be enforced in the right of the latter. In a court of common law, it can be asserted only in his name; and even in a court of equity or of admiralty it can be asserted only in his right. In any form of remedy, the insurer can take nothing by subrogation but the rights of the assured."

[3] The insurers stand by subrogation in the shoes of the insured, and can claim no more than the insured could claim. It follows that there can be no right of subrogation, if the ship which is injured and the ship which commits the injury are owned by the same party. In Phœnix Insurance Co. v. Erie Transportation Co., supra, the court, speaking through Mr. Justice Gray, said:

"For instance, if two ships, owned by the same persons, came into collision by the fault of master and crew of the one ship and to the injury of the other, an underwriter, who has insured the injured ship, and received an abandonment from the owner, and paid him the amount of insurance as and for a total loss, acquires thereby no right to recover against the other ship, because the assured, the owner of both ships, could not sue himself."

[4] The principle is a general one in the law of subrogation that a surety, paying off a debt, can acquire no greater rights than the creditor had at the time of payment, as the surety cannot be placed in a more favorable condition than the principal. We must therefore start with the proposition that the libelant is not entitled to maintain this suit, if the party insured, declared in the libel to be "the United States Railroad Administration," as operator of the said railroad and said float No. 47 (the Central Railroad Company of New Jersey float No. 47), could not itself maintain a suit against the respondent herein to recover for the injury insured against. If such a suit had been brought, and the right to maintain it had been seasonably challenged, could this court have sustained it? That, as it appears to us, is the question we must determine. If such a suit could not be maintained, the libel was properly dismissed in the court below; otherwise, not.

[5] It is elementary that the same person cannot be both plaintiff and defendant at the same time in the same action. It is incongruous that the same person should direct and conduct both the prosecution and the defense of the same suit, no matter in what capacity he may appear. Swope v. Swope, 173 Ala. 157, 164, 55 South. 418, Ann. Cas. 1914A, 937. And the rule has been applied where the same person sues and defends in different capacities. Thus a town treasurer has been held incapable of maintaining an action in his individual capacity against himself in his official capacity on a claim against the town. Barber v. Barber, 32 R. I. 266, 79 Atl. 482.

[6] And in such cases it is the general rule that the jurisdiction of the court depends upon the character of the party to the record, and the court does not inquire as to who may have an equitable interest in the suit. Sharps' Rifle Manufacturing Co. v. Rowan, 34 Conn. 329, 91 Am. Dec. 728. In Osborn v. Bank of the United States, 9 Wheat. 738, 6 L. Ed. 204, Chief Justice Marshall, referring to the provision of the Constitution giving jurisdiction of the federal courts of controversies between citizens of different states, said:

"Does this provision depend on the character of those whose interest is litigated, or of those who are parties on the record? In a suit, for example, brought by or against an executor, the creditors or legatees of his testator are the persons really concerned in interest; but it has never been suspected that, if the executor be a resident of another state, the jurisdiction of the federal court could be ousted by the fact that the creditors or legatees were citizens of the same state with the opposite party. * * * Why, then, is it universally admitted that this interest in no manner affects the jurisdiction of the court? The plain and obvious answer is because the jurisdiction of the court depends, not upon this interest, but upon the actual party on the record."

In that view of the case it would seem unimportant to inquire in what capacity the Director General sues or is sued, and as to whether he represents the United States, or whether he represents the particular railroad company or companies operating.

It is, however, earnestly urged upon the court that, as between the Railroad Administration and the underwriters, it should be held that during the period of federal control the railroads were operated by the Director General as separate entities, and that courts of equity often recognize a party's dual relationship, and that courts of admiralty, administering equitable principles, are able to differentiate between a party's diverse relationships. Corrigan Transit Co. v. The Majestic (D. C.) 73 Fed. 499, 500. The importance of the question involved leads us to examine the legislation of Congress on the subject of federal control, with the view of ascertaining therefrom the capacity in which the Director General operated the railroads while that control continued.

On December 28, 1917, pursuant to the powers conferred on him by Act Aug. 29, 1916 (39 Stat. 645), the President took possession and assumed control of every system of railroad transportation, and the appurtenances thereof, located within the boundaries of the continental United States. By his proclamation issued on that day he appointed William G. McAdoo Director General of Railroads, and the railroads passed into the possession, use, control, and operation of such Director General from and after 12 o'clock midnight on December 31, 1917. The proclamation, among other things, provided that the Director General might perform the duties imposed upon him, so long and to such extent as he should determine, through the officers and employees of the said systems of transportation. Until the Director General otherwise directed, the officers and employees of the various systems were to continue the operation thereof in the usual and ordinary course of the business of common carriers in the names of their respective companies. The proclamation further provided as follows:

"Except with the prior written assent of said Director no attachment by mesne process or on execution shall be levied on or against any of the

property used by any of said transportation systems in the conduct of their business as common carriers; but suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said Director may, by general or special orders, otherwise determine." 40 Stat. pt. 2, p. 1733.

Thereafter Congress passed Act March 21, 1918 (40 Stat. p. 451, c. 25 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115¾a–3115¾p]), which further regulated the subject of federal control. Among other provisions was the following:

"Carriers while under federal control shall be subject to all laws and liabilities as common carriers whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government. Nor shall any such carrier be entitled to have transferred to a federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the federal control of such carriers; and any action which has heretofore been so transferred because of such federal control or of any act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such federal control." Section 10.

On October 28, 1918, the Director General promulgated General Order No. 50. It reads:

"Whereas, since the Director General assumed control of said systems of transportation, suits are being brought and judgments and decrees rendered against carrier corporations on matters based on causes of action arising during federal control for which the said carrier corporations are not responsible, and it is right and proper that the actions, suits and proceedings hereinafter referred to, based on causes of action arising during or out of federal control should be brought directly against the said Director General of Railroads and not against said corporations:

"It is therefore ordered that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise: Provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures."

William G. McAdoo having resigned as Director General, the President, on January 10, 1919, pursuant to the powers which had been conferred upon him by law affecting federal control of railroads and systems of transportation, appointed Walker D. Hines as Director General, and authorized him among other things—

"to issue any and all orders which may in any way be found necessary and expedient in connection with federal control of such systems of transportation, railroads, or inland waterways, as fully in all respects as the President is authorized to do, and generally to do and perform all and singular all acts

and things and to exercise all and singular the powers and duties in relation to such federal control as the President is by law empowered to do and perform." 40 Stat. 1922.

On January 11, 1919, Walker D. Hines, as Director General of Railroads, issued General Order No. 50A, which corresponded in all respects with General Order No. 50, except that suits were no longer to be brought against William G. McAdoo, but simply against the director General of Railroads.

The act of February 28, 1920, known as "The Transportation Act, 1920," provided that federal control should terminate on March 1, 1920, and provision was made as to the prosecution of suits. It provided that actions at law, suits in equity, and proceedings in admiralty based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier under the federal control, of such character as prior to federal control could have been brought against such carrier, may, after the termination of federal control, be brought against an agent designated by the President for such purpose.

The act giving to the President federal control of the railroads was based upon the war power, and was a legal exercise thereof, as the Supreme Court practically decided in Northern Pacific Ry. Co. v. North Dakota, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. Ed. 897. So was the action of Congress in giving to the President a like control over the telephone and cable lines. Dakota Central Telephone Co. v. State of South Dakota, 250 U. S. 163, 39 Sup. Ct. 507, 63 L. Ed. 910, 4 A. L. R. 1623.

[7] It seems to us that the result of all this was that the railroad properties within the continental United States, while federal control lasted, were organized into a unified national system of transportation under a single head, the Director General of Railroads. As the Supreme Court, speaking through Chief Justice White, in Northern Pacific Ry. Co. v. North Dakota, 250 U. S. 135, 148, 39 Sup. Ct. 502, 505 (63 L. Ed. 897), declared, the Acts of Congress and the President's proclamation thereunder gave "no divided but a complete possession and control" to the United States "for all purposes as to the railroads in question." How, he asked, "can any other conclusion be reached, if consideration be given the comprehensive provisions concerning the administration by the United States of the property which it was authorized to take, the financial obligations under which it came and all the other duties and exactions which the act imposed, contemplating, * * * one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership theretofore existing?"

The railroads were operated by the Director General as a national system of transportation. To the extent that the former officers and employees of the railroads were retained in their positions, they ceased to act as the agents of their respective corporations, which no longer had any authority over them, but were exclusively the servants of the Director General, and therefore of the government of the United States.

From the time the Director General assumed control of the railroads to the time when his control was relinquished, all the former officers and employees who retained their positions and continued in the operation of the roads became the agents of the Director General, and their acts were his acts. It would have been an anomaly indeed to have given the actual possession and control of the railroads to the Director General, and having divested the railroad corporations of all authority of management or control and of their revenues, and converted their employees into the servants of the Director General, so that their acts became his acts, had, nevertheless, left the corporations liable for the acts of his agents. We do not so understand the acts of Congress or the decisions of the federal courts. Rutherford v. Union Pacific Railroad Co. (D. C.) 254 Fed. 880; Mardis v. Hines (D. C.) 258 Fed. 945; Hatcher & Snyder v. Atchison, Topeka & Santa Fé Railway Co. (D. C.) 258 Fed. 952; Haubert v. Baltimore & Ohio Railroad Co. (D. C.) 259 Fed. 361; Smith v. Babcock & Wilcox (D. C.) 260 Fed. 679; Nash v. Southern Pacific Co. (D. C.) 260 Fed. 280; Westbrook v. Director General of Railroads (D. C.) 263 Fed. 211; Blevins v. Hines (D. C.) 264 Fed. 1005; Erie Railroad Company v. Caldwell (C. C. A.) 264 Fed. 947; Hines v. Dahn (C. C. A.) 267 Fed. 105; Mardis v. Hines (C. C. A.) 267 Fed. 171; Hines v. Smith (C. C. A.) 270 Fed. 132, 135; Ellis v. Atlanta, B. & A. Ry. Co. (D. C.) 270 Fed. 279.

In Hines v. Dahn, supra, the Circuit Court of Appeals for the Eighth Circuit held that "the systems of transportation" and "the carriers" which were taken under federal control by the President's Proclamation of December 26, 1917, were the physical properties of the various railroads, and not the corporations owning and operating them. The court declared that the Director General, in operating a railroad, was the agent of the United States, and not of the railroad company, and that an action brought against him was in legal effect an action against the United States; that, while the action is against the Director General, he is not personally liable, but the government is, and that by the terms of the Federal Control Act it had consented to be sued in causes of action arising out of the possession or operation of the railroads by it.

In Erie Railroad Co. v. Caldwell, supra, the Circuit Court of Appeals for the Sixth Circuit, in holding that no action for negligence could be maintained against a railroad company during the period of federal control, said:

"The trial court should have sustained this motion, and dismissed the Erie Railroad Company from the suit. The Director General of Railroads having lawfully taken full possession and control of this company's property, the company itself could not be held liable for negligence resulting in injury to employees or others during the time its property was being operated by governmental agencies over which it had no control. The decision of the Supreme Court of the United States in the case of Northern Pacific Railroad Co. v. North Dakota, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. Ed. 897, definitely settles and declares the paramount authority of the Director General, and is controlling in this case."

Some courts, it is true, have taken a different view of the act, and held that litigants were authorized by section 10 to sue the companies

as they had theretofore been able to do, and that it was not competent for the Director General to set aside the plain provisions of the statute in that respect. Johnson v. McAdoo (D. C.) 257 Fed. 757, is one of such cases. We think such a construction of the act is based upon a misapprehension of what was intended, and is opposed to the decided weight of authority.

The validity of General Order No. 50, requiring suits to be brought against the Director General of Railroads, and not otherwise, was denied in Lavalle v. Northern Pacific Ry. Co., 143 Minn. 74, 172 N. W. 918, 4 A. L. R. 1659, by a majority of the court. It was held that Order No. 50 was in conflict with section 10 of the Act of March 21, 1918, the court saying:

"In so far as it denied to a plaintiff the right to pursue the railroad company [it] was beyond the power of the Director General and was void."

This the court adhered to in Gowan v. McAdoo, 143 Minn. 227, 234, 173 N. W. 440, and in Palyo v. Northern Pacific Railway Co., 144 Minn. 398, 175 N. W. 687. And the same conclusion was reached in Wisconsin, likewise by a divided court of four to three, in Franke v. Chicago & Northwestern Railway Co., 170 Wis. 71, 173 N. W. 701; the court saying:

"This provision of section 10 of the Federal Control Act and provisions of General Order No. 50 issued by the Director General of Railroads, and upon which the court below based its order, cannot both stand. The legislative declaration is the paramount authority and must control."

The language of section 10 of the act of Congress reads:

"That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President."

The validity of the President's proclamation and of General Order No. 50 has not been challenged by counsel before this court.

In Postal Telegraph-Cable Co. v. Call, 255 Fed. 850, 167 C. C. A. 178, the Circuit Court of Appeals for the Fifth Circuit understood the effect of the Federal Control Act as simply limiting the interference of government control in the prosecution of suits against carriers, whether at law or in equity, to the enforcement of the judgment or decree, and that it did not interfere with the right of the plaintiff to obtain a judgment or decree against the carriers. The case arose out of an application for a writ of mandamus to compel the District Judge to hear and determine a controversy in which the petitioner was seeking to condemn a right of way. The cause was at issue on April 15, 1918, which was before the Director General had issued General Order No. 50, already referred to, and which was not issued, as we have seen, until October 28, 1918. The court said:

"We think the express words of the statute require the court to proceed to judgment or decree in any pending cause, and to prohibit any defense being made to the obtaining of the judgment or decree upon the idea that the carrier or its property is in government control or possession."

It is also declared, however, that:

"It [the Federal Control Act] permits actions at law or in equity to be brought against the carriers, and judgments to be rendered as now provided by law, and prohibits the carrier from defending upon the ground that it is an instrumentality or agency of the federal government."

General Order No. 50 was not mentioned in the opinion, and it does not appear whether it had at that time come to the knowledge of the court. Order No. 50, however, by its own terms expressly stated that it applied to actions "hereafter brought." As to pending actions and proceedings against any carrier company, the order provided that the pleadings "may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom." The decision in the above case must be understood in the light of the facts before the court. We do not understand it as necessarily in conflict with Hines v. Dahn, supra.

[8] While the act of 1918 expressly provided that actions might be brought by and against carriers, and judgments rendered "as now provided by law," that provision was subsequently nullified by General Order No. 50, if valid, the effect of which order was not passed upon by the court. But the Director General, in issuing General Order No. 50, acted under the authority of the President, and his order was in effect the order of the President, and the provisions of the Federal Control Act on the subject now being considered were declared by that act to be binding only in so far as they were not inconsistent "with any order of the President." And after General Order No. 50 was issued actions were not to be brought against the carrier, but against the Director General.

The Act of March 21, 1918, which provided for taking the railroads under federal control, did not provide for taking under federal control the telegraph and telephone and cable systems of the country. But the Act of July 16, 1918, authorized the President, whenever he deemed it necessary for the national security or defense, to assume control and to operate, for the duration of the war, any telegraph, telephone, marine cable, or radio system or systems. 40 Stat. pt. 1, p. 904, c. 154 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¾x). And the President did take these systems into his possession, operation, and control by his proclamation of July 22, 1918. In that proclamation he directed that the possession, operation, and control by him should be exercised by and through the Postmaster General, and that he (the Postmaster General) might perform the duties thus imposed upon him "so long and to such extent and in such manner as he shall determine, through the owners, managers, board of directors, receivers, officers and employees of said telegraph and telephone system." It also contained the following provision:

"Until and except so far as said Postmaster General shall from time to time by general or special orders otherwise provide, the owners, managers, board of directors, receivers, officers and employees of the various telegraph and telephone systems shall continue the operation thereof in the usual and

ordinary course of business, in the names of their respective companies, associations, organizations, owners or managers, as the case may be."

We have seen that in Dakota Central Telephone Co. v. State of South Dakota, supra, the constitutionality of that act was sustained. And in Amerson v. Western Union Telegraph Co. (D. C.) 265 Fed. 909, the court had before it the question whether the Western Union Telegraph Company was liable in damages for the negligent delivery of a message during the time of federal control. It was held that the action could not be maintained; the court saying:

"At the time the cause of action asserted by plaintiff arose, the defendant's entire plant and outfit were in the absolute control of the government of the United States under certain war legislation. It is too much to say that there can be any reasonable doubt that under such circumstances the defendant, which never received nor transmitted the telegram mentioned in the plaintiff's petition, should be responsible for its not being sent or not delivered. Without undertaking to say who would be responsible for the miscarriage of that communication, or for anything else respecting it, it certainly could not be maintained that the defendant is responsible for it."

[9] The only conclusion which we have been able to reach is that the Director General of Railroads represented the United States during the period of federal control, and that whatever liability was incurred during that period because of the negligent operation of the roads was not incurred by the railroad corporations but by the Director General representing the United States. The Director General is the "carrier," and in any action at law, or suit in equity, or proceeding in admiralty it is by virtue of the Act of March 21, 1918, no defense that the carrier was an instrumentality or agency of the federal government.

[10] The fact that in suits of this nature a practice grew up of describing the Director General as operating a certain system or line of road, out of the operation of which the cause of action arose, is without legal significance. It could not affect in any degree his corporate capacity. There was but a single Director General, one corporate entity. The Director General of Railroads operating the New York Central Railroad was the same legal entity as the Director General operating the Central Railroad of New Jersey. The words "operating the Central Railroad of New Jersey" constitute merely a descriptive phrase, adopted by counsel for convenience, and not recognized nor provided for by anything in the acts of Congress or in any proclamation of the President. It is therefore impossible that the Director General of Railroads, operating the Central Railroad Company of New Jersey float No. 47, should be able, under the established rules of legal procedure, to maintain an action at law, or a suit in equity, or a proceeding in admiralty against the Director General operating the New York Central steam tug No. 27. Inasmuch as the libelant stands in the place of its insured, the libel fails to state a cause of action.

Decree affirmed.

HARRIS v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 11, 1921.)

No. 184.

1. **Criminal law ⊂=844(1)—Exception to charge must be specific and point out error.**
An exception by accused to the charge of the court ought to be specific and explicit, and show what ruling is claimed to be error.

2. **Criminal law ⊂=1059(2)—Exception to charge held not to point out error relied on.**
In a prosecution for violating the Harrison Narcotic Drug Act (Comp. St. §§ 6287g–6287q), an exception by the accused to that portion of the court's charge which described the circumstances under which a physician might prescribe narcotics in the course of his practice was sufficiently specific as to the portion of the charge complained of, but did not call the judge's attention to the claimed error in the charge, and does not entitle accused to a reversal, unless the instructions were grossly and manifestly inadequate and unfair.

3. **Criminal law ⊂=823(2)—Court's explanation held to render harmless instruction accomplice was corroborated.**
Where the court, after accused excepted to that portion of the charge stating there was some corroboration of an accomplice, again told the jury that he did not mean to express any opinion as to the facts, but merely stated the facts by way of illustration, and that the jury were the exclusive judges of the fact, any error in the charge as given was corrected by the explanation.

4. **Criminal law ⊂=200(6)—Acquittal of conspiracy does not prevent conviction on counts charging acts as substantive offenses.**
A conspiracy to commit an offense is an offense separate and distinct from the offense itself, and therefore a verdict of not guilty of one count of an indictment alleging conspiracy does not prevent a conviction on the other counts, charging the same acts as substantive offenses.

5. **Indictment and information ⊂=84—Accessory before the fact may be charged as principal, and facts showing participation need not be alleged.**
Under Criminal Code, § 332 (Comp. St. § 10506), making a principal one who at the common law would have been an accessory before the fact, such an accessory may be charged as having done the act himself, and be indicted and punished accordingly, and in such cases it is not necessary to set out the facts by which he aided and abetted or advised and procured the commission of the offense.

6. **Criminal law ⊂=371(1, 12)—Evidence of other sales of narcotics admissible to show intent and motive.**
In a prosecution against a physician for aiding and abetting a druggist in violating the Harrison Narcotic Drug Act by writing prescriptions for drug addicts, the writing of prescriptions for sales other than those alleged was admissible, notwithstanding the general rule that evidence tending to show the commission of another independent crime, even of the same kind, is inadmissible, since one of the exceptions to that rule makes such evidence admissible if intent or motive is one of the elements of the crime charged and the similar acts occurred at or near the time charged.

7. **Criminal law ⊂=1036(3)—Contention that evidence admissible only as to conspiracy was considered on substantive charge not meritorious, where no objection below.**
In a prosecution on an indictment charging substantive offenses in several counts and a conspiracy to commit such offenses in one count, where the jury found defendant guilty of the substantive offenses, but

not guilty on the conspiracy count, accused is not entitled to reversal of the conviction for the substantive offenses, on the ground that evidence was received which was admissible only on the conspiracy charge, where there was no showing that evidence introduced only on the conspiracy charge was used to sustain the substantive counts, and defendant did not object to the reception of any of the evidence, nor seek to limit any of it to any particular count.

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

Leopold Harris was convicted of aiding and abetting another in violating the Harrison Narcotic Drug Act, and he brings error. Affirmed.

Koenig, Sittenfield & Aranow and Barnett E. Kopelman, all of New York City (Raymond H. Sarfaty and Frank Aranow, both of New York City, of counsel), for plaintiff in error.

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

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. The indictment charged one Joseph Freilich, a druggist, with violating Harrison Narcotic Drug Act Dec. 17, 1914 (38 St. at Large, p. 785 [Comp. St. §§ 6287g–6287q]). It also charged the plaintiff in error, hereinafter called the defendant, with aiding and abetting Freilich therein. The indictment was filed on June 24, 1919, and as presented it contained seven counts, six charging substantive offenses and one charging conspiracy. Freilich pleaded guilty on June 25th to all the counts. The trial began on July 10, 1919, and was concluded on the next day. The promptness with which the case was brought to trial is deserving of all commendation. Promptitude in such cases is essential to any efficient administration of the criminal law. At the trial counts 3 and 4 were dismissed, and acquittal was directed on count 1. The jury rendered a verdict of guilty on counts 2, 5, and 6, and not guilty on count 7, which was the conspiracy count. The defendant Harris was sentenced to two years in the United States Penitentiary at Atlanta, Ga. Freilich was fined $1,000 and paid his fine. That part of count 6 which relates to the defendant is found in the margin.[1] Counts 2 and 5 were similar, only naming a different individual as the one receiving the drug.

The defendant is a duly licensed physician and is registered under the Harrison Narcotic Law. He has been practicing medicine for 23 years.

[1] "That said Leopold Harris on April 5, 1919, in the Southern District of New York, and within the jurisdiction of this court, did unlawfully, knowingly and willfully aid, abet, counsel, command, induce, and procure the said Joseph Freilich to sell, barter, dispense, distribute, and give the aforesaid 59½ grains of heroin and the said 4 grains of cocaine to the said Matthew McGovern, not in pursuance of any written order of the said Matthew McGovern on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, against the peace of the United States and their dignity, and contrary to the form of the statute of the United States in such case made and provided (Act of December 17, 1914, and section 332, U. S. C. C.)."

Before proceeding to a consideration of the errors assigned, we may direct attention to certain testimony. The defendant testified that he began to write prescriptions for drug addicts in January, 1918, and that it was a common thing for him to have a couple of hundred addicts in a day, and that there might have been 250 in a day. His usual office charge was from $2 to $5, or $10 a visit in his office. His testimony was to the effect that drug addiction is a disease. "At present," he testified, "there is no cure, and there is only one method that will cure them, as soon as mine is perfected," and "the cure is in the blood, the patient's own blood. * * * No drug will cure it, but the cure is the patient's own blood." He had no faith in what is known as "the reduction method of treatment" and thought it had done many times more to render the victims incurable than to cure them. He testified:

"I asked some of my patients to permit me to experiment upon my theory, and I got one or two to permit me; one I cured, and I was arrested right then, and I got the history of one patient that I started on."

A member of the New York City police force for 14 years, who had been assigned to the narcotic squad and was not a drug addict, and who got a prescription from the defendant, testified as follows:

"I told him I wanted to get a scrip for some stuff. He then said, 'What kind of stuff do you use?' I said, 'I use heroin.' He said, 'Where do you live?' I said, 'I live in 341 East Thirtieth street.' He said, 'Where were you getting your stuff before?' I said that I just came down from Weehawken, N. J., and I bought it up there in the street off a peddler. He said, 'I will have to give you an examination.' I said, 'All right.' He said, 'Come in this room.' He brought me in another room, and told me to drop my pants and lift up my shirt, and he examined my heart; he put the stethoscope on my heart, and in the presence of the lieutenant in the United States army uniform, he shook his head, 'Why, you are a physical wreck,' he said, 'the heroin you have been using is killing you.' He said, 'How do you use it?' I said, 'I blow it.' He then looked up my nose, and to this other man he said, 'Just listen to this man's heart from the use of this heroin.' The other man was Henry Harris. I don't know if he is a doctor or not. He is a nephew of Leopold Harris. Henry Harris put the instrument in his ears and shook his head, and also stated that I was a wreck from the use of that drug. He said, 'Would you take a blow now, if you got it?' I said, 'Doctor, yes, I would.' He said, 'You are too willing; I will give you a scrip, but I won't give you a scrip for heroin; I will give you a scrip for morphine, because I am afraid you will die if you keep using heroin.' He then took me out in the outer office, and he said, 'How many grains do you think will be necessary for you?' I said, 'I don't know; it is up to you.' He said, 'How much stuff were you getting up in Weehawken?' I said, 'I used to buy it up there by the deck.' He said, 'What you get now is going to be the pure drug from the drug store, and it is going to be pretty strong, but nevertheless,' he said, 'I would like to know how much you want.' I said, 'Give me 25 grains; I think that will do me for a day or so.' He then sat down and wrote out a prescription for 25 grains; and I said, 'Now doctor, I am out of work; I would like to know how much you are going to charge me.' He said, 'I will charge you the same as the rest; I will charge you $1.' I said, 'Why, the fellows are telling me I could get a scrip for 50 cents.' He said. 'Why didn't you tell me that in the beginning: I will give you a ten-grain scrip for 50 cents, but over that I must charge you accordingly, and for 25 it will cost you a dollar.' So I said, 'All right, I will take it.' And I paid Leopold Harris, the defendant, the dollar. I took the prescription and I said, 'I am out of work now, but I expect a job in a day or two, and I don't like to lose any time in coming here. What time can I come here and get the scrip?' He said, 'You won't lose any time; can you get me any new customers?' I said, 'Yes, where I am living, there are one

or two fellows, I think, I can bring around.' He said, 'If you bring them around, this man here,' pointing to his nephew, 'will give you a scrip when you come here.' I said, 'Where I am living in Thirtieth street, they have been telling me I can get a scrip around Thirty-Ninth street or in that neighborhood; I can get it filled up there. He said to me, 'Young man, while you are under my treatment, you go to one place; you go to Freilich's drug store and no place else to get the prescription filled, and go around and give them this prescription, and tell them you are a new customer; that I sent you.'"

The government called as a witness the physician to the House of Detention of the City of New York and also to the New York City Prison, known as the Tombs. During the six years he had been physician at the Tombs he had treated approximately 12,000 drug addicts, and he had made a special study of drug addiction, and had written much on the subject. In the course of his testimony he said:

"A person can be cut off the use of cocaine at once, without any reduction at all. It is not necessary to reduce cocaine. I have never reduced cocaine addicts; I always take them immediately off the drug; never had any fatalities or trouble; just gave them a sleeping powder and a tonic mixture to build them up. In the treatment of drug addicts medication is necessary, besides prescribing the drug; pure reduction, reducing the amount of the drug, is not sufficient. They must be built up. That person may have a weakened constitution to begin with; you must build up this person, and you must also see that he has frequent evacuations of the bowels. To give 30 or 40 grains of heroin a day to a patient is an absolute unnecessity; that is absolutely wrong. I have never in all my cases given more than 2 grains of morphine a day to any drug addict; I have not had a single death in the treatment of 12,000 cases. * * * It is a recognized method with practitioners to have some certain definite sign of the presence of drug addiction before giving a prescription. If an addict said he had been using 20 or 30 or 40 grains a day, that would make no difference with me; it all would depend on his physical condition, the condition of his heart and lungs, and if he had any organic trouble. Of course, if I have a patient suffering from locomotor ataxia, or cancer, or tuberculosis in advanced stages, and that person has been taking drugs, I do not reduce such a patient. I believe it is no more than right to give it to them, and, even in those cases, 2 grains a day is enough."

The druggist Freilich, indicted with Harris, and whose drug store was in the neighborhood of the latter's office, testified to going to the office of Harris and inquiring of him why he sent his patients to different druggists. Two days later Harris came to the drug store, and told him that the reason he sent his patients to a different druggist was that he received a commission for doing it, and that if Freilich was willing to do the same thing he would send the patients to him. Harris asked him whether he would pay him a cent on each grain of heroin and morphine. To this Freilich assented, and it was agreed that Harris would send his patients to him. Thereafter Harris was in the habit of calling every week at the drug store for his commissions. Sometimes Harris went over the books and figured up his commission, and sometimes it was done by Freilich. The largest amount Freilich remembered paying Harris in a single week amounted to about $90. He was always paid in cash. The arrangement for the payment of a commission to Harris applied to narcotics only. Freilich sold on the average about 4 or 5 ounces of narcotics a day, and there are 437½ grains in an ounce. The testimony showed that during the months of Feb-

ruary, March, and the first 8 days of April, 1919, defendant wrote 7,940 prescriptions for narcotic drugs. His prescriptions ran from a comparatively small number of grains to 165 grains for 8 days' supply. When he made reductions, they were sometimes as small as 1/24th of a grain. In one case there was a reduction from 30 grains a day to 29 grains, after 2 months of prescribing. In another case of an addict a prescription for 55 grains of morphine and 30 grains of heroin were given at the same time.

The sufficiency of the indictment has not been called in question, either in the court below or in this court. Such questions as are presented relate to the charge to the jury, and to certain evidence which it is claimed was improperly received. At the conclusion of the charge to the jury the defendant's counsel said:

"I take exception to that portion of your honor's charge in which you describe the circumstances under which a physician might prescribe in the course of his practice. I take an exception to that portion in which you say there is some corroboration of the witness Freilich."

There were no other exceptions taken to the charge. There are eight assignments of error respecting the court's charge to the jury concerning the prescribing of the drug.

[1, 2] An exception ought to be specific and explicit, and show what ruling is claimed to be error. Counsel owe it to the court to be specific in their objections. In this case the objection was specific, in that it stated that it was taken "to that portion" of the charge which described the circumstances under which a physician might prescribe in the course of his practice; but it was general, in that it did not state in what the error consisted, whether it related to something omitted which should have been included, or to something included which should have been omitted. In the light of the subsequent assignments of error, it appears that the exception made was intended to cover not less than eight distinct propositions, which the court laid down and which it is now asserted erroneously laid down. How can it be assumed that the general language of the objection could have informed the judge wherein he had fallen into error? The general language of the single exception was quite insufficient to raise the eight objections assigned for error, and they therefore present nothing which this court can review. A defendant is not entitled to a reversal upon so vague an exception as that under consideration, unless the court sees that the instructions were grossly and manifestly inadequate and unfair. And this the instructions complained of certainly were not.

[3] The only other exception to the charge is that already mentioned, in which counsel said that he excepted to that portion in which the court told the jury that there was some corroboration of the witness Freilich. When that exception was taken the court said:

"Of course, gentlemen, as I said to you, you are the judges of the facts. I did not mean to express any opinion as to the truth or want of truth of any fact, but was only using them by way of illustration to apply the law to the case, and not to have you follow me as to any expression of opinions as to facts, because the jury is the exclusive judge of the fact."

If error was committed in the respect mentioned, it was clearly corrected by the explanation which followed, and defendant could not possibly have been prejudiced thereby.

[4] It is claimed that, inasmuch as defendant was acquitted on the conspiracy count, the fact that he was not guilty on that count established that he could not have been guilty on any count of the indictment. But this is to lose sight of the fact that a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. It is also to lose sight of the fact that the counts on which defendant was found guilty are not based on a conspiracy, but on the charge that he unlawfully, knowingly, and willfully aided and abetted Freilich to sell, dispense, distribute, and give the drug to the parties named in the counts and against the peace of the United States and contrary to the form of the statute. A physician who issues a prescription which is illegal under the act because not issued in the attempted cure of the habit, knowing it is to be filled by a druggist who knows of its illegality, aids and abets the druggist in violating the act and in so doing commits the substantive crime. Doremus v. United States (C. C. A.) 262 Fed. 849.

[5] Criminal Code, § 332 (Comp. St. § 10506), makes one a principal who at the common law would have been an accessory before the fact. Such an accessory may be charged as having done the act himself, and be indicted and punished accordingly. And in such cases it is not necessary to set out the facts by which he aided and abetted or advised and procured the commission of the crime. In Louie v. United States, 218 Fed. 36, 134 C. C. A. 58, the defendant had been acquitted on a previous trial of conspiracy to import, conceal, buy, sell, etc., smoking opium. He was then reindicted for the substantive crime of aiding and abetting his former alleged co-conspirator in doing the very act, which was the overt act alleged in the conspiracy indictment, and was convicted. It was held by the Circuit Court of Appeals for the Ninth Circuit that a plea of former acquittal could not be sustained. The Circuit Court of Appeals in the Sixth Circuit in Kelly v. United States, 258 Fed. 393, 169 C. C. A. 408, held that an indictment for conspiracy to defraud and one for the offense which was the object of the alleged conspiracy are for different offenses and that a verdict of acquittal under the conspiracy indictment is not inconsistent with a verdict of guilty under the other, although the overt acts charged in the former are some of the acts relied on under the latter. In the above case the subject was elaborately considered and satisfactorily determined. This court announced the principle in Di Preta v. United States (C. C. A. N. Y.) 270 Fed. 73, 75. And see, also, Carter v. McClaughry, 183 U. S. 365, 394, 22 Sup. Ct. 181, 46 L. Ed. 236.

[6] It is said that the evidence was not confined within proper limits, and that the evidence so received injured the defendant before the jury. The defendant assumes that under the substantive counts of the indictment no evidence could be received except in proof of the particular sales alleged. It is conceded that the general rule is that evidence tending to show the commission by the accused of another independent crime, even of the same kind as that for which the accused is

on trial, is inadmissible. Alexander v. United States, 138 U. S. 353, 356, 11 Sup. Ct. 350, 34 L. Ed. 954. The rule, however, is not without its exceptions.

The instances are many in which evidence of the commission of other offenses is necessarily admissible. In Parker v. United States, 203 Fed. 950, 952, 122 C. C. A. 252, this court held that where evidence as to other offenses is clearly interwoven with the case on trial it is admissible. In Farmer v. United States, 223 Fed. 903, 139 C. C. A. 341, which was an indictment for misuse of the mails in furtherance of a scheme to defraud in violation of section 215 of the Criminal Code (Comp. St. § 10385), we held that instances of frauds of exactly the same sort as charged, committed prior to the taking effect of the Criminal Code, were admissible to show intent. The opinion was written by Judge Lacombe, who pointed out that the opinion of this court in Marshall v. United States, 197 Fed. 511, 117 C. C. A. 65, was sui generis, and that there was nothing in it to support a contrary contention. And we understand the rule to be that, if intent or motive be one of the elements of the crime charged, evidence of other like conduct by the defendant at or near the time charged is admissible. Allis v. United States, 155 U. S. 117, 15 Sup. Ct. 36, 39 L. Ed. 91; Schultz v. United States, 200 Fed. 234, 237, 118 C. C. A. 420; Prettyman v. United States, 180 Fed. 30, 36, 103 C. C. A. 384; Walsh v. United States, 174 Fed. 615, 98 C. C. A. 461; Ex parte Glaser, 176 Fed. 702, 100 C. C. A. 254; Brown v. United States, 142 Fed. 1, 73 C. C. A. 187.

[7] Great stress was placed at the argument upon the decision of this court in Hart v. United States, 240 Fed. 911, 153 C. C. A. 597. That was a case in which the defendants were convicted of using the mails in furtherance of a scheme to defraud. The indictment contained a conspiracy count upon which all the defendants were acquitted, and certain other counts charging substantive offenses upon which a conviction was obtained. The judgments were reversed. The overt acts stated in the conspiracy count were to a considerable extent covered by the substantive counts. In the course of the opinion it was said:

"Thus the action of the jury in acquitting the defendants of the conspiracy charge has (under the circumstances of this case) laid a heavy burden on the prosecution to uphold the conviction for substantive offenses. The verdict of not guilty of conspiracy left for the jury's inevitable consideration a mass of testimony immaterial to the issues, passed upon adversely to these plaintiffs in error and their codefendants, yet extremely prejudicial to them. The possibility of this illogical and injurious result inevitably flows from the settled habit of prosecutors (in this circuit at least) of hitching on a conspiracy charge to a substantive count. We do not, of course, impugn the legality of the practice. Usually the same evidence proves the conspiracy and the substance; sometimes the substance is never reached, the criminal effort does not get so far, and conspiracy alone is proved; but to acquit of conspiracy, and convict of substance, produces a condition requiring a scanning of the record to ascertain whether, under cover of the unsuccessful charge, the successful one (over due objection) has been bolstered up."

The reversal in that case was due to errors in the charge to the jury, to prejudicial statements made by the trial judge in the presence of the jury, and because a mass of testimony which was admitted under the

conspiracy count, and which was extremely prejudicial to the defendants, was considered by the jury in connection with the substantive counts, although wholly unrelated to them.

The case under consideration now, it may be admitted, is one which justifies a scanning of the record to ascertain whether, under cover of the unsuccessful charge of conspiracy the successful charge of the substantive offenses (over due objection) has been bolstered up. The record in this case will be searched in vain, however, to find testimony which, having been introduced to prove the conspiracy count and while immaterial to the issues involved under the substantive counts, was yet used to sustain them. It appears, moreover, that defendant did not object to the reception of any of the evidence; that he did not seek to limit any of it to any particular count; that there was no offer under the conspiracy count of any of the evidence now objected to, and no direction of the court that any of it should be so received.

Judgment affirmed.

HOYT v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 11, 1921.)

No. 186.

1. **Poisons ⊂=4—Defrauding government of revenue not necessary to conviction for illegal sales under Narcotic Act.**
   To sustain a conviction under Harrison Narcotic Act, § 2 (Comp. St. § 6287g), proof that the government was defrauded of revenue is not necessary.

2. **Poisons ⊂=9—Good faith of physician in dispensing drugs question for jury.**
   In a prosecution of a physician for dispensing drugs in violation of Harrison Narcotic Act, § 2 (Comp. St. §§ 6287g), which defendant, rather than the jury, may be entitled to determine what was proper treatment of a patient, whether he made such determination in good faith is a question for the jury.

3. **Poisons ⊂=9—Conviction for illegal sale of narcotics sustained by evidence.**
   Evidence which warranted a finding that defendant, while registered as a physician, was in fact engaged in the sale of drugs to addicts, and not in the practice of his profession, *held* to sustain a conviction for violation of Harrison Narcotic Act, § 2 (Comp. St. § 6287g).

4. **Jury ⊂=131(8)—Refusal to permit examination of jurors as to opinions held not error.**
   In the prosecution of a physician for illegal dispensing of narcotic drugs, refusal to allow counsel for defendant to ask jurors whether they had any preconceived ideas as to the proper method of treating drug addicts *held* not error.

5. **Criminal law ⊂=1166½(6)—Acceptance of incompetent juror not reversible error, where peremptory challenges are unused.**
   The acceptance of an incompetent juror is not reversible error, where defendant did not use all his peremptory challenges.

6. **Poisons ⊂=9—Evidence admissible on trial for illegal sale of narcotics.**
   On the trial of a physician, charged with illegal sale of narcotics, evidence of the quantities of such drugs purchased by him *held* admissible on the issue as to whether defendant was using the drugs in the practice

of his profession in good faith, or whether he was engaged in handling them as merchandise.

7. Poisons ⇐4—That persons to whom narcotics were sold were registered as addicts under state law no defense to prosecution under federal statute.

In the prosecution of a physician for sale of narcotics in violation of Harrison Narcotic Act, § 2 (Comp. St. § 6287g), exclusion of evidence to show that the persons to whom defendant sold drugs were registered as addicts under the New York state law *held* not error.

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

Criminal prosecution by the United States against Daniel J. Hoyt. Judgment of conviction, and defendant brings error. Affirmed.

See, also, 255 Fed. 927.

Campbell, Flaherty, Turner & Strouse, of New York City (Thomas G. Flaherty, of New York City, of counsel), for plaintiff in error.

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

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. The defendant was tried upon four indictments, two of which were filed on October 3, 1917, one was filed on October 15, 1919, and the fourth on March 1, 1920. On March 10, 1920, all four indictments were by order of the court consolidated. The trial began on May 3, 1920, and was concluded on May 13. In the course of the trial counts 5, 8, 9, 10, 11, 12, 13, and 14 were dismissed. The indictments charged a violation of the Act of December 17, 1914, as amended by the Act of February 24, 1919. The act is what is known as the Harrison Narcotic Drug Act (Comp. St. §§ 6287g–6287q). The defendant was convicted on each of 13 separate counts, and was sentenced to four years' imprisonment in the United States Penitentiary at Atlanta, the sentences to run concurrently on each of the counts upon which he was convicted.

This court again takes occasion to express its decided disapproval of allowing a long delay to intervene between the finding of indictments and the time of trial. There cannot be efficient administration of criminal law, if long delays occur between indictments and trials. We feel that this cannot be too strongly expressed. Those of us who have any part in administering criminal law are under the most serious obligation to prevent unnecessary delays in the prompt trial of all accused persons. This is due alike to society and to persons accused. The long delays which have occurred in this case are to be justified only by very extraordinary circumstances, which, if they exist, are not disclosed by anything which appears in the record, nor by any satisfactory statement at the argument. It was said that delay was occasioned by doubt concerning the constitutionality of the act, and a decision of the Supreme Court was expected and awaited. But the first indictment, as previously stated, was found in October, 1917, and

the case in which the Supreme Court passed upon the constitutionality of the law had not at that time, and not until long after, and in January, 1919, been submitted to that court. United States v. Doremus, 249 U. S. 86, 39 Sup. Ct. 214, 63 L. Ed. 493. Then it was decided as early as March 3, 1919; but even that decision does not appear to have expedited the trial, as a whole year elapsed thereafter before the case was called for trial.

It should also be added that, if doubt existed as to the validity of the statute upon which the indictment was based, that was in our opinion not a reason for delaying the trial, but for hastening it to a conclusion, as no man should be allowed long to remain under the cloud of a possibly invalid indictment while courts exist in which the question can be determined. It is written into the Constitution (article 6) that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial," and it is the duty of the sworn officers of the law to govern themselves accordingly. A dilatory administration of the criminal law not alone violates the rights of accused persons, but is also discreditable to the country and prejudicial to the protection of life and property.[1]

[1] Since the filing of this opinion the United States attorney for the Southern district of New York has submitted to the court an extended statement of the history of the case and an explanation of how it happened that trial was so long delayed. The concluding portions of his statement are so important that it is due to him, although he has not requested it, and also due to the efficient administration of justice in the Southern district of New York, that they be stated in connection with the criticism which we have passed upon the delay which occurred in this case. The concluding portions of his statement follow:

"In the fiscal years 1917 to 1920, inclusive, and the 11 months of the present fiscal year between July 1, 1920, and May 31, 1921, the government cases in the District Court for the Southern District of New York and their disposition were as follows:

	1917	1918	1919	1920	11 Mos. (1921)
New civil suits	186	233	515	1,204	1,898
Civil suits terminated	229	279	350	340	443
New criminal prosecutions	378	2,070	8,647	2,216	2,602
Criminal cases terminated	442	1,789	1,006	1,879	2,688

"It is impossible to correct the congestion on the court dockets until more [District] Judges are available. It would require three judges, sitting continuously, to dispose of the government's criminal cases. There are now untried enough pending prosecutions under the mail fraud statute alone to occupy the full time of one judge for a year.

"Moreover, since I assumed my duties in June, 1917, there has been an enormous increase in the importance of the government's civil litigation in this district. While I am unable at the moment to state the sum involved in 1917, the civil cases (exclusive of admiralty) which have been pending and are still pending this year involve nearly $70,000,000. In 1917 only a fraction of the time of one assistant was required for all the admiralty work in this district. To-day, there are on the dockets of the District Court here about 1,200 government admiralty cases, involving about $40,000,000.

"The liquor business handled is another illustration. During the current fiscal year upwards of 4,500 persons have been brought to this office charged with criminal violation of the Volstead Act. By March 31st, 1,724 of these had been released after investigation and prosecutions had been instituted against 2,628 (combined into 1,749 cases). In addition, during the present fiscal year, 734 injunction suits have been commenced under the nuisance

The material portions of section 2 of the Harrison Act are as follows:

"That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. * * * Nothing contained in this section shall apply—(a) To dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this act in the course of his professional practice only: Provided, that such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in this act." Comp. St. § 6287h.

The defendant was engaged in the practice of medicine in the city of New York and was registered with the collector of internal revenue of the United States as a dealer in and dispenser of opium and coca leaves and their salts, derivatives, and their compounds. He had made, according to his testimony, some special study of drug addiction, and maintained a small sanitarium for drug addicts, into which he received for treatment in the course of four years only 38 patients, although during the same period he dispensed narcotics to from 1,000 to 1,500 addicts. He admitted upon the stand that in February, 1920, persons to the number of 80 were coming to him for narcotics in a single day. The testimony was that the addicts paid him $1 for a day's supply of the drug and $3 for three days' supply. In his dealings with patients the payments were all cash transactions. The following is from his cross-examination:

"These addicts paid you $1, $2, $3, sometimes $4, sometimes $5, sometimes nothing; is that correct? A. Yes, sir."

In the year from February 1, 1919, to February 1, 1920, he dispensed 95,175 grains of heroin and 53,779 grains of morphine. A number of those who had been furnished with the drug by him testified at the trial. One addict began getting heroin from him in January, 1916, and continued receiving it to August 10, 1917, and from July 26, 1918, to February 3, 1920; during these periods it appeared that the defendant was furnishing the drug without any substantial reduction in

section of the Volstead Act (41 Stat. 305), 483 injunctions have been granted, 20 contempt proceedings for the violation of injunctions have been instituted, 6 contempt cases have been tried, numerous proceedings have been instituted for the destruction or other disposition of seized liquors (of which, as I am informed, there are stored in this district quantities of the value of upwards of $2,000,000), and numerous suits have been brought against government officials seeking the recovery of seized liquors. Congress appropriated nothing to the Department of Justice for the enforcement of the Volstead Act this year, and all the work under the liquor laws has been carried on by my regular force.

"These facts indicate the problem of this office in the endeavor to keep its work current."

amount and without any cure being effected. Another procured heroin from the defendant from June 20, 1916, to August 14, 1917, and again from June 26, 1918, to February 3, 1920, and in this case, also, there was no substantial reduction in the amount of the drug, and no cure was effected. The defendant admitted that an addict could not be taken off the drug by the sole method of the drug being given to him to administer to himself; that is, by what is known as the ambulatory method. He admitted that, to take him off the drug, it was essential that the addict should be put under absolute control. Nevertheless he was for long periods of time and for self-administration furnishing the drug to large numbers of persons over whom he had no control. There is abundant evidence in the record from which a jury might conclude that he was engaged in carrying on a mercantile business in selling narcotics, and was dispensing the drugs wholly outside of what under any theory of medicine could have been denominated professional practice only.

There are 29 assignments of error, but all except 4 were abandoned at the argument in this court. Those relied upon are as follows:

(1) That the evidence did not sustain the allegations of the indictments and did not show that the defendant had been guilty of any offense against the laws and statutes of the United States.

(2) The refusal of the court to permit defendant's counsel to ascertain whether or not any of the jurors had preconceived ideas as to the treatment of drug addicts.

(3) The refusal of the court to strike out testimony showing the quantities of narcotics purchased by the defendant after the court had dismissed the indictment charging the defendant with purchasing drugs for use not in the course of his practice.

(4) The refusal of the court to permit the defendant to bring out facts and the law in relation to the registration of addicts under the New York state law.

We shall consider them in the above order.

As respects the first of the errors assigned, if the evidence did not sustain the allegations of the indictment and did not show that defendant was guilty of any offense against the act, then the court was plainly in error in denying the motions to take the case from the jury. The motion for a dismissal of the indictment and for the direction of a verdict was upon the following grounds:

(1) That there was no proof that through the alleged misconduct of the defendant the government failed to collect all the taxes it was entitled to.

(2) That the defendant's method of treatment of drug addiction was in itself wrongfully made the main issue in the case; that the defendant, as a physician, was entitled under the law himself to judge as to what narcotics should be dispensed to patients, without a review of his decision by a jury.

(3) That the proof by the government's expert witness failed to disclose that there was any well-recognized method of successful treatment of drug addiction.

[1] It is true that there is no proof in the record that the government has failed to secure full revenue for all narcotics dispensed by defendant. But the defendant was not charged in the indictment with having defrauded the United States out of any revenue, and to sustain the conviction it is not necessary to show that the government has been

defrauded. It is true that the Harrison Act purports to be passed under the authority given to Congress under article 1, section 8, of the Constitution, which empowers it to lay and collect taxes, duties, imposts and excises. The raising of revenue is not, however, the sole purpose of the act. The statute has a moral as well as a revenue end in view. The revenue end is provided for in section 1 and the moral end in section 2. The fact that the motive which impelled Congress to enact section 1 differed from the motive which led it to adopt section 2 is immaterial, if it can be seen that the legislation enacted has some reasonable relation to the exercise of the taxing power given to Congress by the Constitution. That it has such a relation has been decided, and is not now open to question in this court. United States v. Doremus, 249 U. S. 86, 36 Sup. Ct. 214, 63 L. Ed. 493. To sustain a conviction for a violation of section 2, it is no more necessary to show a violation of section 1 than it would be necessary to show a violation of section 2 to sustain a conviction for a violation of section 1. It cannot be seriously contended that any other conclusion is possible.

[2] It may be true that a physician's method of treatment of drug addiction is a question to be determined by the physician himself, and not by a jury; but it can only be true so long as the physician is pursuing his method in his honest endeavor to effect a cure. If that is not his purpose, and he is dispensing the drug to keep the addict comfortable, he is violating the law, and whether he is doing the one thing or the other is a question the jury must decide. Webb v. United States, 249 U. S. 96, 39 Sup. Ct. 217, 63 L. Ed. 497.

[3] Then it is claimed that there is an absence of proof of what a physician might properly do in the course of his professional practice in treating drug addiction. There is no foundation upon which such a claim can rest. The evidence, if the jury believed it, justified the conclusion that the defendant was really engaged, and practically exclusively engaged, in the sale of drugs to addicts, and not in the practice of medicine for the cure of drug addiction. The statement as to the testimony already made clearly shows that, and it need not be enlarged upon in this connection. It is also asserted that the government failed to prove that there is any method for the successful treatment of addicts, and, if there is, in what it consists. We think the defendant's own testimony on the subject of a cure is sufficient, in itself and without more, to justify the verdict of the jury. The government, however, called to the stand as an expert witness a member of the staff of Bellevue Hospital in New York City, who had made a study of narcotic drug addiction, and who had treated thousands of such cases, and who testified fully on the subject. He testified that drug addiction cannot be cured, except by putting a person into an institution where he cannot get the drug; that that course is absolutely necessary. "Drug addicts themselves will tell you that, as long as they are out where they can get the drug, walking around, why, they will get it." His testimony was that in institutions heroin is never given, and that in cases where the gradual withdrawal method is pursued a patient is given as a rule one or two grains of morphine for a day, and

that the drug is gradually withdrawn in the course of a week or ten days, until it is reduced to nothing. Then before he is permitted to leave the institution he is kept confined for six weeks or two months, and given treatment to build up his general health. There are other methods, such as the rapid withdrawal method and the sudden withdrawal method. He testified that all the various methods of treating drug addiction involved taking the patient off the drug. A hypothetical question was put to the witness, justified by the evidence in the case and he was asked whether in his opinion the method pursued by the physician could be regarded as "a method of promoting the cure of a drug addict." And he replied that it could not.

[4] This brings us to the second assigned error. It is claimed that defendant was prejudiced by the refusal of the court to permit defendant's counsel to ascertain whether or not any of the jurors had preconceived ideas as to the treatment of drug addicts. It appears that, while the jury was being impaneled and in the course of the examination of talesmen, the government objected to a certain course of examination, and the court sustained the objection and said:

"I am not going to have methods of treatment discussed here to any elaborate extent. They can be asked the question whether they would be so prejudiced in regard to any idea they have about treatment, if you want to, that would influence their impartial judgment of the case, or whether they will try the case according to the evidence and the law given by the court."

Again, counsel for defendants asked a juryman whether he had formed any idea, while serving on the grand jury, as to what a doctor should do, to which counsel for the government objected, and the objection was sustained. Counsel for defendant desired to ask the juror whether, as a result of hearing grand jury cases, he had any notions as to what a doctor should do, and the court stated that such question was improper. Again, a juror was asked what a doctor should do in his practice of treating an addict, to which objection was made and the objection sustained.

These rulings cannot be held error. By the great weight of authority a juror is not disqualified, even if he has an opinion, if he states that it will not affect his verdict, and the court is satisfied of the truth of his statement. Jones v. State, 181 Ala. 63, 61 South. 434; Forte v. People, 57 Colo. 450, 140 Pac. 789; Commonwealth v. Minney, 216 Pa. 149, 65 Atl. 31, 116 Am. St. Rep. 763; State v. Hoyt, 47 Conn. 518, 36 Am. Rep. 89; People v. McGonegal, 136 N. Y. 62. 32 N. E. 616; State v. Salgado, 38 Nev. 64, 145 Pac. 919, 150 Pac. 764; State v. Owen, 126 La. 646, 52 South. 860; Whitehead v. State, 97 Miss. 537, 52 South. 259; State v. Banner, 149 N. C. 519, 63 S. E. 84; Palmer v. State, 121 Tenn. 465, 118 S. W. 1022; Russell v. State, 53 Tex. Cr. R. 500, 111 S. W. 658; Hall v. Commonwealth, 89 Va. 171, 15 S. E. 517; State v. Hudson, 110 Iowa, 663, 80 N. W. 232.

It is said that the rule established at an early day in England was that no opinion previously formed or expressed by a juror as to the merits of a case was sufficient to disqualify him, unless it proceeded from actual favor or ill will towards one of the parties, or was of

such a nature as to furnish of itself a presumption of such favor or ill will. People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; 16 R. C. L. p. 263. Mr. Chief Justice Marshall, in Burr's Trial (1 Burr's Trial, 416), stated the rule to be that—

"light impressions, which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror, but that those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him."

In Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244, a petit juror in a criminal case testified on his voire dire that he had formed an opinion as to the guilt or innocence of the accused, but that he did not think that it would influence his verdict. He was challenged for cause by the prisoner and the challenge was not allowed by the trial court. The Supreme Court, in an opinion written by Chief Justice Waite, held that this action of the trial court was not erroneous, but that if the juror had formed a positive and decided opinion he would have been incompetent. If a juror's state of mind is such that he can weigh the testimony and render a verdict without bias or prejudice of any kind, he is competent. Partan v. United States (C. C. A.) 261 Fed. 515, 517.

In the case now before us the record shows that the court gave every opportunity to question the talesmen as to whether they had any ideas which would prevent them from deciding the case according to the evidence. In Hopt v. Utah, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. Ed. 708, the talesman stated on his voire dire that he had impressions as to the guilt or innocence of the person accused, and that they were possibly strong enough to create some bias or prejudice, but that he thought he could be guided by the evidence and try the case impartially. The court below held the juror competent, and the Supreme Court held that the judgment of the trial court as to the juror's competency was conclusive. And see Holt v. United States, 218 U. S. 245, 248, 31 Sup. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138; Spies v. Illinois, 123 U. S. 131, 168, 8 Sup. Ct. 21, 22, 31 L. Ed. 80.

[5] In this connection it may be said that, even if in the above rulings an error had been made, and we are convinced that none was committed, the defendant would not be entitled to complain of it, inasmuch as at the time the jury was impaneled he had exercised only 5 of the 10 peremptory challenges to which he was entitled. Hopt v. Utah, supra; Stroud v. United States, 251 U. S. 15, 21, 40 Sup. Ct. 50, 64 L. Ed. 103.

[6] The next assignment of error is based upon the refusal of the court to strike out the whole of the testimony of three drug wholesalers, called as witnesses by the government, and who had testified as to the amount of drugs purchased from time to time by the defendant. The testimony was introduced primarily for the purpose of sustaining certain counts in the second indictment, which charged the defendant with having purchased large quantities of the drugs for a purpose other than the use or distribution by him in the legitimate practice of

his profession as a physician. At the close of the government's case that indictment was dismissed. The defendant's counsel then moved that all evidence based on that indictment covering purchases from wholesale druggists should be stricken out. The motion was properly denied. It is said that, inasmuch as all charges for purchasing drugs had been dismissed, all evidence of purchases should have been stricken out. While the evidence was originally introduced to support the counts of the indictment that was dismissed, we think it was also material in support of the counts in the remaining indictments upon which the verdict was rendered. Those counts involved the question whether the defendant was practicing his profession in good faith in an attempt to cure the addicts to whom defendant dispensed the drugs, or whether he was engaged in handling the prohibited drugs as merchandise. In determining that question the jury was entitled to have before it information as to the quantity of the drugs purchased. In his instructions to the jury the court made it plain that the mere amount of drugs purchased was only to be considered upon the issue of good faith in an attempt to cure. "It merely has a bearing upon what he was doing," the court charged, "and presents an argument for your consideration which the government has outlined, as to what time he had, in view of the quantities of people he treated, to give them a conscientious examination." There was no exception to this instruction; and if the refusal of the motion to strike out was error it was cured by a correct instruction to the jury concerning the purpose for which they might consider it. Pennsylvania Co. v. Roy, 102 U. S. 457, 459, 26 L. Ed. 141.

[7] This brings us to the last error relied upon. It is argued that the court committed an error in not permitting counsel for defendant to bring out facts and the law in relation to the registration under the New York state law of certain of the addicts named in the indictment, and as to the possession by those addicts of state registration cards permitting them to obtain certain quantities of narcotics. It is said that defendant should have been permitted to show that he dispensed the drugs only to persons holding such cards. We do not see that it was at all material whether the addicts had or had not complied with the state law, or whether the defendant had refused to treat any addicts who had not obtained such cards. The defendant was not being tried for any offense against the New York state law, but for the violation of a federal act.

The defendant had a fair trial, and was in our opinion properly convicted of the criminal acts with which he was charged.

Judgment affirmed.

CHIN SHEE v. WHITE, Commissioner of Immigration.

(Circuit Court of Appeals, Ninth Circuit. June 6, 1921. Rehearing Denied August 1, 1921.)

No. 3619.

1. **Aliens ⟸32(1)—Chinese woman not entitled to judicial hearing before deportation for prostitution after admission.**
In view of the provision of Immigration Act Feb. 5, 1917, § 38 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼u), saving from repeal the laws relating to Chinese, except as provided in section 19 (section 4289¼jj), which latter section provides for deportation of an alien engaging in prostitution after entry in the United States, which differs in that respect from the similar proviso in Immigration Act Feb. 20, 1907, § 43, a Chinese woman is not entitled to the judicial hearing granted by Chinese Exclusion Act Sept. 13, 1888, § 13 (Comp. St. § 4313), before her deportation for prostitution after her entry, but may be deported after the executive hearing granted by the immigration laws.

2. **Aliens ⟸20—Cannot object that law requiring deportation was enacted after entry into court.**
A Chinese person cannot object that the statute permitting her deportation after executive hearing was enacted after her entry into the country, since the nation has the inherent power to exclude or expel any class of aliens absolutely or on its own conditions.

3. **Aliens ⟸32(12)—Inclusion in record of correspondence and memoranda not offered at hearing does not deny fair hearing.**
In proceedings for the deportation of an alien, the inclusion in the record sent to the Commissioner of Immigration and the Assistant Secretary of Labor of letters and memoranda written before petitioner's arrest and not introduced at the hearing does not make the hearing unfair, since bad faith or improper conduct will not be imputed to executive officers because they acquainted themselves with former official action in the case.

4. **Aliens ⟸32(1)—Technical procedure need not be followed in deportation hearing.**
Since the statute expressly provides for a summary hearing for the deportation of an alien, it is not necessary that the executive officers observe the technical rules of law and procedure that are accorded to parties in a criminal proceeding.

5. **Aliens ⟸32(1)—Presence of counsel at preliminary examination not necessary for fair hearing.**
The fact that an alien was not represented by counsel at a preliminary examination does not make the hearing an unfair one, entitling her to release on habeas corpus, where she was represented by counsel at the final hearing and given full opportunity to examine and cross-examine witnesses.

6. **Aliens ⟸32(12)—Immaterial statement in record does not prevent fair hearing, where there was sufficient competent evidence.**
The inclusion in the record of deportation proceedings of an irrelevant hearsay statement by an inspector does not render a hearing unfair, where there was ample evidence of legitimate character to support the finding, since it is inconceivable that the judgment of the Secretary of Labor was controlled by such irrelevant matter.

7. **Aliens ⟸32(12)—Judgment of Secretary on credibility of witnesses cannot be questioned.**
The credibility of the witnesses in proceedings for the deportation of an alien is for the Secretary of Labor to pass on, and his judgment can-

not be questioned, so long as the evidence is sufficient to support his conclusion.

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

Habeas corpus proceedings by Chin Shee, alias Ah Sue, against Henry M. White, as Commissioner of Immigration at the Port of Seattle, Wash. From a judgment discharging the writ (270 Fed. 356), petitioner appeals. Affirmed.

Adam Beeler and John J. Sullivan, both of Seattle, Wash., for appellant.

Robert C. Saunders, U. S. Atty., and R. E. Capers, Asst. U. S. Atty., both of Seattle, Wash., for appellee.

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

WOLVERTON, District Judge. This appeal brings in review the judgment of the District Court discharging a writ of habeas corpus sued out by the appellant, Chin Shee, alias Ah Sue, to secure her release; she being held by United States Commissioner of Immigration Henry M. White for deportation as a person unlawfully within the United States. The petition for the writ sets out that the petitioner is restrained of her liberty under the charge that she has no lawful right to be in the United States and should be deported, and further that such imprisonment, restraint, and order of deportation are illegal and not according to law.

The return of the commissioner to the order to show cause shows that the petitioner is lawfully detained by him, for the purpose of deportation, as an alien Chinese woman found practicing prostitution subsequent to her entry into the United States, under and by virtue of an order of the Secretary of Labor of the United States of June 5, 1920, issued and directed to respondent. By reference to the order or warrant, it will be found that the petitioner landed at the port of San Francisco on June 15, 1916, from the steamship Nippon Maru.

The petitioner's reply states that on January 30, 1919, she, having been then and there arrested, was given a hearing by the Commissioner of Immigration at Seattle, Wash., and that said examination was not before a special board of inquiry, but was before an individual inspector of the immigration service.

[1] It is contended on the part of Chin Shee that she, being a Chinese and having entered the United States, is not subject to deportation through executive order, but is entitled to judicial inquiry and determination as to her right to remain in this country. A Chinese person, when charged under the Chinese exclusion statutes with being unlawfully in the United States, is entitled to a hearing before a justice, judge, or commissioner of a United States court, or before a United States court; and, if found and adjudged to be not lawfully entitled to be or remain in this country, it is then declared that such person shall

be removed to the country whence he came. Section 13 of the Act of Congress of September 13, 1888, 25 Stat. 476 (Comp. St. § 4313).

It has been determined that the statute is applicable in view of section 21 and the proviso of section 43 of the Act of Congress of February 20, 1907, 34 Stat. 898, entitled "An act to regulate the immigration of aliens into the United States." Section 21 provides:

"That in case the Secretary of Commerce and Labor shall be satisfied that an alien has been found in the United States in violation of this act, or that an alien is subject to deportation under the provisions of this act or of any law of the United States, he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came."

The proviso of section 43 is:

"That this act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent." United States et al. v. Woo Jan, 245 U. S. 552, 38 Sup. Ct. 207, 62 L. Ed. 466.

The question involved was one of construction, whether section 21, which contains the clause "or any law of the United States," in view of the proviso of section 43, was applicable in a case where it was charged that the alien, a Chinese person, was unlawfully within the United States, in that he was found therein in violation of the Chinese exclusion laws. The court held it was not, and therefore that Woo Jan was entitled to a hearing as provided by section 13 of the Act of September 13, 1888. The holding of the court was more recently concretely stated in the case of Edward White, Commissioner, v. Chin Fong, decided May 17, 1920, No. 506, 253 U. S. 90, 40 Sup. Ct. 449, 64 L. Ed. 797, where the court says:

"We had occasion to consider the difference between the situation of a Chinese person in the United States and one seeking to enter it, and held that the former was entitled to a judicial inquiry and determination of his rights, and that the latter was subject to executive action and decision."

It was earlier determined by the Supreme Court, in a case where Chinamen had entered the United States surreptitiously and were arrested in transitu, that they were subject to deportation in pursuance of sections 20 and 21 of the Act of February 20, 1907. United States v. Wong You, 223 U. S. 67, 70, 32 Sup. Ct. 195 (56 L. Ed. 354). The court there said:

"To allow the Immigration Act its literal effect does not repeal, alter, or amend the laws relating to the Chinese, as it is provided that it shall not, in section 43."

In the present case Chin Shee is charged with unlawful practices subsequent to her entry into the United States, which was June 15, 1916. It is sought to deport her in pursuance of section 19 of the Immigration Act of February 5, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼jj). This section provides, among other things, that—

"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 * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported."

Section 38 of the act (section 4289¼u) contains a proviso in all respects like the proviso above quoted as contained in section 43 of the act of 1907, with the added words, "except as provided in section 19 hereof." It can scarcely be questioned that with this additional clause section 19 stands to repeal any provisions of the Chinese exclusion statutes not in harmony therewith. Such an intendment is obvious from the plainest reading of the proviso of section 38.

[2] Nor can the appellant complain that the law was enacted after her entry into this country and after her status as to her right to remain here had become fixed. It has long since been settled that every sovereign and independent nation has the right and inherent power to exclude or expel aliens, or any class of aliens, absolutely or upon certain conditions, whether in war or in peace. Fong Yue Ting v. United States, 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905; Wong Wing v. United States, 163 U. S. 228, 16 Sup. Ct. 977, 41 L. Ed. 140. The applicant, therefore, cannot complain that she was not given a judicial hearing within the intendment of section 13 of the Act of September 13, 1888.

[3] The second specification of error here presented is to the effect that the petitioner was not given a fair trial, in that letters, memoranda, statements, etc., from officials and inspectors of the department and witnesses were considered by the Commissioner of Immigration and the Assistant Secretary of Labor, without apprising petitioner of the same, or giving her the right to be heard concerning them.

The letters and memoranda referred to consist of certain correspondence had between the Commissioner of Immigration at Seattle, Wash., and the immigrant inspector at Walla Walla, and between the Commissioner of Immigration and the Commissioner General at Washington, and certain statements and testimony of witnesses, accompanying the correspondence, which were taken before petitioner's arrest. These matters have been included in the record from Washington, and certified here, but they are really not a part of the record made upon the hearing before the inspector upon the charge preferred against applicant looking to her deportation if found amenable to the charge.

While it is true that the Secretary of Labor might with propriety take cognizance of such correspondence and matter accompanying it, it would be extraordinary to impute bad faith or improper conduct to the executive officers because they examined the records or acquainted themselves with former official action. Tang Tun v. Edsell, 223 U. S. 673, 681, 32 Sup. Ct. 359, 56 L. Ed. 606. Furthermore the question here presented has been considered and determined by this court contrary to the contention (Guiney v. Bonham [C. C. A.] 261 Fed. 582, 8 A. L. R. 1282), upon a record quite similar to the present.

[4] The next contention is that the petitioner was not accorded a fair hearing in that the executive officers were arbitrary, and that their

findings were not based upon competent testimony. It should be premised that the statute expressly provides for a summary hearing (Low Wah Suey v. Backus, 225 U. S. 460, 472, 32 Sup. Ct. 734, 56 L. Ed. 1165), and it is not required that the Secretary should, in a hearing for deportation, observe the technical rules of law and procedure that are accorded to parties in a criminal proceeding.

[5] In the present case the petitioner was advised at her preliminary examination that she was entitled to counsel, to which she replied that she did not know what to do. On the same day, January 30, 1919, and probably at the same time, the witness Go Yen was examined, and on the next day Woo Bing was also examined: these without the presence of counsel. It appears, however, that petitioner procured counsel on the 30th, and the Commissioner was notified of the fact on the 31st. Counsel was not present either on the 30th or on the 31st, and it is complained that petitioner was denied the presence of her counsel.

The examination of the petitioner at the time was preliminary in character. Such an examination is permissible under the statute without the presence of counsel. If at subsequent stages of the proceeding she was represented by counsel her constitutional right was fully protected. Low Wah Suey v. Backus, supra. The examination of Go Yen and Woo Bing was but a part of the same preliminary hearing, and the objection that she was not represented by counsel thereat is not vital.

Petitioner was given further hearing on July 31, 1919, at which counsel was present. She was then fully examined, and counsel was accorded the privilege of cross-examination. At this hearing the government also presented certain affidavits, and a transcript of the examination at Walla Walla of Hue Wing, alias Jimmy John, and a record showing that petitioner had been found guilty of vagrancy, to all of which counsel for petitioner gave his assent, waiving any objection to the introduction of the same as testimony in the cause. Petitioner also introduced certain affidavits on her part, which were received in evidence. Thus was the record of the trial completed, and it shows that petitioner was not denied appropriate representation by counsel.

[6] At the preliminary hearing the inspector injected into the record this statement:

"Alien, when arrested on the street, was loudly dressed, bedecked with jewelry, and face painted; it is common knowledge in Chinatown that she is a prostitute, though of course the Chinese, by reason of their peculiar laws among themselves, cannot make affidavit to that effect, because of fear of assassination by a Tong man."

It is complained that such a statement was wholly incompetent to go into the record as evidence against the petitioner. It is clear that the statement was entirely gratuitous; but here again it may be stated that the officers of the government are not bound by the strict rules of evidence applied in criminal cases in courts of justice (In re Jem Yuen [D. C.] 188 Fed. 350), and it is inconceivable that the judgment of the Secretary of Labor was controlled in any degree by the interjection of this bit of irrelevant matter.

[7] There is ample evidence of legitimate character adduced and found in the record to support the finding. The credibility of the witnesses was for the Secretary of Labor to pass upon, and his judgment cannot be questioned so long as the evidence is sufficient to support his conclusion.

Judgment affirmed.

PAYNE, Director General of Railroads, v. SHOTWELL.

(Circuit Court of Appeals, Third Circuit. May 9, 1921. Rehearing Denied June 13, 1921.)

No. 2692.

1. **Railroads ⇐327(1)—Automobile driver's duty to stop, look, and listen.**
The duty of an automobile driver to safeguard his safety and that of the traveling public on approaching a grade railroad crossing, by stopping, looking, and listening, is imperative, but the question whether a violation of that duty is negligence depends on the circumstances.

2. **Railroads ⇐350(31)—Automobile driver's contributory negligence held question for jury.**
An automobile driver with an obstructed view, who stopped, looked, and listened 50 yards from a railroad grade crossing, and then permitted his car to drift quietly under full control toward the crossing, and who on reaching a point alongside the track from which he could see to the nearest curve, and from which the statutory crossing signals could have been heard, looked to the left and then to the right, when he first saw the unsignaling train which was almost upon him, and struck his car while he was attempting to cross, *held* not guilty of contributory negligence as a matter of law.

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

Action by Leila Shotwell, as administratrix, against John Barton Payne, Director General of Railroads and as Agent. Judgment for plaintiff, and defendant brings error. Affirmed.

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

W. A. Dolan, of Newton, N. J. (Joseph Coult, Jr., of Newark, N. J., of counsel), for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

BUFFINGTON, Circuit Judge. Showing jurisdiction by reason of diversity of citizenship, the plaintiff, as administratrix, brought suit against the defendant railroad company to recover damages for the loss of her husband, whose death, she alleged, was caused by the negligence of the railroad. She recovered a verdict, and on entry of judgment thereon, the railroad sued out this writ.

On the trial, the proofs tended to show the negligence of the railroad, but it was contended they also showed the deceased was himself so clearly guilty of contributory negligence that the court should have given binding instructions for the railroad. The trial judge refused this request and submitted the issue of the decedent's contributory neg-

ligence to the jury. Accordingly the question here involved is whether the evidence in that regard was such that the court should, as a matter of law, have adjudged the decedent guilty of contributory negligence.

[1] The decedent was killed while driving his automobile over a grade crossing. He was an experienced driver, and his wife, who was a licensed and also an experienced driver, was on the seat beside him. The danger incident to such a crossing and the imperative duty of an automobile driver to safeguard both his own safety and the safety of those traveling on the railroad have been stated by this court. N. Y. Cent. & H. R. R. Co. v. Maidment, 168 Fed. 21, 93 C. C. A. 413, 21 L. R. A. (N. S.) 794; Brommer v. P. R. Co., 179 Fed. 577, 103 C. C. A. 135, 29 L. R. A. (N. S.) 924; D. L. & W. R. Co. v. Welshman, 229 Fed. 82, 143 C. C. A. 358, L. R. A. 1916E, 816. What we there said we now adhere to and emphasize, and the present case, which in no way detracts therefrom, is but an effort to apply those general principles to this particular case, which, like every other, must be adjudged on its own individual circumstances and surroundings. So doing, we have reached the conclusion that the question of the decedent's alleged contributory negligence was one which the court could not decide as a matter of law.

[2] The proofs in this case tended to show that on the afternoon of the accident, the decedent drove his automobile and stopped at a point on the road some 50 yards back from the defendant's single track railroad. From this point the road dipped between higher ground on each side and dropped by a gentle slope to the railroad. The railroad track from the left also passed through a cut or dip and had a sharp curve a short distance from the crossing. At that time, a fast express train, which was behind time, was liable to come from this left side, and a freight train was liable to come from the right side after the express passed. From the point where the decedent stopped the view of the track in both directions was so limited owing to the lay of the land and the foliage, that no helpful view of either track could be had, and indeed there was no place where an adequate extended view of the track could be had until just alongside the track. From that point a view of some 150 feet could be had to the left side by the person attempting to cross. The decedent stopped, as we have said, at the point 50 yards back from the track and listened for the noise or whistle of an approaching train. He heard no whistle or rumble. At this point we note a statute of New Jersey made it the duty of a train approaching a crossing to give warning by ringing of bell or blowing of whistle from 300 feet until the crossing was passed. By the verdict the fact is established that this warning the engineer, who was making this run for the first time and who was behind schedule time and running at 50 miles per hour, failed to give. In view of the fact that no signal was given, that if given it would possibly have held the decedent where he had stopped or warned him as he went forward, there was ground for a jury to infer that a driver might, with due regard to the situation, have concluded it was safe for him, with his machine under control and capable, as the proofs showed, of being stopped in

its own length, to proceed slowly, under the belief and faith that, if a train were approaching, it would evidence the fact by a signal 300 yards away from the crossing. Hearing no whistle or noise, the decedent started his car and went slowly down the slight declivity which led to the track, the machine, as the proof showed, making no noise whatever, and being under control. The only witnesses as to what followed were his wife and the engineer. The testimony of the wife was as follows:

"Q. Now, when you left the factory and started on the road toward the track, did you yourself make any observations as you approached the railroad track? A. Yes.

"Q. Which way did you look? A. Well, we looked both ways.

"Q. You say 'we'; do you know whether your husband looked or not? A. Yes.

"Q. Did he? A. Yes; I know that he looked.

"Q. And was there anything in sight? A. No.

"Q. Either way? A. No; absolutely nothing.

"Q. Where were you when you did that looking? A. Well, just before we started to go down the hill, we looked, and then we couldn't see again till you get very, very close to the track.

"Q. Why couldn't you see again? A. Well, there is a bank there, and there was an undergrowth, or there was grass and stuff growing up there to at least 2½ feet on top of the bank, and the bank runs along just so that, when the train comes through the bank, you cannot see just any more than the top of the train when that brush is off of there, and when it is grown up there you cannot see it at all until you get well, within 40 or 50 feet of the crossing, anyhow, before you can get a clear view of the track.

"Q. Now, when you get a view of the track, which way did you look first? A. Well, he looked down the track the way that train came that hit us.

"Q. That would be to your left? A. Yes; and as he looked my gaze followed his, so we both looked to the left.

"Q. How far were you away from the track then? A. Well, we were maybe 40 or 50 feet.

"Q. And how was he running his automobile? A. Very, very slow.

"Q. And going down grade? A. Yes.

"Q. Then what did you do? A. Well, then I turned and looked the other way.

"Q. Do you know whether he looked, or not, then? A. Yes.

"Q. How do you know that? A. Well, I sat right beside of him, and, as I looked, why he looked, too.

"Q. Was there— A. We always used to watch the train.

"Q. Was there any train due then? A. After that 3:38 comes in, usually there is a freight train. I don't know that it goes every day, but it goes real often; it pulls out from Newton and goes on down after the 3:38 comes in.

"Q. The 3:38 is the one that struck you? A. Yes.

"Q. And after that goes out, there is a freight due? A. A freight pulls out.

"Q. From the Newton station? A. Yes.

"Q. How many tracks are there? A. Just a single track.

"Q. As you approached this crossing, did you hear any signal? A. I did not hear anything at all.

"Q. Was the automobile making any noise? A. No; it was not.

"Q. How long did you continue looking towards your right? A. Well, we looked to our left first, and didn't see anything; then we looked to our right, and we—I don't suppose we looked real quickly; we just looked one way and then turned looked the other way; we didn't see anything either way; of course, as we looked back again, the train was right onto us.

"Q. When you looked back again to the left, how close was the automobile to the railroad track? A. Oh, well, we were right down close to the track I mean.

"Q. Well, give us some idea. A. Oh, we were right down on the track.

"Q. Were you actually on the track? A. Well, I cannot tell; looking over the head of the car, I couldn't actually tell you whether the wheels were on the track or not.

"Q. And how was the automobile moving at that time? A. Oh, we were moving very slow.

"Q. Did it actually stop? A. Well, I cannot remember whether we actually stopped or not; but I know that we were going very, very slow.

"Q. And what did you see when you looked again to the left? A. When we looked again to the left, the train was right there.

"Q. How far away from you? A. Oh, well, it seemed to be real close; I don't know. Oh, well, it wasn't the distance—well, possibly, from the corner there to the end of the room.

"Q. From where you are to the end of the room? A. No; maybe from that corner where that cuspidor is to the end of the room. It seemed as though it was that close to me, as near as I can remember.

"Q. At that time was there any signal from the train? A. Well, I cannot remember; it just seems as though there was a noise, a loud shriek, or something, and I was hit so quickly that I was knocked unconscious, and didn't remember so well.

"Q. Previous to that time, when you looked up and saw that train, had there been any signal? A. There was none.

"Q. Did you listen? A. Well, we were looking for the train, and naturally we would have heard it, if it had blown, I should think.

"Q. Were you listening? A. Why, yes, we were looking for the train, naturally listening for the whistle.

"Q. At the time that this train bore down on you, you say the distance from the end of the room to there, was there any bell being rung? A. No.

"Q. Sure of that? A. Yes."

The testimony of the engineer is as follows:

"Q. On September 8, 1919, you were the engineer of a train involved in a grade crossing collision near Newton? A. Yes, sir.

"Q. Now, will you tell to the jury just what you recollect with respect to the happening of this accident, the management of your machine—I mean your engine—from the time you left the station just east; I think that is Andover? A. Yes, sir. Why, after we left Andover, our next stop would be Newton; between that time, approaching this crossing where this accident occurred, I gave the proper whistles, two long and two short, and there is a caution block there that governs the signals down at the station.

"Q. Now, just a moment; may I interrupt you? Will you step down and look at this map? there is a signal here? A. That is the caution block right here; that governs the signals down at the Newton station, and after I blew the whistle for the crossing, I watched next for that signal on account of the freight train in Newton I knew was there; if they were using the cross-over down at the station, I had to figure on stopping there on account of they don't flag there, on account of the yard limits; when I see the signal was clear, I looked next for the crossing; I saw this automobile just coming down slow on the crossing; that was in the neighborhood, I judge, of 250 feet.

"Q. What kind of a caution signal is this—a semaphore signal? A. Yes; automatic signal.

"Q. The arms are how high from the ground? A. On top I should judge in the neighborhood of 50 feet probably.

"Q. You say, as you approached the crossing, you looked up at this caution signal? A. Yes, sir.

"Q. Then, after you looked at that and saw it clear— A. Saw it was clear.

"Q. Then you directed your attention to the crossing? A. To the crossing, and as soon as I saw—coming around there the curve is very sharp—I could see the crossing, I saw this automobile, looked to me as if it was just about stopped, just moving on the crossing. As soon as I saw it, I threw the brakes into emergency and blew the whistle, gave one long blow, and struck the car, probably a very short time, only 250 to 300 feet.

"Q. About how fast were you traveling at that time? A. I should judge between 45 and 50 miles; in the neighborhood of that.

"Q. And for how long a time had you been traveling at that—how long a distance had you been traveling at that rate of speed? A. Not very long, because it is upgrade from Andover to what we call the slate cut; then it is downgrade from there down below this crossing a short distance, about half way to the shoe factory, probably 300 yards.

"Q. Will you tell the jury if you used your bell on that trip up from Netcong, by way of Andover, to Newton on that day, and, if so, how the bell is operated? A. The bell is operated by air, and I started the bell ringing, coming over the slate cut, and the bell was still ringing.

"Q. Where did you start it? A. Coming over the slate cut, there is a cut just west of the slate cut, and I left the bell still ringing, and I blowed the whistle for both crossings, and the reason I know the bell was still ringing is, after this accident occurred, the first thing come to my mind, had I done everything that was for me to do to avoid the accident? I knew I had blowed the whistle, and the bell was still ringing; I went up in the cab shut the bell off after I see Mr. Shotwell on the front end.

"Q. Do I understand you to say, after you brought the train to a stop, you went out of your cab? A. Yes, sir.

"Q. And helped Mr. Shotwell; he was on the engine some place? A. Yes, sir; he was on the front end of the engine.

"Q. When you found that you couldn't do anything for him, then you went back to your cab? A. Went back to my cab, and shut the bell off, and tooted the whistle; by that time Mr. Zeke was coming down; he was the conductor.

"Q. Can you tell us about where you put that bell on? A. Why, west of slate cut.

"Q. How far is that place west of slate cut, where you put your bell on from the crossing whistle signal? A. Oh, probably quarter of a mile; anyhow the bell was ringing all the time; I left it still ringing."

Under this situation we feel it is clear the court would not have been warranted in holding, as a matter of law, the decedent guilty of contributory negligence. On the contrary, the situation was one which made it the province of a jury to determine whether, in view of all the circumstances of the case, the decedent did, or omitted to do, anything contributing to his safety which the situation required or made possible. He had stopped and listened for the whistle; he was approaching the track slowly; the machine was under control and making no noise; his wife and he were alert, both looking and listening, both evidently relying on the fact that no whistle or bell was sounding.

Certainly, on the question of due care and the fact of contributory negligence, there was such a possible divergence of view on the part of fair-minded men that one might find the decedent had done everything possible and omitted nothing which contributed to his safety, and another fair-minded man find otherwise. The decedent stopped at the top of the grade and listened. He knew a train approaching in either direction was bound to whistle when 300 feet distant from the crossing, and keep whistling until the crossing was passed; he heard nothing; he could not foresee or presume that the engineer would negligently fail to give the statutory warning. He did not attempt to dash across the track, chancing the consequences, but let his car drift down the slope at slow speed, at which it was under control, and, under the proofs, could be stopped in its own length. As the car descended, it made no noise, and the nonsounding of the whistle of the approaching train tended to assure him he could cross in safety. At the first oppor-

tunity, he looked to the left for the freight train, and saw none, and then to the right, only to find that the approaching, unsignaling train was so close upon him that in his effort to avoid it, his car was struck.

To say that the accident would have been avoided, had he then stopped, with the nose of the machine close up to the track, and that failure to then stop it was contributory negligence begs the whole question. Perhaps he could have done otherwise than he did, when suddenly required to act in the position then confronting him; but, assuming he might have instantaneously stopped the car and that it would have been wiser to do so, instead of attempting to cross, it still remains that there was ground from which a jury might fairly infer that his attempt to cross was not the breach of an absolute duty to then stop, but was rather a mistake of judgment, made by a man confronted by an unlooked for peril, unexpectedly brought about by the unanticipated and misleading negligence of the company in failing to blow the crossing whistle. Indeed, the situation as a whole was one where men of reasonable mind might reasonably differ in their conclusions, namely, where one such man might be of opinion that the decedent did not act with due regard to his safety, and where another could find he had done nothing and left undone nothing, in the way of proper care and forethought.

Under such circumstances, the court committed no error in refusing to give binding instructions.

THE BLACK DIAMOND.

THE WILLIAM E. CLEARY.

(Circuit Court of Appeals, Second Circuit. May 18, 1921.)

No. 238.

1. **Collision ⇐153—Rule requiring affirmance of finding supported by evidence does not require acceptance of improbabilities.**
   The rule that the finding of the court below in a collision case, having some evidence to support it, shall be affirmed, does not require affirmance, where that would involve the acceptance of the improbable, rather than the probable.

2. **Collision ⇐95(2)—Tug held at fault for navigating up East River near New York shore in violation of statute.**
   A tug proceeding up the East River near the New York shore, with a barge in tow on each side, *held* at fault for violating the state statute requiring navigation in the center of the river, and for being on the wrong side of the channel, which resulted in a collision when she was forced to turn to starboard to avoid a vessel backing out from her slip, and was unable to straighten out the sheer against wind and tide before her tow collided with the tow of another tug proceeding down the center of the channel; her claim that the other tug turned across her course being improbable under the facts.

3. **Collision ⇐21—Custom of violating East River statute to avoid tide does not relieve from liability.**
   The fact that by custom some navigators took chances by following the New York side in the East River to avoid the strong ebb tide does

not alter the rule that, when a navigator takes that chance, he violates the law, and, if a collision occurs, is presumptively at fault.

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

Libel by the Pennsylvania Coal Company and another against the steam tug Black Diamond, of which Walker D. Hines, as Director General of Railroads, was claimant, in which the steam tug William E. Cleary, of which the Cornell Steamboat Company was claimant, was brought in under the fifty-ninth rule (29 Sup. Ct. xlvi). From a decree for the libelants against the steam tug William E. Cleary, the claimant of that tug appeals. Reversed, with directions to enter a decree against the Black Diamond.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City (Robert S. Erskine, of New York City, of counsel), for appellant.

Harrington, Bigham & Englar, of New York City (Leonard J. Matteson and C. W. Hagen, both of New York City, of counsel), for claimant appellee.

Park & Mattison, of New York City (Henry E. Mattison, of New York City, of counsel), for appellee Pennsylvania Coal Co. and Hines.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. On May 8, 1918, at about 2 p. m., in the East River, betwen Manhattan Bridge and Corlears Hook, a collision occurred between the libelants' boat No. 370, which was in tow of the Cleary, and a loaded car float in tow of the Black Diamond. The weather was clear, with a strong ebb tide and a strong westerly wind. The Cleary was proceeding down the river, in the center thereof, with four light boats in tow on a hawser about 100 feet long. These boats were made up in a tier of three, with a fourth trailing behind on the starboard hawser boat. The Black Diamond was coming upstream close to the New York shore with two loaded car floats, one made fast on each side. The testimony as to the navigation and the occurrence is in conflict. The District Judge held the Black Diamond solely at fault. The probability as to this occurrence is so strongly in favor of the Cleary's claim that we are of the opinion that the result below was erroneous, and requires a consideration of the facts resulting in a conclusion which is opposed to that reached below.

[1] Probability is always a guide in determining the truth as to a question of fact. Once probability is ascertained, by holding onto it and being led thereby, the course of justice is easily followed. We have due regard for the rule that the finding of the court below, having some evidence to support the finding of fault, will receive our affirmance. The Gangoga, 135 Fed. 747, 68 C. C. A. 385; W. G. Mason, 142 Fed. 914, 74 C. C. A. 83. Still, in the case here under consideration, a review of the evidence requires our being led by the probable rather than the improbable.

[2] Just prior to the collision, the Cleary was proceeding down the center of the river, and the Black Diamond was coming upstream admittedly close to the New York piers. The libel was filed against

the Black Diamond alone. It charged as a fault coming upstream nearer to the New York shore, a violation of the East River statute. Laws N. Y. 1848, c. 321, p. 450, § 1; Amos C. Barstow, 66 Fed. 366, 13 C. C. A. 515; The Wm. E. Cleary, 235 Fed. 107, 148 C. C. C. A. 601; N. Y. Central No. 17, 256 Fed. 220, 167 C. C. A. 436. She was on the wrong side of the river. Her presence on the wrong side of the river, close to the New York piers, presented a situation, for her, of an emergency resulting from the transfer No. 6 backing out from her slip on the New York side, and required the Black Diamond to so navigate as to attempt to avoid the No. 6. This caused the tow of the Black Diamond to swing out into the river and encroach upon the course of the Cleary. The result was the collision.

[3] The rule made it the duty of the Black Diamond to be on the right-hand side of the center of the stream, and not on the left. The fact that there was a strong ebb tide, and that by custom some navigators took chances by being over on the New York side, so as to go faster does not alter the fact that, when a navigator takes this chance, he violates the law and takes the risk. If a collision occurs, his vessel is presumptively at fault. N. Y. Central No. 17, supra. If the Black Diamond had navigated with due regard for this rule, in the middle of the river, an emergency such as was presented by the No. 6 leaving her dock would not have arisen. She was obliged to navigate so as to accommodate the passage of the No. 6, and did not have sufficient power to overcome the set of the tide and the strength of the wind, and was unable to straighten up her car floats in time to pass the Cleary's tow safely.

The testimony—and much of this is given by her witnesses—places the Black Diamond coming up the stream with the outside corner of her outside car float about 150 to 200 feet off the New York piers. The Cleary was first observed by her off Pier 44, on a course to pass well to starboard of the Black Diamond. She was in the center of the river. These original courses are substantially testified to by the witnesses called on both sides. The westerly wind was blowing from the New York side and toward Brooklyn. The ebb tide sets strong over on the Brooklyn side. The story of the Black Diamond is that the Cleary navigated toward the New York shore, and then immediately whipped her hawser tow against the set of the strong ebb tide and a westerly wind, about in the vicinity of Gouverneur Slip. The Cleary had no reason to make any stop on the way down the East River. She was bound down the river from 119th street to Hoboken and Edgewater, N. J. There was no occasion for her to land at the New York shore, or to make way toward it, and no reason is ascribed in endeavoring to go against the tide and wind in the maneuver claimed by the witnesses for the Black Diamond. She was proceeding at from 3 to 3½ knots on the ebb tide. If she had held her course and come straight up, by no possibility could the collision have occurred.

We think what she did was caused by the Transfer No. 6 coming out of Pier 37, and as the No. 6 backed out close to the Black Diamond's port bow, the Black Diamond sheared out stream with her tow and ported her helm to clear the stern of the No. 6. There seemed to

be ample room for the Black Diamond to straighten up, after clearing the No. 6, and pass in safety to the starboard of the Cleary's tow. The Cleary had the right to expect such navigation of her. Her tow passed about 75 feet off the starboard side of the Cleary. When the car floats were a short distance from the hawser tier of the Cleary tow, the Black Diamond blew an alarm whistle, and at that time she was unable to break her shear. The Cleary answered the alarm, but it was then too late for her to pull her tow clear. The point of collision was the center of the river. At the time the Cleary tow was straight behind her—possibly a little toward the Brooklyn shore, because of the influence of the tide and wind—the starboard corner of the starboard car float hit the starboard side of the No. 370, which was the starboard hawser boat of the Cleary's tow. After the car float went clear to the tow, a helping tug came to the Black Diamond's assistance and helped to straighten her car floats upstream again.

The version given is supported by the testimony of the Cleary's crew and, in addition thereto, the master of the No. 370, and by the master of two of the boats in tow. The fact that the boats in the tow were following straight behind the Cleary at the time of collision, negatives the idea of the Cleary having swung her tow over toward the New York shore. The fact that assistance was required to straighten out the Black Diamond car floats is a strong indication of the course of her navigation. If the Cleary had turned at right angles to the New York shore, as contended, her tow, on 100-foot hawsers, would have swung downstream on the tide, and it would not have been possible for the Cleary to have whipped her tow back to New York against the tide and wind by reversing her helm. It would have resulted in the loss of control of the tow. It is also doubtful if the swing could be made around on the angle as described, resulting in collision of the car float not more than 200 feet off the piers, without the tail of the tow having first collided with the piers above the car float during the swing. The Black Diamond's claim is so incredible that we are forced to reject its story as improbable. We think the probabilities are strongly supported by the conditions, which are above described to be that in attempting to avoid the Transfer No. 6 she sheared out of the center of the river. She was at fault in taking the course of navigation she did prior to the collision. It is this that brought about the happening of the collision.

The decree is reversed, and the court below is directed to enter a decree against the Black Diamond.

THE HAZELTON.

THE ARLINGTON.

(Circuit Court of Appeals, Second Circuit. May 11, 1921.)

Nos. 188, 189.

1. Collision ⟸93—Ferryboat, after leaving slip, is bound by navigation rules.

While ferryboats, while operating in or close by the entrances to their own slips, have rights somewhat superior to those of other craft in the immediate vicinity, such rights are no greater than reasonably required for their proper and efficient navigation, and they must maintain a sharp lookout for craft passing up and down the stream, and, once safely clear of their racks, are bound to navigate with respect to other craft in accordance with the rules of the road.

2. Collision ⟸93—Ferryboat held in fault for collision with crossing tug.

A collision between a ferryboat, leaving her New York slip to cross North River, and a tug, coming down 600 feet or more off the piers, and therefore the privileged vessel under the starboard hand rule, *held* due solely to the fault of the ferryboat in failing to sooner see the tug and to navigate accordingly. That another tug with a tow, passing down ahead and closer in, agreed by signal to allow the ferryboat to pass ahead did not require the outer tug to do the same, nor affect her rights or duty under the rule to keep her course and speed, nor was she in fault for failing to answer the ferryboat's signal, given when collision was imminent and probably inevitable.

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

Suit in admiralty for collision by the Erie Railroad Company, owner of the ferryboat Arlington, against the steam tug Hazelton; the River & Harbor Transportation Company, claimant and cross-libelant. Decree dividing damages, and cross-libelant appeals. Reversed.

At about 8:50 a. m. of March 25, 1914, the ferryboat Arlington started to leave her slip at Chambers street, New York, bound for the Erie Railroad Terminal on the New Jersey side of the North River, and somewhat to the north of Chambers street. There was no wind, and the tide was high water slack. As the boat cast off she blew one blast of her whistle and started ahead full speed, but, as is usual, slowed down somewhat upon coming near to the end of the ferry rack and the open water of the stream. Then it was that the Arlington observed the steam tug Depew proceeding down the river, having in tow upon one side a derrick lighter, and on the other a covered barge.

The Depew was about 350 feet off the pier ends, and something like 250 feet to the north of the Arlington's course, which lay to the northwest. To the west of the Depew, and about abreast of her stern, the steam tug Hazelton was on her way from Hoboken to Pier 5, East River. The distance of the Hazelton from the pier ends is variously estimated at from 550 to 1500 feet.

The Arlington's whistle had been heard by the Depew, and, as the former emerged from the slip, the latter blew two blasts, thus indicating that the Arlington might cross the Depew's bow. The Arlington, by an answering signal of two blasts, agreed to the arrangement, and at full speed proceeded to put it into execution. In so doing the Arlington, for the first time, took note of the presence of the Hazelton. The master of the Arlington accounts for his succeeding movements as follows: "* * * I immediately blew

him two whistles. No reply. I blew him two more. No reply. I commenced to think that there must be something wrong, and I threw my helm to starboard, and I blew him two more. No reply; and when I threw the wheel hard astarboard I gave an extra jingle bell to the engineer. * * * As I blew the last two whistles, I was then coming across the course of the Hazelton. * * * I went to blow an alarm whistle, and my hand slipped from the cord, trying to throw the wheel at the same time. It didn't sound like an alarm whistle, but like two double toots. * * *" The master succeeded in putting his wheel hard aport, so as to throw the ferry's stern down stream and thus lessen the force of the then inevitable collision.

The Hazelton claims that as the ferryboat left her rack she angled up the river on her usual course, apparently intending to pass under the tug's stern, but that, as soon as the Arlington crossed the Depew's bow, she signaled the Hazelton and changed her course. The Hazelton maintains that upon hearing the Arlington's second signal of two blasts she stopped her engines, put them full speed astern, and hard astarboarded her wheel. This being done, two whistles were blown the Arlington.

The net result of the various maneuvers was that the Hazelton's bow swung to port and struck the Arlington a glancing blow upon her starboard quarter.

Cross-libels were filed in the court below and, coming on for trial, were consolidated. After hearing the evidence the court held both boats equally at fault and entered a decree in conformity therewith. The Hazelton appeals.

Barry, Wainwright, Thacher & Symmers, of New York City (James K. Symmers, of New York City, of counsel), for Erie R. Co.

Harrington, Bigham & Englar, of New York City (D. Roger Englar and Leonard J. Matteson, both of New York City, of counsel), for River & Harbor Transportation Co.

Before WARD and MANTON, Circuit Judges, and KNOX, District Judge.

KNOX, District Judge (after stating the facts as above). [1] In our opinion the entire blame for this collision should be borne by the Arlington. It is true that boats of her class, when operating in or close by the entrances to their own slips, have rights somewhat superior to those of other craft in the immediate vicinity. The Breakwater, 155 U. S. 252, 15 Sup. Ct. 99, 39 L. Ed. 139. These rights, however, are no greater than those reasonably required for the proper and efficient navigation of the privileged boats. Carroll v. City of New York, 249 Fed. 453, 161 C. C. A. 411. They must maintain a sharp lookout for craft passing up and down the stream, and, once safely clear of their racks, are bound to navigate with respect to other craft in accordance with the rules of the road. In this case there is no good reason why the Arlington should not have seen the Hazelton at the same time she observed the Depew. Neither that boat nor her tow obstructed the view from the Arlington. Her master frankly says there was "nothing to prevent" seeing the Hazelton, "I presume, but my attention being called to the exchanging whistles with the Depew and getting across his bow and looking at the distance for crossing his bow."

[2] The delay in seeing the Hazelton seems to us to account for all that transpired, and there can be no basis for holding the Hazelton liable, unless the District Court was justified in finding, as it did, that she was bound to hear the exchange of whistles between the Depew

and the ferryboat, and then to navigate in recognition of the rights of ferryboats in entering and leaving their slips. Assuming for the moment that the Hazelton was not, as claimed by the Arlington, more than 600 feet off the pier ends, she was, being the privileged boat, entitled to proceed, irrespective of the arrangements made between the Depew and the ferryboat.

The fact that the Depew was willing to, and did, give way to the Arlington was no cause for the Hazelton to do so. The Depew had a tow, the Hazelton was light, and, for all the latter knew, there might be good reason why the former did not care to proceed. The arrangement made as between the Depew and the Arlington did not curtail either the rights or obligations of the Hazelton. We accordingly hold that there was no duty upon the Hazelton to take note of, and to act in accordance with, the signals passing between the Depew and the Arlington.

The Hazelton, under the starboard hand rule, was bound to keep her course and speed, and, being at least 600 feet off the pier ends, could not with propriety depart from the obligation resting upon her prior to the time that the Arlington blew her the first signal of two blasts. Until that moment, at least, the Hazelton believed that the Arlington would navigate so as to pass under her stern. The ferryboat says this would have been impossible; but, in view of all the testimony as to the distance of the Hazelton from the pier ends, we are unable to say that such was the fact.

The signals from the Arlington, once the Hazelton was observed, followed in quick succession, and, even if it be assumed that the Hazelton should have stopped and reversed her engines at the first of such signals, it is by no means clear that the collision would then have been avoided. The master of the Arlington, in imputing fault to the Hazelton, suggests that she should have navigated as follows:

"If he had answered my first whistle according to law by an alarm whistle and throwed his wheel aport, that would have given me an opportunity to stop, and he would have went on ahead; but he would have had to alter his course to do it."

This, in our opinion, is but another way of saying that the Arlington, through her own fault, having placed the Hazelton in an emergency, primarily relied upon her to extricate both vessels from their perilous position. This being so, the conduct of the Hazelton, when placed in extremis, is not properly the subject of that degree of censure upon which her liability can be predicated. In this respect this case is not unlike that of The Haida (D. C.) 191 Fed. 623, wherein it was held that, when the burdened vessel is grossly at fault, the law puts upon her the burden of showing clearly that the other was at fault. Such burden has not been borne by the Arlington. We are not convinced that the Hazelton's failure to change her course and speed, upon receiving the first signal given her by the Arlington, and to then answer the Arlington's signal, made any real contribution to the collision. The second signal, at which the engines were stopped and reversed, followed immediately after the first; and having regard for that interval of time, almost instantaneous though it be, wherein a person must com-

prehend a condition and determine upon his course of action, we are unwilling to hold that the Hazelton's action, or lack thereof, was of such character as to merit condemnation.

For the reasons specified, we hold the Arlington alone at fault, and reverse the decree below.

WEBER et al. v. WARD BAKING CO. et al.

WARD BAKING CO. et al. v. WEBER et al.

(Circuit Court of Appeals, Third Circuit. June 6, 1921.)

Nos. 2636 and 2637.

Patents ⇐328—Reissue 11,751, for the making and shaping of dough, held valid and infringed.

Reissue patent No. 11,751, for the making and shaping of dough, *held* valid and infringed.

Appeal from the District Court of the United States for the District of New Jersey; Joseph L. Bodine, Judge.

Suit by the Ward Baking Company and others against Weber Bros. and others. From a decree on an accounting, both parties appeal. Affirmed.

See, also, 230 Fed. 142, 144 C. C. A. 440.

James L. Hopkins, of St. Louis, Mo., for appellants.

Melville Church, of Washington, D. C., Leo J. Matty, of New York City, and Harry B. Rook and Russell M. Everett, both of Newark, N. J., for appellees.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the Ward Baking Company et al. brought suit against Weber Bros., et al., charging infringement of certain patents. The case was so proceeded in that a decree was entered in the court below, based on its opinion, which is printed in full on pages 142 to 149, both inclusive, of 230 Fed. (144 C. C. A. 440–447). From such decree an appeal was taken to this court by the Ward Baking Company in an opinion reported at said 230 Fed. 150, 144 C. C. A. 448. This opinion, as to the four questions raised by said appeal, which are specified on page 156, affirmed the decision of the lower court. Pursuant to the decree of the lower court, an accounting was had, and resulted in a money decree against the defendants. From such decree both parties entered appeal, both of which we consider and dispose of in the present opinion.

Without entering into a present discussion of the somewhat involved status of the patents involved and the proceedings thereon, and referring for such information to the opinions of the lower court and of this court, reported at length in the Federal Reporter referred to, it suffices to say that the questions involved in the appeals now before us may be thus summarized: On behalf of the defendant, first, is re-

issue patent No. 11,751 valid? and, second, if valid, is it infringed? and on behalf of both plaintiff and defendant, third, should the money judgment on the accounting stand?

Turning to the first and second questions involved, we note that reissue No. 11,751 was granted upon patent No. 675,821, issued September 14, 1897, to Corby for a machine for making and shaping dough. This reissue was the basic patent involved in this litigation, and on its validity and infringement the substantial sum allowed in the accounting depends. Addressing ourselves to that question, we find the dough machine here involved is aptly described in the opinion of the court below as follows:

"The machine of the patent was designed to be used in one of the processes of making bread on a large scale. After the dough has acquired the proper degree of lightness, it is separated into small masses, to be made into loaves for baking. It is the design of the machine of the patent to knead and shape such masses. The machine of the reissued patent may be briefly described thus: Upon a suitable frame a rigid table is constructed, at each end of which is mounted a roller, and over the rollers an endless belt or apron is passed, the upper part of which rests upon and travels over the table. Above the table and the belt is a yieldingly supported pressure board held in place by suitable devices, with means provided for adjusting it toward and away from the table and belt. It is between this pressure board and the belt that the dough is kneaded and shaped as it is carried along by the belt. The batch of dough which is to be so converted into a loaf first passes between a pair of rollers, mounted at the forward end of the frame, by which it is sheeted. At the front entrance of the space between the top of the belt and the under side of the pressure board is a device referred to in the patent as a 'curler.' Its function is to engage the front end of the dough sheet after it has passed between the sheeting rollers onto the carrying belt and retard it sufficiently to start it coiling or rolling up, so that the sheeted dough will pass into the space between the traveling belt and the pressure board (which space is greater than the thickness of the sheeted dough) in a coiled or thickened condition, and thus will be kneaded and shaped into a loaf."

The machine is described in combination claim 6 of the reissue which is:

"The combination of a traveling belt, an opposing pressure device, and a curler at the forward end of the latter, substantially as set forth."

The device has proven its worth. It forms loaves with astonishing rapidity and accuracy. It has gone into large use. Its functional novelty and efficiency center in its curler, which was a novel feature in the art. After an examination of the prior art and finding the French patent of 1885 to Dathis was the nearest possible approach, the judge below said:

"There is nothing in the description or drawings of the Dathis patent which in any way suggested such a curler. * * * The two machines, so far as the curler element is concerned, are quite different in principle. I cannot find that the disclosure of the Dathis patent measures up to the rule above stated, nor can I find a substantial identity between the two machines."

We agree with that conclusion. In the work of both plaintiff's and defendant's machine it is the curler that makes a loaf output which was before that time impossible. Its presence in Corby's device and its absence in Dathis makes Corby a great signal success and puts Dathis

out of the Corby class. Without entering into a discussion of the technical grounds on which the reissue is attacked, it suffices to say they are all discussed in the opinion below, and we see no reason for invalidating this reissue either on these technical grounds or on the larger contention that Corby's device did not involve invention or was anticipated. Such being our conclusion, finding the issue valid, and holding as we do that the curler combination on the sixth claim is the functional gist of the defendant's machine, and that from the use of that combination the defendant's machine got its operative value, we are clear that infringement is shown. While the defendant has avoided a formal duplication of the particular embodiment of Corby's device shown in the patent drawing, it has retained all the elements of the combination claim and has used them and Corby's curler to secure the substantial and novel functional results which Corby first disclosed.

Holding, then, that there is infringement, and that such infringement has been of substantial advantage, it follows that the third contention of the defendant, namely, that the substantial money award of the master should be reduced to a nominal one, or that it is based on contributing elements other than Corby's combination, must be denied. And so with the plaintiff's contention that that award must be increased by an interest charge in the nature of a penalty on the ground that the infringement was wantonly deliberate. We find nothing in the case that stamps the infringement as of that type of conduct.

The decree below will therefore be affirmed; each party to pay its own cost of appeal.

MURRAY v. PAYNE, Director General of Railroads.

(Circuit Court of Appeals, Third Circuit. June 13, 1921.)

No. 2664.

Courts ⇐366(25)—State decision that railroad police are "public officers," and not servants of companies, followed.

The decisions of the Supreme Court of New Jersey that railroad policemen, commissioned by the Governor pursuant to P. L. N. J. 1904, p. 323, § 4, though selected and paid by the railroad companies, were "public officers," and not agents of the companies, when performing their duties as peace officers, are controlling, and require a directed verdict for defendant in an action against the Director General of Railroads for the shooting of plaintiff by a railroad policeman.

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

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

Suit by Frank Murray against John Barton Payne, Director General of Railroads, to recover damages for injuries. Judgment for defendant, and plaintiff brings error. Affirmed.

Robert V. Kinkead, of Jersey City, N. J. (Thomas J. O'Neill and John A. Goodwin, both of New York City, of counsel), for plaintiff in error.

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

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

BUFFINGTON, Circuit Judge. In this case, Frank Murray brought suit against John Barton Payne, Director General of Railroads, to recover damages for the injury inflicted upon him by a pistol shot fired by an alleged servant of the defendant. The proofs show the shooting was done by one Ford, who was serving, at the time, as a railroad policeman, to which position he was commissioned by the Governor of New Jersey, pursuant to the act of that state known as "An act concerning carriers (Revision of 1904)," P. L. 1904, p. 323, the fourth section whereof is printed in the margin.[1] At the conclusion of the proofs, the trial judge gave binding instructions for the defendant, saying:

"I have directed a verdict for the defendant under the law, as I see it, in view of several decisions in the New Jersey Supreme Court and the Court of Errors and Appeals which I have decided to follow."

His action in so doing is here assigned for error. The statute was, as we have seen, one of the state of New Jersey. It has received a construction by the Supreme Court of that state, and the trial court, pursuant to the opinion in Erie R. R. Co. v. Hilt, 247 U. S. 97, 38 Sup. Ct. 435, 62 L. Ed. 1003, relied on that court's construction of the act. The pertinent decisions construing and applying the act are Tucker v. Erie R. R. Co., 69 N. J. Law, 19, 54 Atl. 557, and Kraft v. Erie R. R. Co., not reported [November term, 1911]. In the first case, the Supreme Court of New Jersey said:

"It is plain, from a reading of the provisions of this statute, that, although these men were appointed on the application of the defendant company, received their compensation from it, and were subject to be divested of their powers by its act, they were nevertheless state officers, charged with the performance of public duties. They were, in law, police officers—constables—authorized to arrest persons guilty of criminal offenses or breaches of the peace, not only in cases where the property of the company was involved, but in every case where the crime was committed or the peace broken within the boundaries of any of the counties through which the company's railroad

[1] "On application of any railroad company, street railroad company, canal company or steamboat company, the Governor of the state may appoint such persons as the company may designate to act as policemen for such company, and shall issue to each person so appointed a commission, a copy of which shall be filed in the office of the secretary of state; every person so appointed and commissioned shall, in the counties traversed by the conveyances or route of such company, possess all the powers of policemen and of constables in criminal cases of the several townships and municipalities in such counties, and shall receive from the company by whom employed, such compensation as shall be agreed between such company and person; when on duty, except when employed as detective, he shall wear in plain view a metallic shield or device with the words 'railway police,' 'canal police,' or 'steamboat police' as may be appropriate, and the name or style of the company for whom appointed inscribed thereon; when any such company shall file in the office of the secretary of state a notice that it no longer requires the service of such policeman, his power as such shall cease and determine."

ran. For the proper discharge of their official duties, as well as for the proper exercise of their official powers, they were responsible, not to the defendant company, but to the state."

And in the last case the same court said:

"Under the rule of Tucker v. Erie Railroad Co., 40 Vr. 19, the defendant cannot be held for his act unless the plaintiff shows that his action was instigated by the company, or some of its officers or employees, and that what he did was done as the agent of the company and not solely of his own volition as a peace officer."

We think the facts of the present case bring it within these rulings. In shooting at the plaintiff when he was running away, Ford acted solely of his own volition as a peace officer, and neither the defendant, Director General, nor any of his employees were in any way connected with his act. In view of these decisions, the court below committed no error in giving binding instructions for defendant.

Its judgment is therefore affirmed.

SAFE DEPOSIT & TRUST CO. OF BALTIMORE v. MILES, Collector of Internal Revenue.

(District Court, D. Maryland. May 26, 1921.)

No. 947.

Internal revenue ⟸7—Taxable "income" from sale of right to subscribe for stock.

Where a guardian, as holder for its ward of shares of stock of a corporation, was given the right to subscribe for an equal number of shares of a new issue of stock at a fixed price, which right it sold, the sum received therefor is not taxable in its entirety as income received during the year, under Income Tax Act Sept. 8, 1916, § 2 (Comp. St. § 6336b), but the amount taxable is the gain or profit realized from the sale which was the excess of the sum received above the net value, after deducting the subscription price, of the new shares it would have obtained by itself exercising the right.

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

At Law. Action by the Safe Deposit & Trust Company of Baltimore, guardian of Frank R. Brown, against Joshua W. Miles, Collector of Internal Revenue. Judgment for plaintiff.

Arthur W. Machen, Jr., of Baltimore, Md., for plaintiff.

Robert R. Carman, U. S. Atty., of Baltimore, Md., for defendant.

ROSE, District Judge. The plaintiff, the Safe Deposit & Trust Company of Baltimore, as guardian of one Frank R. Brown, an infant, sold for $12,546.80 the right to subscribe for 35 shares of the stock of the Hartford Fire Insurance Company. The defendant, as collector of internal revenue, insisted that this entire sum was taxable income of the ward, and demanded $1,130.77 as the tax thereon. The plaintiff paid it under protest, unavailingly appealed to the Commission-

er, and brought this suit. Its contention that what it received for the rights was capital, and not constitutionally taxable as income, has since been negatived by the Supreme Court. Merchants' Loan & Trust Co. v. Smietanka, 255 U. S. —, 41 Sup. Ct. 386, 65 L. Ed. —, decided March 28, 1921.

There remains for consideration its further claim that it is taxable upon such part only of the proceeds of the rights as was, in fact, gain or profit derived from the sale of or dealing in its property in the insurance company. The government, on the other hand, says that, as the plaintiff paid nothing directly for the rights as such, all that it got from their sale was a clear profit to it.

The issue thus joined is whether the law will look to the transaction as a whole, or will close its eyes to everything that preceded the issue of the rights, and to all that came after their sale. There is apparently only one case which has passed upon the precise question here raised. Tax Commissioner v. Putman, 227 Mass. 522, 116 N. E. 904, L. R. A. 1917F, 806. There the government's position was squarely sustained, as was natural, if not inevitable, after the court had held that stock dividends were taxable income, for while the returns from rights are different things, and may be income, although such dividends are not, the reverse is scarcely possible.

If the stockholder must pay an income tax upon the full nominal amount of a stock dividend, he can hardly escape from paying upon all he gets from the sale of stock rights. It is impossible to be sure that the Supreme Judicial Court would have held the latter taxable, had it not first reached the conclusion that the former were. The express refusal of the Supreme Court of the United States to accept the ruling that stock dividends were income necessarily deprives the Massachusetts case of persuasive force in the federal courts. Eisner v. Macomber, 252 U. S. 189–216, 40 Sup. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570. The question must therefore be dealt with as one upon which there is no direct authority. The reiterated declarations of the Supreme Court have, however, it is believed, made plain the principles which should govern its decision. What is taxable is the gain, profit, or income derived from the sale or dealing in property, whether real or personal. 39 Stat. 757 (Comp. St. § 6336b); 40 Stat. 300–307; Goodrich v. Edwards, 255 U. S. —, 41 Sup. Ct. 390, 65 L. Ed. —. decided March 28, 1921.

Congress, it is true, has very ample authority to adjust its income taxes according to its discretion, and the rules it prescribes for the ascertainment of taxable income are binding upon the courts, unless they are palpably arbitrary and unjust. La Belle Iron Works v. United States, 255 U. S. —, 41 Sup. Ct. 528, 65 L. Ed. —, decided May 16, 1921. The net revenue from some peculiar kind of property, such as mines, may include, not only profit from operation, but a portion of the capital as well. The problems of apportionment may be too difficult, and some of their factors too uncertain, for adjustment by the courts, and the tax may have to be assessed upon the entire net proceeds, with such deductions only, if any, as Congress may have authorized. Von Baumbach v. Sargent Land Co., 242 U. S. 503, 37 Sup.

Ct. 201, 61 L. Ed. 460. Nevertheless, by and large, the statute means what it says, and that is that the tax is to be levied on nothing else except gains, profits, and income, and upon them only when actually realized in money or in money's worth, and in determining what is included therein the courts will look through form to substance. Doyle v. Mitchell Bros. Co., 247 U. S. 179, 38 Sup. Ct. 467, 62 L. Ed. 1054; Eisner v. Macomber, supra.

What are the facts to which these general rules are to be applied? The shares of the Hartford Fire Insurance Company were worth, on March 1, 1913, $760 apiece. At the time of the death intestate of the ward's father, the government said that, for the purpose of the estate tax, they were each of the value of $710, and that may be taken as their cost to the plaintiff. The insurance company determined to double the number of its shares, and to give each of its stockholders the right, upon payment of $150 a share, to obtain as many new shares as he held old.

The plaintiff, in the right of every share it held, and which had cost it, as just mentioned, $710, could, by paying $150 a share more, get another, so that it would have two, which in the aggregate would have cost it $860, or $430 apiece. There would be no way of distinguishing between the old and the new. If the latter was something which had not before existed, almost the same might as truthfully be said of the former. Its characteristics had undergone a great change. Before the issue of the new stock, it represented one twenty-thousandth of the capital of the company; afterwards it stood for but one forty-thousandth. Moreover, if the plaintiff had in person taken the new stock, and had had its old and new consolidated into one certificate, and had subsequently sold a part of its holdings, it could not say that that with which it parted was out of the old, or out of the new, or partly out of both. In determining the cost of its shares for the calculation of the profit or loss upon resale, it would be necessary to assume that they had one and all cost the holder an equal amount, which in the case of the plaintiff here was $430 a share.

It certainly could make no difference that without waiting until the stock was issued, and then selling, it sold the right to the new stock, and made it part of the consideration that the buyer should assume for it the payment of the $150 per share exacted by the company. All that would have to be borne in mind in comparing the two ways of reaching the same end is that, if the right was sold, the price really received for the new share was $150 more than the sum paid to the seller, which in the case at bar was $358.48. That was equivalent to $508.48 for a fully paid for share, and the $78.48 by which it exceeded the $430, which the share cost the plaintiff, was the gain or profit it made out of the transaction.

That is the whole story. If $78.48 be multiplied by 35, the number of shares or rights sold by the plaintiff, the product will be $2,746.80, and upon that it was properly taxable, and upon nothing more. It still retains 35 shares. When, if ever, they, or any of them, are sold, there must be returned as profit, in the year in which the price is received for them, the amount, if any, by which that price exceeds $430. It is, of

course, immaterial that, if the plaintiff had chosen at the time it parted with the rights to the other 35, to sell any of those it still held, it would have made a taxable profit of nearly $80 a share upon those so disposed of. There is no tax upon a profit until that profit is realized.

The counsel for the opposing parties can doubtless agree upon the figures for which, in accordance with the conclusions herein reached, the plaintiff is entitled to a verdict.

NEW YORK CANAL CO., Limited, v. BOND et al.

(District Court, D. Idaho, S. D. May 24, 1921.)

1. Waters and water courses ⟸257(1)—Charges to users of water from government project upheld.

Under a contract by which the government took over the canal system of an irrigation company for the purpose of incorporating it in a larger government project, and providing that "an equitable proportion of the cost of maintaining and operating the system of irrigation works which may be constructed by the United States on the south side of the Boise Valley, as may be determined by the Secretary of the Interior, shall be paid to the United States by the holders of said certificates of stock," the fact that during the construction of the government project the manager made charges for water furnished such stockholders on a different basis *held* not to affect the right and duty of the Secretary, after completion of the project, to make the apportionment as expressly provided in the contract.

2. Contracts ⟸170(1)—Practical construction by parties binding only where terms are ambiguous.

Where the meaning of an instrument is clear, error in its construction by the parties cannot control its effect.

In Equity. Suit by the New York Canal Company, Limited, against J. B. Bond and Charles F. Weinkauf. Decree for defendants.

C. C. Cavanah and A. A. Fraser, both of Boise, Idaho, for plaintiff.

J. L. McClear, U. S. Atty., and B. E. Stoutemyer, both of Boise, Idaho, for defendants.

DIETRICH, District Judge. On March 3, 1906, the government, having on foot a project for the irrigation of a large body of arid lands near Boise, Idaho, entered into a contract with the plaintiff corporation by which it took over the ownership and control of a canal system theretofore constructed by the plaintiff, and diverting water from the Boise river for use upon lands owned by its stockholders. From the enlarged system the plaintiff and its stockholders were to receive from year to year the water which they had appropriated, the amount of which was stipulated, and in turn they were to share in the burden of maintaining and operating the system. Their obligation in this respect is defined in the following paragraph of the agreement:

"It is further agreed that an equitable proportion of the cost of maintaining and operating the system of irrigation works which may be constructed by the United States on the south side of the Boise Valley, as may be determined by the Secretary of the Interior, shall be paid to the United States

by the holders of said certificates of stock. The holders of rights under said contracts with the company shall pay to the United States the cost of maintaining and operating such system of irrigation works in accordance with the terms of their said contract."

The enlarged system was not completed until 1917, and in the meantime, from year to year, the project manager made charges against the plaintiff upon the basis of a proportionate part of the expense of maintaining and operating that part of the system approximating in length and location the canal as it existed when taken over by the government. These charges the plaintiff paid. Upon the completion of the project the Secretary apportioned to the plaintiff, each year, for the years 1918, 1919, and 1920, an equitable part of the expense of maintaining and operating the whole of the enlarged system, as constructed by the government, on the south side of Boise Valley, and these bills plaintiff declined to pay, and because of such refusal the defendant Bond, who is the project manager, threatened to withhold the delivery of water from the plaintiff's stockholders. To prevent such threatened action, the plaintiff brought this suit and procured a temporary restraining order. The cause is now submitted upon the merits.

[1] There is little controversy touching the facts, and the question of law is a narrow one. Primarily it involves the meaning of the paragraph above quoted from the contract. By the plaintiff it is conceded that the system, as constructed by the government on the south side of the Boise Valley, is substantially what was contemplated when the contract was executed, and that the charges in question are for a portion of the actual expense of maintaining and operating this system. It does not contend that in making the apportionment the Secretary acted fraudulently, or that if the expense of maintaining and operating the entire system is to be taken as the proper basis, the amount apportioned to it is excessive or inequitable. Its position is that because, during the period of construction, extending over the years from 1906 to 1917, the charges were made upon a different basis, the Secretary must be deemed to have determined the method of making the equitable apportionment contemplated by the contract, and from that method he cannot now depart. In that connection it is conceded that under the contract he might originally have adopted the basis which he now attempts to use, but, having employed the other method for a course of years, he is bound thereby. Not that he is estopped, for admittedly no element of estoppel is present. Nor is it contended that the provision of the original contract has been modified.

[2] The plaintiff's sole reliance is upon the principle that, where the language of a contract is indefinite or uncertain, the interpretation placed upon it by the parties themselves in giving it practical effect is a consideration of great, if not controlling, weight. But, even if we assume, without deciding, that here the Secretary had knowledge of and approved the bills rendered for the period from 1906 to 1917, it is to be noted, first, that the rule is of doubtful application, for the reason that the Secretary's interest is not the same as that of a party to a private contract. In the second place, in the light of the admitted fact that the system for the maintenance of which the charge is made is sub-

stantially what the parties had in mind at the time the agreement was entered into, the principle is thought to be inapplicable, because the provision under consideration is not uncertain, ambiguous, or indefinite; its meaning is clear and unequivocal. The plaintiff is to bear an equitable proportion of the expense of maintaining and operating, not a part, but all, of the system; there is no room for construction. It is not left to the Secretary to determine what shall be distributed or apportioned; that the contract of the parties expressly designates, and the Secretary's duty is limited to its equitable distribution. He is to apportion the "cost of maintaining and operating the system of irrigation works * * * on the south side of the Boise Valley"—not of a part of it, but of all of it. Where the meaning of an instrument is clear, error of the parties in construing it cannot control its effect. 4 Enc. U. S. Sup. Ct. Reports, 574; Railroad Co. v. Trimble, 77 U. S. (10 Wall.) 367, 19 L. Ed. 948.

Finally, the bills presented by the project management and paid by the plaintiff, from 1906 to 1917, do not necessarily imply a construction of the contract inconsistent with that now maintained by the Secretary. The system was incomplete, and the method adopted may not unreasonably have been regarded as fairly equitable during the period of construction. The Secretary is not bound to adopt, or, having once adopted, permanently to employ, any specific method of making the apportionment. The conditions are not fixed or invariable. Admittedly the amount of the charge against the plaintiff may change from year to year, and it is conceivable even that the proportion to be assigned the plaintiff will be subject to a measure of variation because of changing conditions. But surely the Secretary is not limited to any given method of making the apportionment. His one substantive duty is to determine what is plaintiff's equitable proportion, not of a part, but of the entire burden, and the use of one method in the performance of the task this year is not necessarily inconsistent with the use of another method next year. The parties have the right to insist upon results, but not the means or method, and so long as the result is within the terms of the contract, and the Secretary acts reasonably and in good faith, there is no legal ground for complaint. The principle of apportioning maintenance costs as provided for in the contract, and followed by the Secretary in making the charges in controversy, generally prevails in actual practice, and is recognized by the Supreme Court of the state as being just. Niday v. Barker, 16 Idaho, 73, 101 Pac. 254; Colburn v. Wilson, 24 Idaho, 94, 132 Pac. 579. And, as already intimated, there is no claim here that, applying this rule, the Secretary made an inequitable apportionment.

It follows that the bill must be dismissed, and such will be the decree.

ATKINS et al. v. W. R. CARPENTER & CO., Limited.

(District Court, N. D. California. First Division. May 27, 1921.)

No. 16552.

Admiralty ⊂=47—Service of foreign attachment not legal.

Under admiralty rule 11 of the District Court for the Northern District of California, providing that, when property named in a foreign attachment is not delivered up to the marshal by the garnishee, it shall be sufficient service of the attachment to leave a copy thereof with the garnishee, "with notice of the property attached," compliance with the latter provision, which was added to the rule to conform the practice to that under the state law in the service of writs of attachment, is essential to the validity of the service and to the acquiring by the court of jurisdiction over the property.

In Admiralty. Suit by G. H. Atkins and others against W. R. Carpenter & Co., Limited. On motion by respondent, appearing specially, to vacate attachments. Motion sustained.

Andros & Hengstler, of San Francisco, Cal., for libelants.

Samuel Knight and F. E. Boland, both of San Francisco, Cal., for American Trading Co.

William Denman, of San Francisco, Cal., for respondent W. R. Carpenter & Co., Limited.

DOOLING, District Judge. Upon the filing of the libel herein, libelant secured an order from the court for the issuance of a "monition against respondent, citing it to appear and answer, and in case respondent cannot be found that its goods and chattels be attached to the amount sued for, and if sufficient goods and chattels cannot be found, that its credits and effects be attached in the hands of American Trading Company and of Wolff, Kirchman & Co., garnishees, and of any other garnishees having credits and effects of said respondent in hands, and that said garnishees may be cited to appear and answer on oath as to credits and effects in their hands and belonging to respondent." This was the prayer of the libel, and the order of the court was in the following form: "Let process issue as prayed for."

The respondent is a foreign corporation and could not be found in this district. The process issued in accordance with this order was directed to the marshal and contained the following, after preliminary recitals:

"Now, therefore, we do hereby empower and strictly charge and command you, the said marshal, that you warn the said respondent, if it shall be found in your district, to be before the said District Court of the United States, at the United States Post Office Building, in the city and county of San Francisco, on the 6th day of May, 1919, at 10 o'clock a. m., then and there to answer the said libel, and to make its allegations in that behalf; and if the said respondent cannot be found in your district, we further command you that you attach its goods and chattels in your district to the amount sued for, and, if no goods and chattels can be found, that you attach his credits and effects to the amount sued for, in the hands of American Trading Company, and of Wolff, Kirchmann & Co., garnishees, and of any other garnishees hav-

ing credits and effects of said respondent in hand, and that you summon the said garnishees to appear before the said District Court on the said 6th day of May, 1919, to do and abide what may be required of them in this behalf; and have you then and there this writ, with your return thereon."

The respondent not being found in the district, nor any of its goods or chattels, a copy of this process was delivered to American Trading Company and to Wolff, Kirchmann & Co. named therein as garnishees, but no notice of the property attached was given them, nor was any mention of such property made, nor were the effects and credits delivered to the marshal by the garnishee. The only service of the attachment was by the delivery of the copy of the process. This was on April 25, 1919. A second process without further order of the court was later issued, which was in the same form and served in the same way on May 1st. The garnishees answered as required, and it is contended by them that they had no credits or effects of respondent, and by libelant that they had.

Respondent, however, appearing specially for that purpose, moves to vacate the attachments on a number of grounds. The gravest one, in my opinion, is based on the fact that the only service on the garnishees was by leaving a copy of the process with them. The manner of service of a foreign attachment is provided for in rule 11 of the Admiralty Rules of this court which is as follows:

"11. *Service of Foreign Attachment; And of Process Against Freight and Proceeds.* When the property, effects, or credits named in any process of foreign attachment, are not delivered up to the marshal by the garnishee or are denied by him to be the property of the party defendant, it shall be a sufficient service of such foreign attachment to leave a copy thereof with such garnishee, or at his usual residence or place of business, with notice of the property attached; and on due return thereof by the marshal the libellant, on proof satisfactory to the court that the property belongs to the defendant, may proceed to a hearing and final decree in the cause. If the defendant appears, further proceedings may be had as is usual in suits in personam."

In addition to leaving a copy of the foreign attachment with the garnishee, this rule requires that there also be left with him "a notice of the property attached." The old rule required only that a copy of the foreign attachment be left with the garnishee. The words "with notice of the property attached" were added for a purpose, and I believe that purpose was to make the manner of service conform to the manner of service of writs of attachment under the state law. The New York rules, from which the rule of this court was taken, formerly provided that service might be made by leaving a copy of the attachment with the garnishee; but that rule has been amended, so that it, too, now requires that a notice of the property attached be also left with him. This manner of service conforms both here and in New York to the manner of service of an attachment in each state. There are many decisions in each state holding that the giving of a notice of the property attached is essential to a valid garnishment. As no service upon respondent can be had, the only jurisdiction that the court can have is over his property or effects in this district.

To acquire such jurisdiction the rules must be adhered to in all essentials. In the absence of a statute on the subject, they have the force

of law. It would be an idle thing to amend the rule, so as to require notice of the property attached to be given or left with the garnishee, and upon the first occasion when the question arises to say that the requirement is without any significance. The present rules were prepared by a committee of the admiralty bar, and adopted by the court as an improvement over the ones formerly in use, and there is no reason why they should not be given effect.

As there was no valid service of the attachments upon the garnishees named, and as such service is essential to the jurisdiction of the court over respondent's property, effects or credits in this district, the motion to vacate will be granted; and it is so ordered.

MORSE v. HIGGINS.

Petition of HIGGINS.

(District Court, D. New Hampshire. April 18, 1921.)

Removal of causes ⇐19(10)—Proceeding not allowed, where petition did not show any connection between officer's acts and revenue statute.

A proceeding against a national prohibition agent, appointed under National Prohibition Law, § 38, for an alleged unlawful search, will not be removed from the state court to the federal court, under Judicial Code, § 33 (Comp. St. § 1015), providing for removal of suits and prosecutions against officers appointed under or acting by authority of the revenue laws, and on account of acts done under color of such laws, where it was not shown that there was any rational connection between the prohibition agent's appointment and his acts, and the customs or revenue laws of United States, for the prohibition law is penal in its nature.

At Law. An action by Frank Morse against James A. Higgins was begun in the state court, and defendant petitions for certiorari to remove the same to the federal court. Petition denied.

See, also, 273 Fed. 832.

John M. Stark and Robert W. Upton, both of Concord, N. H., for plaintiff.

Fred H. Brown, U. S. Atty., of Somersworth, N. H., for defendant.

ALDRICH, District Judge. It does not seem clear that there is authority for ordering this case removed under the allegations of the petition. The allegations are that the petitioner was appointed prohibition agent under section 38 of the National Prohibition Act (41 Stat. 319), but there is no allegation as to the officer by whom the petitioner was appointed. That section provides that the Commissioner of Internal Revenue and the Attorney General of the United States are authorized to appoint and employ assistants for the enforcement of the provisions of the act. But the National Prohibition Act, in the substantial sense, is a penal law, which prohibits and regulates the use of intoxicating beverages. It has some incidents with respect to revenue, but it would hardly seem justifiable to remove this case under section

33 of chapter 3 of the Judicial Code (Comp. St. § 1015), which is the section upon which the petitioner bases his claim for removal, because that section has reference to suits and prosecutions against officers appointed under or acting by authority of revenue laws, and on account of acts done under color of office or of such laws.

It would seem that, in order to justify removals under this section, the acts complained of should have some rational connection with official duties under a revenue law, or with authority contemplating such duties. See Bank v. Goodwin (C. C.) 162 Fed. 937, where there is considerable discussion of the question.

It is hardly worth while, under this petition, to go into much discussion of the general question, because it seems that section 38 of the Prohibition Act has reference to the Commissioner of Internal Revenue and the Attorney General. In United States v. Hill, 123 U. S. 681, 8 Sup. Ct. 308, 31 L. Ed. 275, it was sought to maintain a writ of error in the Supreme Court on the ground that the money collected was for fees collected by the clerk of the court of the United States for naturalization. There it is said that the section of the statute which provides for the payment by the clerk into the treasury of surplus moneys received from fees was not a thing done under a revenue law within the meaning of section 699, Rev. St.

Judge Trieber goes into a very considerable discussion of the question of removal (162 Fed. 944), and says in effect that if Congress had desired to extend the benefits of the Removal Act to officers of all departments of the government, who might, incidentally, collect moneys which have to be covered into the treasury, and for that reason become revenue, it would have used language which would have left no doubt as to its intention.

Judge Woodruff, in a case cited by Judge Trieber, said that the legislation of 1833 was for the protection of officers of the customs, and that of 1864 and 1866 for the protection of internal revenue officers and their subordinates.

The petition in question sets out the declaration in the writ pending in the state court. That declaration alleges that the acts were done willfully and maliciously and without probable cause. There is nothing in the petition for certiorari which shows the authority or the circumstances under which Higgins was operating in respect to the search in question.

The petition does not show under whose authority or by whose appointment Higgins was acting, or by whom warrant was issued.

Before ordering such a case as this out of the state court, I should want to see clear authority for doing it.

While I think the petition should be denied as it now stands, I make no intimation as to what the situation would be if there were allegations, properly supported, creating some rational connection between Higgins' appointment, and things done by Higgins, and the customs or revenue laws of the United States.

The case of Feibelman v. Packard, 109 U. S. 429, 3 Sup. Ct. 289, 27 L. Ed. 984, was one in which removal in a case relating to a proceeding in bankruptcy was sustained, upon the ground that the suit arose un-

der a law of the United States. The ground upon which the removal was sustained does not clearly appear, further than that the suit arose under a law of the United States.

I should not want to intimate in advance what the situation would be if there should be a petition in which it should be made to appear that the case pending in the state court arose under a law of the United States. It would be time to deal with such a question as that when it arises.

It must be observed that the declaration in the writ is not based on the idea that the law was unconstitutional, but rather upon the wrongful and unreasonable manner involved in the circumstances of the search.

There is another view that may, or may not, have some bearing, and that results because concurrent jurisdiction as to the Prohibition Act is supposed to exist in the federal and state courts.

Before ordering the removal of such a case as this from the state court, I should want to see my authority to do it more clearly than I do under this petition.

Under the aspect of the present petition I think certiorari must be denied; and it is denied.

In re HIGGINS.

MORSE v. HIGGINS.

(District Court, D. New Hampshire. May 24, 1921.)

Removal of causes ⊂=19(10)—Proceeding against prohibition agent removable.

As Prohibition Act, § 28, seems to contemplate federal protection to officers acting under its authority, and as the act, while primarily a penal law, has some revenue features, actions against a federal prohibition agent for his acts under the law will be removed from the state court where begun.

At Law. In the matter of the petitions of James A. Higgins for removal to the federal courts of two actions, one by Frank Morse and the other by Cora Morse, against petitioner, pending in a state court of New Hampshire. Certiorari issued.

See, also, 273 Fed. 830.

John M. Stark and Robert W. Upton, both of Concord, N. H., for plaintiff.

Fred H. Brown, U. S. Atty., of Somersworth, N. H., for defendant.

ALDRICH, District Judge. There were earlier petitions in these cases, which were denied April 18, 1921.

The present petitions bring out more clearly than the former ones the relations which prohibition agents sustain to the revenue features of the National Prohibition Act, 41 Stat. 305.

Section 28 of the Prohibition Act seems to contemplate federal protection to officers acting under its authority.

Judge Wolverton of the Oregon district, in a recent case in an elaborate opinion (State of Oregon v. Wood, 268 Fed. 975) holds that cases against officers appointed under the federal law in question are removable from state to federal courts under the provision of the act for the protection of revenue officers.

It seems rather unfortunate that authority to do this must, in a large degree, at least, be rested upon the ancient acts for the protection of revenue officers—acts which, primarily had reference to the protection of officers who were distinctively revenue officers. Yet I am disposed to follow the reasoning of Judge Wolverton.

Certiorari to issue in both cases.

ZELL v. ERIE BRONZE CO. et al.

(District Court, E. D. Pennsylvania. June 27, 1921.)

No. 2153.

Patents ⇐288—Defendant in infringement suit may be served in another district of same state.

Judicial Code, § 52 (Comp. St. § 1034), providing that, when a state contains more than one district if there are two or more defendants residing in different districts, suit may be brought in either district and duplicate writ issued to any other district where any defendant resides, and be there served upon him, *held* applicable to suits for infringement of patents, brought in a district where authorized by section 48 (section 1030).

In Equity. Suit by Frank D. Zell against the Erie Bronze Company and others. On motion to set aside service. Denied.

Fraley & Paul and William A. Glasgow, all of Philadelphia, Pa., for plaintiff.

J. Neff Ewing and Chas. N. Butler, both of Philadelphia, Pa., for defendants.

Facts.

DICKINSON, District Judge. The cause is a patent case, and the proceeding is one against the defendants jointly for a joint trespass upon the patent rights of plaintiff. The ground of jurisdiction of the subject-matter is that a law of the United States is involved. Jurisdiction with respect to parties is based upon the fact of the service of the bill. One of the defendants is an inhabitant of this district and was here served. The other defendants are inhabitants of the city of Erie, and the service upon them was extraterritorial; they having been served in the Western district. The motion is on behalf of the latter defendants.

The Question Outlined.

The question before us is not one of jurisdiction, otherwise than in a very subordinate sense. The expression is an allowable one that

jurisdiction is twofold, in that to give the court authority to decide the cause it must have jurisdiction both of the subject-matter and of the parties. Jurisdiction is indeed threefold, in that the court may have jurisdiction generally of the subject-matter and jurisdiction of the defendants by service of its process, and yet may not be the court designated by law to try the particular case. Jurisdiction of the parties, strictly viewed, is wholly a question of the proper service of process, including in this, of course, whether the party was amenable to such service. The real question involved here is whether those of the defendants who reside out of the district were properly there served with process, in the sense of whether they were there amenable to such service.

Discussion.

Broadly and generally, in the absence of any statutory limitation or extension of its powers or other regulation of service, a court may acquire jurisdiction of the parties defendant by the service of its process within the territorial limits of the jurisdiction of the court, but not beyond these limits. The early legislation affecting the courts of the United States recognizes this general rule by providing that a defendant might be served in the district of which he was an inhabitant or in any district where found. This was changed by subsequent legislation providing that courts of the United States could entertain actions only in that district of which the defendant was an inhabitant unless the jurisdiction was solely on the ground of diverse citizenship, in which case the action might be brought in the district either of the defendant or the plaintiff.

The present proceeding, although one known as a patent suit, is, however, a proceeding in equity in no respect different from other such proceedings, except as provided by statute. A special provision was made by statute in respect to proceedings or actions brought for infringement of letters patent, in that such actions or proceedings might be instituted in the district of which the defendant was an inhabitant, or in the district in which he had committed acts of infringement and had a regular and established place of business, although he was not an inhabitant of that district. In the latter case process might be served upon the agent in charge of such business. There was occasion to provide for the class of cases in which there were several defendants, some of whom resided in one district and some in another, and this was done by the statute which enacted that in such a case the plaintiff might proceed against the defendant served, and if the defendants all were inhabitants of the same state, although of different districts, the action might be brought in the district of any one of them, and service had upon all by the usual service upon the defendants within the district in which the action is brought and extraterritorial service in the district in which the other defendants were. The service in this case is upheld, if at all, by this latter statute.

The thought, as we grasp it, which the argument addressed to us is intended to enforce, is that, although this statute would authorize

this extraterritorial service in other actions or proceedings, it does not authorize it in suits at law or in equity in infringement of letters patent cases.

Legislation.

The legislation on the subject may be summarized chronologically as follows:

(1) Service permitted upon a defendant wherever found. Act March 3, 1875, 18 Stat. p. 470.

(2) Restricted to district of defendant, except where jurisdiction is dependent upon diverse citizenship alone, and then to district of either party. Act March 3, 1887, 24 Stat. p. 552; Act Aug. 13, 1888, 25 Stat. p. 433.

(3) In patent cases service was permitted in defendant's district, or upon him or his agent in any district in which acts of infringement had been committed, and the defendant had an established place of business. Act March 3, 1897, 29 Stat. p. 695.

All these provisions were carried into the revised Judicial Code (Act March 3, 1911, 36 Stat. p. 1087); cases 3 as section 48 (Comp. St. § 1030); cases 2 (R. S. § 739) as 51 (Comp. St. § 1033); and two other sections (R. S. §§ 737 and 740), 50 and 52 (Comp. St. §§ 1032, 1034), were added.

(4) Where there are several defendants residing in different districts, the court may entertain jurisdiction against those properly served, etc. Judicial Code 1911, § 50.

(5) Where there are several defendants residing in different districts of the same state, the court may entertain jurisdiction against all; those in other districts being served extraterritorially. Judicial Code, § 52.

This array of the legislative facts brings to light the contrasting views advanced by counsel:

That of the plaintiff is that any one of the several defendants was amenable to service in his own district, and as all of the defendants resided in the state, they might be brought in by extraterritorial service, and the whole wrong redressed in one action. The acts of Congress authorizing this applied to all actions, and, in consequence, to patent suits. With respect to these there was no inconsistency in subjecting infringers to process also in the district in which the infringement was committed, if they there maintained an office at which service could be made.

The view of defendant is that patent cases are in a class by themselves; that the present Revised Statutes and Judicial Code provide first for patent suits which can be brought only as the law prescribes, and after that provide a system for all other cases.

The Decided Cases.

Each of these views finds support in some of the cases, and neither in others.

In re Hohorst, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211. This case arose September 15, 1888, and was ruled December 18,

1893. The case was a patent case. The question was whether the restriction of the venue to the district of the defendant by the acts of 1887 and 1888 applied. The court held it did not.

In re Keasbey et al., 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402, was a trade-mark case. It arose January 26, 1895, and was determined December 6, 1895. The question was whether a Massachusetts corporation could be sued in New York, because it there maintained an office, and because the other defendants were of the New York district. It was held that it could not. It will be noted that neither ruling is directly in point, for the double reason that the acts of Congress upon which the plaintiff in the instant case relies clearly did not apply, and that the Act of March 3, 1897, relating to the venue in patent cases, had not then been passed. The cases are cited in support of the proposition that the acts of Congress, upon which the present plaintiff relies, do not apply to patent cases, because emphasis was there laid upon the feature of the Hohorst Case, that it was a patent case, of which the United States courts had exclusive jurisdiction, "and was therefore not affected by general provisions regulating the jurisdiction of the courts of the United States concurrent with that of the several states."

The inference drawn by counsel for defendant is that the venue in patent cases is determined by the acts of Congress relating thereto, and as the act of 1897 now makes such cases triable in certain districts, this establishes a special system which is unaffected by other acts relating to a general system for other cases. The obstacle to the acceptance of this inference is that the act of 1897 had not been passed at the time of the quoted expression from the opinion in the Keasbey Case commenting upon the Hohorst Case. What we then had was a general regulation that no defendant was answerable, except in his own district or in a particular class of cases in the district of the plaintiff, if service was there had, and the further regulation that patent cases (which the Hohorst Case was) were triable only in the courts of the United States.

Bowers v. Atlantic G. & P. Co. (C. C.) 104 Fed. 887, however, supports the contention of counsel for defendant that the act of 1897 establishes a special system for the exercise of the jurisdiction of the courts in patent cases.

United Shoe Mach. Co. v. Duplessis Independent Shoe Mach. Co. (C. C.) 133 Fed. 930, was an identical case with In re Hohorst.

Doscher v. United States Pipe Line Co. (C. C.) 185 Fed. 959, was not a patent case, as jurisdiction there depended simply upon diverse citizenship. It is in consequence not directly in point, but the discussion of the general question by Judge McPherson is very helpful, in that he makes clear the absence of any inconsistency in proceeding in one district of a state against a number of defendants, each one of whom is of a district within the state.

Cheatham Electric Switching Device Co. v. Transit D. Co. (C. C.) 191 Fed. 727, is directly in point, and may be considered together with the Bowers Case.

A further historical review of the legislation affecting the question now before us, covering the occasion for the passage of the acts which were passed, gives promise of helpfulness in construing them. Patent suits, if resort is had to the equity side of the court, let us be again reminded, do not differ from other suits in equity, beyond such differences as may be ingrafted upon them by statute. When the general system affecting venue was such that the defendant in an infringement case might be served wherever found, the inconvenience of being called upon to answer in a distant jurisdiction was felt to be an injustice, and efforts were made to correct this. Before anything was done in relief of such difference, the venue had been limited to the district of the defendant. This meant that infringement of a patent might be carried on before the very eyes of the patentee, who would be without remedy to redress the wrong done him until he had gone to a perhaps distant district, in which the infringer resided. This was remedied by permitting the action to be brought in that district in which the infringing act was committed, if the defendant there maintained an office.

The line of thought upon which Cheatham v. Transit D. Co., and other cases of like import, were ruled, is clear enough. It begins with the proposition that the In re Hohorst Case rules in principle that the act of 1897 prescribes a special system for patent cases, which is unaffected by the general system for other kinds of cases. We do not so read the Hohorst Case. The defendant there was an alien corporation. Under the general system provided it could be sued only in its own district, and as it had no district it could not be sued in a United States court. Ordinarily it would, however, be subject to an action in the state court; but as the case was a patent case it was triable only in a court of the United States, and as a consequence, if the limitation in the act of 1887 applied to such a case, such a defendant in a patent case could not be sued at all. These two reasons, one that the defendant was an alien corporation, and the other that the case was a patent case, were given for the ruling made.

The genesis of these several acts of Congress and the order in which they appear in the present Judicial Code are all consistent with this thought, that a defendant in any kind of a case may be sued in his own district, and there alone, except that where diversity of citizenship is a sole ground of jurisdiction he may also be sued, if service can there be had upon him, in the district of the plaintiff, and that in patent suits the infringer may be sued in the district in which he commits acts of infringement, if he there maintains an office, etc.; that where there are several defendants the plaintiff may proceed against the defendant who is an inhabitant of the district in which the suit is brought, and if all of the defendants reside within the same state, although in different districts, they may all be sued in the district of any one of them, extraterritorial service being made upon those out of the districts. Had the act of 1897 been passed when infringers were suable in any district where found, the provision of the act limiting the venue to the district of the infringers and the district in which acts of infringement were committed and an

office maintained, it might well be viewed as a restriction of the right of action against them. Inasmuch, however, as at the time the act was passed infringers could be sued only in the court of their own district, the addition of another court in which they were liable to process cannot be regarded as a restriction, but an extension, of the rights of the plaintiff, and sections 51 and 52 gave further relief to plaintiffs broadly in all cases.

We have, as a result, a fairly complete system, equally protective of the rights of all litigants, including litigants in patent cases, and we are unable to see any inconsistency in so including them, nor any occasion to make of them exceptions to the general rule.

The motion of the defendants is denied, and an exception allowed them.

CARNES ARTIFICIAL LIMB CO. v. DILWORTH ARM CO.

(District Court, D. Connecticut. June 16, 1921.)

No. 1519.

1. **Patents ⟸328—760,102, claims 1 and 4, for mechanical artificial arm and hand, held valid and infringed.**
   The Carnes patent, No. 760,102, for an artificial mechanical arm and hand, claims 1 and 4, *held* not anticipated, valid, and infringed.
2. **Patents ⟸64—Patent for inoperative device not anticipation.**
   A patent for a device, which is inoperative or fails to accomplish the desired end, is not an anticipation of one which successfully accomplishes it.
3. **Patents ⟸26(2)—New combination of old elements may constitute invention.**
   That some of the elements of a combination are old does not negative invention, where the combination is new, and produces a new and practical device.
4. **Patents ⟸328—999,484, claim 1, for artificial arm, held valid and infringed.**
   The Carnes patent, No. 999,484, for an artificial arm, is for a primary invention, and entitled to a broad range of equivalents. Claim 1 also *held* infringed.
5. **Patents ⟸167(2)—Words "substantially as set forth" not limitation to precise construction shown.**
   The use of the words "'substantially as set forth" do not limit a patentee to the precise construction shown, nor exclude infringement by mechanical equivalents.
6. **Words and phrases—"Mechanical arm."**
   The term "mechanical arm" is understood in the artificial limb trade as meaning an arm provided with fingers which can be moved by some mechanical contrivance, together with mechanism for rotating the wrist, simulating, as nearly as possible the motion of the human wrist, hand, and fingers.

In Equity. Suit by the Carnes Artificial Limb Company against the Dilworth Arm Company. Decree for plaintiff.

Harrie E. Hart, of Hartford, Conn., and J. C. & H. M. Sturgeon, of Erie, Pa., for plaintiff.

Arthur L. Shipman, of Hartford, Conn., for defendant.

THOMAS, District Judge. This is a suit for an alleged infringement of claims 1 and 4 of patent No. 760,102, dated May 17, 1904, and of claim 1 of patent No. 999,484, dated August 1, 1911, both issued to William T. Carnes. Title to both patents is now vested in plaintiff company. The defenses are noninfringement as to both patents and anticipations voiding the first patent.

[1, 6] The inventions forming the subject-matter of the patents in suit are for what are known in the artificial limb trade as "mechanical" arms, adapted for the use of individuals who have lost either or both arms, and where amputation has occurred either above or below the elbow joint. The term "mechanical" arm is understood in the trade as meaning an arm provided with fingers which can be moved by some mechanical contrivance, together with mechanism for rotating the wrist, simulating, as nearly as possible, the action of the human wrist, hand, and fingers.

The invention disclosed in the first patent, as stated in the specification, relates to—

"artificial limbs, and has for its object the construction of an artificial hand provided with mechanism so constructed and combined that the fingers of the hand can be operated either with or without the assistance of the wearer's other hand, and with the joints of the wrist and fingers so made that they present no shoulders or corners visible through a glove worn on said hand, and also with a wrist joint so adjustable that it can be rotated on its axis and be secured at any desired point to which it may be rotated."

This structure comprises a forearm section, a wrist section, which swivels or rotates on the forearm section, and a hand section, which is hinged to the wrist section.

The wrist section is supported on the forearm section through a plate, which is secured thereto and has a nipple, which extends through the plate on the forearm into a chamber in the end of the forearm, and is there secured in place. The nipple constitutes the swiveling support having a bearing in the plate. In order to hold the wrist section in any position to which it may be turned, a latch is provided in the wrist section, which has a projection engaging hole in the plate. This makes it possible to move the hand, which is carried by the wrist section, so that the palm is up or down or in intermediate positions, and to lock the hand in any of those positions.

The hand section is hinged to the wrist section, and its end approximates the shape of the human hand and wrist, and fits into the socket of the wrist section. It has notches which are engaged by a catch, so that the hand member may be adjusted on its hinge joint into any one of several positions, and there held by the engagement of the catch with one of the notches.

Fingers are hinged to the hand section, and each finger is connected by a link with a crank shaft, which is rotated by means of the pull of the cord attached through links, with the rack bar meshing with a pinion on the crank shaft. The rotation of the crank shaft causes the fingers to move alternatively to closed and open positions.

The cord is attached to a harness, which goes about the shoulders of the wearer, so that by the action of the shoulders tension is exert-

ed on the cord. The cord, and the link to which it is attached, extend through the hand member, wrist member, and forearm member. The thumb is mounted in the hand section on a pivotal support, and is held in a forward position by a spring.

The peculiar utilities of the mechanically moved fingers and the yielding thumb are explained by the inventor in his testimony as follows:

"The fingers, by being closed, allow one to hold an object in such a manner that it will not yield when the thumb is pressing against the object that is being held; it gives a yielding grip, that will hold and take up the lost motion that would take place by a positive mechanism. The thumb will spring back and allow the fingers to become closed, so that the object will be held. The spring tension of the thumb—if it wasn't there, if the thumb was made rigid, the wearer, in gripping a street car handle, if the cord that operates the mechanism should break in the operation of closing the hand, he would be locked fast, without the spring in the thumb to let it loose; with the spring in the thumb, the wearer could wrench his hand loose and get away without any danger."

So that, in the first patent in suit, the swivel and hinge action of the wrist and hand member are accomplished by the use of the wearer's other hand; first tripping the catches and then moving the wrist or hand to the desired position, and permitting the catches to re-engage.

Plaintiff charges infringement of claims 1 and 4 of the first patent, which are as follows:

(1) "The combination, in an artificial arm, of an artificial hand secured thereto, swivel and hinged joints intermediate of the elbow joint and the artificial hand, fingers hinged thereto, mechanism in said artificial hand adapted to open and close the fingers thereof, a thumb member pivoted to the hand body, and means for yieldingly holding said thumb member in a normally closed position in opposition to the fingers, substantially as and for the purpose set forth."

(4) "In an artificial arm and hand, the combination of a swivel joint in one part of the wrist portion, latch or stop mechanism adapted to secure said swivel joint in a position desired, a hinged socket joint in the wrist portion of said artificial hand below said swivel joint, latch or stop mechanism for retaining said hinged socket joint in a desired position, a hand body, mechanism therein for opening and closing the fingers of said hand, fingers pivoted to said hand body by means of hinged socket joints, and means for connecting the actuating mechanism of the fingers with the body of the wearer, whereby the same may be operated, substantially as and for the purpose set forth."

We will first dispose of the prior art cited against the first patent. Seven patents were set forth in the answer, and three additional were admitted in evidence. It is unnecessary to discuss them in detail. All show one form or another of an artificial "mechanical" arm. The earliest was dated in 1853, and the latest in 1867. This art, relied upon by defendant to anticipate plaintiff's invention, covers a period of 14 years, and ended 37 years prior to the date of plaintiff's first patent, and the latest of these patents expired 20 years before Carnes entered the field.

It appears from the evidence that Carnes, having lost his own arm in 1902 was prompted to and did carefully investigate the market for an artificial arm. In the course of that investigation, however, he made no examination of patents in the Patent Office, and he had never seen any one of the patented arms described in the prior patents in use,

and had never heard of any of them being used. It is also in evidence that Dilworth, who lost a foot in 1908, was prompted by that unfortunate accident to carefully examine the market, and he, too, thoroughly investigated the artificial arm business. He explored the field, examined all devices available, looked over all the patents in the art, including all patents cited here, and testified that he never saw or knew of an arm made in accordance with any one of the prior patents, except one in Worcester, Mass., which was not in use.

[2] From this, as well as from other testimony respecting the patents of the prior art, and an examination of the patents themselves, the conclusion is that the prior art patents were either inoperative or impractical for the purposes intended. Respecting such a finding the Circuit Court of Appeals for the Fourth Circuit, in Farmers' Mfg. Co. v. Spruks Mfg. Co., 127 Fed. 691, 62 C. C. A. 447, said:

"It cannot be said that a patent for a device, which fails to accomplish the desired end, is an anticipation of one which successfully accomplishes it."

See Cimiotti Unhairing Co. v. American Unhairing Mach. Co., 115 Fed. 498, 53 C. C. A. 230 (C. C. A. 2d Cir.).

Every feature of the Carnes arm has been carefully designed to make it a practical structure. Positive mechanism is provided for moving the fingers. No mechanism is provided for moving the thumb, but the thumb is held in a forward position by a spring. Consequently, as the fingers are closed upon the thumb, a tight grip on articles can be secured, because of the resilient mounting of the thumb.

Carnes provides for wear in the mechanical parts, and for lost motion in the hinged joints of the fingers, by providing the resiliently held thumb. This is a feature of practical importance. Another feature of extreme importance, so far as the yieldingly held thumb is concerned, as was explained by Carnes, supra, is the ability of the user, once having gripped an article, to immediately release himself from it by pressing against the thumb, which yields, so that a handle of a trolley car, for example, once gripped, can be released quickly by pressing against the thumb.

The value of the structures of the prior patents as anticipations is to be determined by the evidence in this case, which shows conclusively that every one of the patents relied upon by defendant is either inoperative, or impractical, or both, to meet the demands of the present-day requirements. Obviously, therefore, they are not anticipations of the claims of the first patent in suit, which recite complete organization of parts co-operating to produce a thoroughly practical mechanical arm.

This situation falls within the rule stated by the Supreme Court of the United States in Loom Co. v. Higgins et al., 105 U. S. 580, on page 591 (26 L. Ed. 1177), where the court, speaking by Mr. Justice Bradley, said:

"Now that it has succeeded, it may seem very plain to any one that he could have done it as well. This is often the case with inventions of the greatest merit. It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known ele-

ments produce a new and beneficial result, never attained before, it is evidence of invention."

See, also, Baltzley v. Spengler Loomis Co. (C. C. A.) 262 Fed. 423; Miehle Printing Press & M. Co. v. Whitlock P. P. & M. Co., 223 Fed. 647, 650, 139 C. C. A. 201.

[3] In view of the facts here disclosed, a general résumé of the cases applicable to this discussion sustains the doctrine that, in order to establish anticipation, it is not sufficient to pick out one part of a patented device from one prior patent, another part from some other, and still a third from a third prior patent, and then say that it is not invention to bring those several parts together, especially when the patentee is the first to conceive of so doing, and by so doing has produced a practical, operative device and has discovered "what is the difficulty with an existing structure, and what change in its elements will correct the difficulty, even though the means for introducing that element into the combination are old, and their adaptation to the new purpose involves no patentable novelty," as Judge Lacombe held in Miehle Printing Press & Mfg. Co. v. Whitlock Printing Press & Mfg. Co., 223 Fed. 647, supra, on page 650, 139 C. C. A. 201, on page 204.

Defendant's counsel argues that the claims in suit are open to the objection that they are for aggregations; but an examination of plaintiff's arm is sufficient to show that in a very small space, where lightness, rigidity, and strength are required, the inventor has combined all mechanical structures necessary to the complete manipulation of the hand and arm, therein embodying the swiveling or rotating action of the wrist, the hinging action of the hand and the fingers connected therewith.

In Grinnell Washing Machine Co. v. Johnson Co., 247 U. S. 426, 432, 38 Sup. Ct. 547, 549 (62 L. Ed. 1196), the Supreme Court said:

"Generally speaking, a combination of old elements, in order to be patentable, must produce by their joint action a novel and useful result, or an old result in a more advantageous way."

But here all elements were not old. A yieldingly supported thumb in juxtaposition to the mechanically closing fingers was new, the mechanism for closing the fingers as recited in the first claim of the first patent in suit was new, and all parts recited in this claim are parts necessary to a complete operative mechanism, and all of these parts cooperate with one another to produce a new and beneficial result.

The complete structure recited in claim 4 is new as to some of its parts. The hinging and latching of the wrist is new. Hence the structure is not a combination of old elements, but a combination of old and new elements. Furthermore, in a complete arm having motion approximating the motion of the human arm, the swiveling action of the wrist and the latching and hinging action of the hand are essential and co-operative features, because combined with these motions there is the mechanism for operating the hinged fingers, which are on the swiveled wrist and hinged hand, and the means for connecting this mechanism with the body of the wearer, in order that motions of the parts of the body will actuate the finger-closing mechanism. All of

these parts had to be combined and properly co-ordinated, in order that all necessary motions of the parts of the artificial limb could be had, without the motion of one part interfering with the motion of other parts.

In the Grinnell Washing Machine Case, supra, the inventor had taken a washing machine which was old, and attached to it a wringer and a motor, both of which were old, and by a system or combination of gears drove both the washing machine and the wringer from the motor, somewhat the same as in factories where several machines of different characters are grouped together, connected to and driven from a line shaft. That case presents an example of an aggregation. The instant case presents an example of a combination.

In Specialty Mfg. Co. v. Fenton Metallic Mfg. Co., 174 U. S. 492, 498, 19 Sup. Ct. 641, 643 (43 L. Ed. 1058), the rule was again tersely stated:

"Where a combination of old devices produces a new result, such combination is doubtless patentable; but where the combination is not only of old elements, but of old results, and no new function is evolved from such combination, it falls within the rulings of this court in Hailes v. Van Wormer, 20 Wall. 353, 368; Reckendorfer v. Faber, 92 U. S. 347, 356; Phillips v. Detroit, 111 U. S. 604; Brinkerhoff v. Aloe, 146 U. S. 515, 517; Palmer v. Corning, 156 U. S. 342, 345; Richards v. Chase Elevator Co., 158 U. S. 299."

The claim that the patent is void as an aggregation is untenable.

Dilworth concedes that his structure contains all of the elements of the first claim, except "a thumb member pivoted to the hand body." In his testimony he admits that the distinction between the construction of his arm, equipped with the thumb, and the structure as set forth in claim 1, is that the thumb of defendant's arm, instead of being pivoted directly to the hand body, is pivoted to a member which is then mounted in and connected to the hand body. So that the issue of infringement as to this claim is reduced to the question of whether or not the defendant has escaped infringement by pivoting his thumb to a removable member, which is secured to the hand member by a threaded pin, which is screwed into a metal opening and thus securely attached to the hand member. In my opinion the threaded screw amounts to a pivoting.

Defendant seeks to escape infringement by claiming that the thumb is screwed into the hand body, and that it rests on a "rotar base." The claim is not concerned with how the result is accomplished, but is only concerned with providing a thumb which is pivotally mounted on the hand, and that is what defendant has. Defendant's method of mounting his thumb does not change the function of the pivoted thumb member, or its mode of operation, and is obviously a subterfuge, resorted to for the purpose of being able to point out some difference between defendant's structure and the precise language of the claim.

With Dilworth's admission that his structure contains all of the other elements of claim 1 of the first patent in suit, precisely as described in the claim, it is entirely obvious that his structure also contains "a thumb member pivoted to the hand body," precisely as de-

scribed in the claim. In my opinion, infringement of claim 1 is established by the testimony of the defendant's witness Dilworth.

As to claim 4 the issue of infringement has been made definite by Dilworth's testimony. On the direct examination, after reading the fourth claim in full, he testified as follows:

"We have all of the elements but the fingers hinged in socket joints"

—and later on testified that, so far as his familiarity with the art was concerned, the combination of elements recited in claim 4 had never been brought together until Carnes did it, and that Carnes was the first to accomplish it.

Dilworth appropriated the complete combination of claim 4, using every element, and those elements he has arranged, co-ordinated, and combined precisely as set forth in the claim; but he now seeks to avoid the charge of infringement by saying that he does not have "hinged socket joints" for his fingers, but some other kind of a joint —the other kind of a joint being devised for the purpose of producing as smooth a joint as possible. There is no evidence indicating that the phrase "hinged socket joints" in this claim was forced into the claim during the prosecution of the application as a definite limitation. Under the rules of interpretation, Carnes is entitled to a reasonable range of equivalents, and, so far as this claim is concerned, all that is necessary in that complete combination is that the fingers shall be hinged to the hand body. Carnes mentioned his preferred method of hinging; but it is not thought that defendant can take advantage of that complete combination, which he definitely states was first brought together by Carnes, and then avoid the charge of infringement by a change of an immaterial element. True, he says that his type of joint does not make as good a finish as plaintiff's type of joint; but infringement cannot be avoided by making a slight change in a patented structure, which, while utilizing every functional feature of the claimed invention, renders the apparatus less perfect in its operation. The defendant, therefore, infringes claim 4 of the first patent in suit.

[4] The second patent, No. 999,484, is dated August 1, 1911. Only one claim is in issue, and it reads as follows:

"In an artificial arm, the combination of a forearm member, a sleeve member to be secured to the upper arm, a wrist member secured to the forearm member by a swivel joint, gear mechanism in said joint for rotating said wrist member upon the forearm member, rod mechanism operatively connected with and extending from said gear mechanism to the upper end of the forearm member, a rod secured to said sleeve and extending downward to a pivot on the upper end of the forearm member, and an offset in said rod pivoted to the upper end of the rod in the forearm member, whereby the bending of the elbow of the wearer operates said gearing to rotate the wrist member upon the forearm member, substantially as set forth."

The validity of this claim is conceded, so that the only question to be decided is whether defendant infringes. The claim recites a structure made up of parts combined with the greatest ingenuity in order to produce the result of giving to the public an arm with which the motions of the human arm are closely simulated.

The objects, inter alia, of the invention, as stated in the specification, "are to produce an artificial arm and hand particularly adapted to be fitted to the forearm of the wearer whose elbow joint is in its normal operative condition, and relates to improvements for operating and controlling the rotation of the wrist of the hand upon the forearm; also to improvements in the finger operating mechanism, and to other improvements in the hand construction hereinafter described;" and the patentee also says that this patent is designed to be an improvement on the earlier patent, No. 760,102.

Plaintiff's structure shows bevel gears, through which the bending of the elbow produces a rotary or swiveling action of the wrist member on the forearm; while defendant's structure shows a belt running over a sheave pulley or fulcrum pulley, and through which the same result is obtained by the bending of the elbow. It will be noted that the claim calls for "gear mechanism" for rotating the wrist member upon the forearm member, so that the only question is whether the pulley mechanism operating the wrist movement is an infringement upon the "gear mechanism."

Carnes developed a swiveling action of the wrist member by a movement of the elbow joint. He accomplished this by providing at the elbow joint a crank mechanism, which produced a rectilinear movement of a rod positioned on the forearm. He then introduced in the wrist member a gear mechanism to translate that rectilinear motion of the rod into a rotary motion of the wrist member. The gear mechanism, which he illustrates and describes, is a bevel gear mechanism. Carnes claims that the "gear mechanism" in claim 1 was intended to cover the pulley and cord, as well as the bevel gears, and that the bevel gearing adopted by him is one type of gear mechanism suitable for use in translating the rectilinear motion of the rod on the forearm member to the rotary motion of the wrist member. He further claims that defendant's belt gearing is another suitable gear mechanism to produce that same translation from rectilinear to rotary motion, and that, in the mechanical art, belt drives are used interchangeably with gear drives, and cites as the most familiar example of belt gearing the drilling machine. The plaintiff further claims that, where the belt gear mechanism is used, it is commonly referred to as a quarter turn belt; that is to say, there is a vertical axis on which one pulley is mounted, a horizontal axis on which another pulley is mounted, and there are two intermediate pulleys about which the belt runs as it passes from the vertical to the horizontal pulley, and that such is the structure that the defendant has adopted, to wit, a belt gear mechanism in place of plaintiff's bevel gear mechanism.

Defendant concedes that this claim is valid, but insists that it should be limited to the precise construction which it shows and describes, and that it cannot be construed freely to cover any mechanism in order to turn the wrist. If the claim should be strictly construed, I would conclude that the belt gearing is not an infringement on bevel gears. So that the question is: What construction must be given the claim, in view of all the evidence?

Counsel for plaintiff maintains that Carnes was a "pioneer" in the construction of a practical mechanical arm, and that he is therefore entitled, under the law, to have his claims liberally construed, and that every doubt must be resolved in such manner as to support his patents; but I cannot agree that this invention is within the domain of "pioneer" inventions. True, he produced the first practical mechanical arm; but that does not necessarily constitute him a "pioneer" inventor, as that term is used in the patent law.

Mr. Justice Brown, in Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, on page 561, 18 Sup. Ct. 707, on page 718 (42 L. Ed. 1136), in speaking of "pioneer" inventions, said:

"This word, although used somewhat loosely, is commonly understood to denote a patent covering a function never before performed, a wholly novel device, or one of such novelty and importance as to mark a distinct step in the progress of the art, as distinguished from a mere improvement or perfection of what had gone before"

—and then follow the references to the sewing machine, telegraph, and telephone patents to Howe, Morse, and Bell as conspicuous examples of "pioneer" patents.

While it seems clear that Carnes was not a pioneer in the strict sense of the word, nevertheless it seems equally clear that his invention rose to the dignity of a primary invention, as he was the first to give to the world a practical and operative mechanical arm with the manifest advantages of simulating the action and motions of the human hand, fingers, and wrist, and that his invention is therefore deserving of recognition and "entitles the patent to a liberality of construction which would not be accorded to an ordinary improvement upon prior devices," as was said by Mr. Justice Brown, on page 562 of 170 U. S., on page 718 of 18 Sup. Ct. (42 L. Ed. 1136), in the Westinghouse Case, supra.

Mr. Justice Blatchford, in Morley Machine Co. v. Lancaster, 129 U. S. 263, on page 273, 9 Sup. Ct. 299, on page 302 (32 L. Ed. 715), said:

"Where an invention is one of a primary character, and the mechanical functions performed by the machine are, as a whole, entirely new, all subsequent machines which employ substantially the same means to accomplish the same result are infringements, although the subsequent machine may contain improvements in the separate mechanisms which go to make up the machine."

In that case it appeared that Morley was the first person who succeeded in producing an automatic machine for sewing buttons of the kind in question upon fabrics, and the court there held that he was entitled to a liberal construction of the claims of his patent. With forceful effect one may apply to this feature of the case what Judge Hough said, speaking for the Circuit Court of Appeals for the Second Circuit in Homer Brooke Glass Co. v. Hartford-Fairmont Co., 262 Fed. 427, on page 430:

"Of such an invention we have said that, when it 'inaugurates a new industry,' courts should be 'zealous so to construe the claims as to give validity to what is a meritorious invention.' Auto Vacuum, etc., Co. v. Sexton Co., 239

Fed. 900, 153 C. C. A. 26. It is also true that, under restrictions not necessary to dwell upon, a patentee is entitled to the benefit of properties or functions inherent in his invention whether fully comprehended by him at the date of disclosure or not. Electric, etc., Co. v. Gould, etc., Co., 158 Fed. 610, 85 C. C. A. 432; Van Epps v. United, etc., Co., 143 Fed. 869, 75 C. C. A. 77. Whether Mr. Brooke's invention is of such a primary nature as to merit the application of the word 'pioneer,' we shall assume, but not decide; for whatever the proper adjective applicable to this patent, the legal rule of construction is the same. Outlook, etc., Co. v. General, etc., Co., 239 Fed. 878, 153 C. C. A. 5, et seq."

That rule is particularly apposite to this discussion. The evidence is conclusive that Carnes' invention "inaugurated a new industry" in mechanical arms and that it was "a meritorious invention."

[5] But defendant urges that by using the words "substantially as set forth" the patentee limited the construction to the precise construction shown in the drawings, to wit, bevel gears. It will be noted, however, that in the first claim the patentee uses the words "gear mechanism" only. These words seem to me to be general respecting the mechanism to be used for transmitting motion. But in the second claim he uses the words "bevel gear mechanism." These words are specific and call for the specific device shown in the drawings. Moreover, belt gearing is a kind of mechanism used for the purpose of transmitting motion, and that is what the plaintiff and defendant both do. They transmit a rectilinear motion into a rotating motion.

This contention made by defendant is answered by the Supreme Court in Hobbs v. Beach, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586, where the matter is fully discussed, and Mr. Justice Brown laid down the rule at page 399 of 180 U. S., at page 416 of 21 Sup. Ct. (45 L. Ed. 586), in the following words:

"While the words 'substantially as described or set forth' are not absolutely meaningless, they do not limit the patentee to the exact mechanism described in his specification, or prevent recovery against infringers who have adapted mechanical equivalents for such mechanism. In determining the range of such equivalents, much depends upon the question whether the machine is a primary one, or whether the patent covers some novel feature introduced into an old machine. It is difficult to say exactly what effect should be given to these words. In one sense it may be said that no device can be adjudged an infringement that does not substantially correspond with the patent. But another construction, which would limit these words to the exact mechanism described in the patent, would be so obviously unjust that no court could be expected to adopt it."

Furthermore, the patentee is entitled to a broad range of equivalents in view of the primary or meritorious character of the invention. In Miller v. Eagle Mfg. Co., 151 U. S. 186, on page 207, 14 Sup. Ct. 310, on page 318 (38 L. Ed. 121), Mr. Justice Jackson, in discussing this proposition, laid down the rule as follows:

"The range of equivalents depends upon the extent and nature of the invention. If the invention is broad or primary in its character, the range of equivalents will be correspondingly broad, under the liberal construction which the courts give to such inventions."

In this connection what Judge Hough further said on page 430, in the Homer Brooke Glass Case, supra, is pertinent:

"It is always necessary, even after granting the widest range of equivalents, to find as a matter of fact that what the defendant has done is the invention of the plaintiff 'substantially as described.' The range of decision, the limits imposed by law on the triers of the facts, are indicated by the word 'substantially'; an infringer may easily substantially imitate a big thing —i. e., a deeply rooted and wide-spreading inventive thought; whereas, without 'Chinese copying,' imitation of a little thing is oftentimes difficult."

So, as I view it, the conclusion naturally follows, in view of the evidence in the instant case and the rules of law applicable thereto, that the limitation urged by the defendant is not imposed upon the claim by the use of the words "substantially as set forth."

Concluding, as I do, that Carnes discloses a meritorious invention, a broad or primary invention, he is entitled to a liberal construction of his claim and a broad range of equivalents. It follows, therefore, that the defendant infringes the first claim of the second patent in suit.

Let a decree be entered for plaintiff, with costs to abide the event. So ordered.

UNITED STATES v. READING CO. et al.

(District Court, E. D. Pennsylvania. May 21, 1921. Decree June 6, 1921.)

No. 1095.

1. **Monopolies ⟸26(2)—In distribution of assets of dissolved combination, equality between common and preferred stockholders required.**
Where by a decree for dissolution of a combination adjudged to be in violation of the Sherman Anti-Trust Law (Comp. St. §§ 8820–8823, 8827–8830), maintained through the medium of a Pennsylvania corporation, it became necessary to take from that corporation and dispose of stock of another corporation which it held unlawfully, in offering such stock to its individual stockholders, through the medium of a corporation created for the purpose, equity *held* to require that no distinction be made between the holders of its common and its preferred stock.

2. **Monopolies ⟸26(1)—Provisions of decree dissolving illegal combination.**
A decree for dissolution of an illegal combination maintained through a corporation, entered pursuant to a mandate of the Supreme Court requiring that the controlling stock interest in a railroad company held by such corporation should be so disposed of as to establish entire independence between the two companies, *held* to comply with such mandate by requiring the railway stock to be transferred to a trustee, to be held and voted under supervision of the court until it could be advantageously sold, where by reason of pending railroad regulation a fair price could not at the time be realized.

In Equity. Suit by the United States against the Reading Company and others. On settlement of decree.

See, also (D. C.) 226 Fed. 229; 253 U. S. 26, 40 Sup. Ct. 425, 64 L. Ed. 760.

Abram F. Myers, Sp. Asst. Atty. Gen., of Washington, D. C., for the United States.

Charles Heebner and William Clarke Mason, both of Philadelphia, Pa., and R. C. Leffingwell, of New York City, for Reading Co.

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

Robert W. De Forest and Charles E. Miller, both of New York City, for Central R. Co. of New Jersey.

Alexander S. Lyman, of New York City, for intervener New York Cent. R. Co.

Hugh L. Bond, Jr., of Baltimore, Md., for intervener Baltimore & O. R. Co.

Edwin P. Grosvenor and Cadwalader, Wickersham & Taft, all of New York City, for intervener preferred stockholders' protective committee.

Allen McCarty and White & Case, all of New York City, for intervener common stockholders' protective committee.

Arthur H. Van Brunt and Larkin, Rathbone & Perry, all of New York City, for Central Union Trust Co.

George Wharton Pepper, of Philadelphia, Pa., for intervener Penn Mut. Life Ins. Co.

Michael J. Ryan, of Philadelphia, Pa., for intervener Girard Ave. Trust Co.

Maurice Bower Saul and Saul, Ewing, Remick & Saul, all of Philadelphia, Pa., for intervener Pennsylvania Co. for Insurance on Lives and Granting Annuities.

Thomas Raeburn White, of Philadelphia, Pa., for interveners Kurtz.

Alfred A. Cook, F. F. Greenman, and Robert Szold, all of New York City, for interveners Continental Fire Ins. Co. and Fidelity-Phœnix Ins. Co.

George S. Ingraham, of Brooklyn, N. Y., for interveners Ingraham and others.

Before BUFFINGTON and DAVIS, Circuit Judges, and THOMPSON, District Judge.

BUFFINGTON, Circuit Judge. [1] On the return to this court of the mandate of the Supreme Court of the United States directing, inter alia, this court to enter a decree "dissolving the combination of the Reading Company, the Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, the Central Railroad Company of New Jersey and the Lehigh & Wilkes-Barre Coal Company, existing and maintaining through the Reading Company, with such provision for the disposition of the shares of stock and bonds and other property of the various companies, held by the Reading Company, as may be necessary to establish the entire independence from that company and from each other of the Philadelphia & Reading Railroad Company, the Philadelphia & Reading Coal & Iron Company," etc., we called before us the counsel for the United States and the counsel for the Reading Company, and directed the latter, in consultation with the former, to formulate a dissolution plan in conformity with the said mandate. In accordance with these directions, and after consultation by all of said counsel from time to time with the court, a tentative plan was eventually drafted and placed on file in the clerk's office, for the inspection of all parties concerned. Subsequently the court gave a hearing to all parties who

desired to be heard, and signified its willingness to receive for consideration petitions to intervene. Numerous parties and representatives of various interests having thus been heard, and numerous briefs having been filed showing the views of the parties concerned, the court was thereby placed in possession of such information as enabled it to determine what parties should be allowed to intervene, and also to formulate such questions, issues, and objections to the proposed plan as would afford a basis for an enlightening and constructive discussion on the part of all parties of record. Accordingly this court, by its order of April 12, 1921, directed it would on May 2, 1921, hear arguments on the following questions:

"1 (a) Whether the sale provided for in paragraph 5 of the Reading plan is such a disposition of the interest of Reading company in the stock of the Philadelphia & Reading Coal & Iron Company as accomplishes the express purpose of the mandate of the Supreme Court of the United States requiring disposition by Reading Company of such stock because the holding of it has been and would be unlawful; (b) and if the mandate is thereby complied with, whether such disposition confers upon any one class of stockholders of Reading Company any benefit to the prejudice of the legal rights of any other class of stockholders.

"2. Whether the stock of the Coal Company should be sold free from the lien of the general mortgage, or whether a sale of certificates of interest therein would be a compliance with the provisions aforesaid of the mandate of the Supreme Court of the United States.

"3. Whether the Reading Company should offer a premium of 10 per cent. to the general mortgage bondholders for release of the Coal Company's property from the lien of the mortgage, or whether the requirements of the mandate of the Supreme Court of the United States may be fulfilled by proper injunctive provisions in the decree to be entered in this cause"

—and directed that all parties who desired to be heard should file briefs on April 30, 1921, containing in substance their proposed arguments. Having thus in advance the advantage of the proposed arguments, the court found on the day set for argument that, due to a modification of the plan agreed to by the Attorney General of the United States, the counsel for the Reading Company and counsel representing certain holders of bonds secured by the general mortgage of the Reading Company, substantially all of the above questions were disposed of, save those arising under subdivision (b) of the first question. And this feature, briefly stated, resolved itself into an issue as to the relative rights of the preferred and common stock of the Reading Company, arising out of the disposition of the stock of the Philadelphia & Reading Coal & Iron Company, which latter stock was owned by the Reading Company. The stock of the Philadelphia & Reading Coal & Iron Company so owned by the Reading Company has a par value of $8,000,000. It will be noted that this stock holding by the Reading Company in the Coal Company was decreed by the Supreme Court an unlawful holding, and was one as to which the Supreme Court directed this court to enter a decree—

"with such provision for the disposition of the shares of stock and bonds and other properties of the various companies, held by the Reading Company, as may be necessary to establish the entire independence from that company and from each other of the Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company," etc.

In the plan proposed this order was complied with, in that the offending stock was, under proper restrictions and elections, to be disposed of to all the stockholders, both common and preferred, of the Reading Company. By this stockholding passing from the ownership of the Reading Company and being vested in the disassociated ownership of the individual stockholders with such provisions for safeguarding against an unlawful combination between them as is provided in the proposed decree, and as will be hereafter described, it will be seen the letter and spirit of the mandate of the Supreme Court are complied with. The offending stock passes out of the ownership of the unlawful holder, and neither it nor the proceeds of its sale can be hereafter used in unlawful combination. In that connection it will be noted that the mandate directs a "disposition of shares of stock and bonds and other property held by the Reading Company," and in that respect the mandate has been complied with precisely, in that there has been a "disposition" of the stock, it being taken from the Reading Company, and it has not even been distributed by that company, but, treated as an unlawful holding of that company, it is to be taken by the court and disposed of absolutely by it, by sale through the agency of a corporation created under the provisions of this decree, to such persons as have qualified to lawfully acquire it. The mere circumstance that those persons are stockholders of the Reading Company is attributable to the fact that, in the application of equitable principles and without sacrifice of the spirit of the mandate, they compose a class of suitable recipients, in the manner above stated, of the stock which was unlawfully held by the company of which they were stockholders. In other words, if the carrying out of the mandate had necessitated the use of this stock to reduce, for example, the bonded or other indebtedness of the Reading Company, the stockholders of that company, which unlawfully held the stock to be disposed of, would have no claim in law to prevent such disposition.

From these considerations it is apparent that, whatever this disposition of the stock may be called, it is in no sense an earning of the Reading Company, which is to be disposed of by that company as a dividend. It is a taking by the law of an asset of that company, a stock asset, which was and has been owned in specie by Reading Company since the Reading reorganization was formed, and which never was earned or could be earned by the Reading Company itself. Indeed, it is now disposed of in substantially the same way as the law would dispose of the property of that company, were it being dissolved, and in that connection we deem it proper to say that, under the facts and circumstances before us, the legal question of dividend distribution between different classes of stockholders is not here involved, and on that question we express no present opinion for the simple reason that we are not dividing profits or earnings.

Seeing, then, that this stock is not an earning of the Reading Company to be distributed as a dividend, but is a part of its capital disposed of in this case to qualifying shareholders, in the manner provided for by the creation of this intermediate corporation, it will be apparent

that this decree of equal right to all shareholders, preferred and common alike, to participate in the sale as ultimate purchasers, is based on the general equitable principle that equality is equity and on the corporate right of all shareholders in a Pennsylvania corporation to share equally on a disposition of its assets. We are therefore of opinion that the plan which embodies these equitable principles should be approved and that the claim of the common shareholders to take all of this stock to the exclusion of the preferred stockholders should be denied. And in approving such plan we note that in point of fact the equity of a common participation of all stockholders, preferred and common, has not only the approval of the government of the United States that has no interest in the controversy, save to see that equity is done to all; of the Reading Company which has no interest save an impartial stewardship for all its shareholders; and, lastly, the silently expressed approval of substantially two-thirds of the shares held by common stockholders.

This significant and impressive fact cannot but be regarded as highly persuasive of the substantial equity of this plan. Of the 1,400,000 shares of the common stock of the Reading Company, less than one-third object to it. The other two-thirds having had the opportunity to object, and failing to do so, we are warranted in treating as acquiescing in the proposed plan. Indeed, we are justified from one circumstance in concluding, from the positive attitude of 100,000 of those shares, that the remainder are not only passively acquiescing, but really actively approving. This particular block of 100,000 shares of the common stock is represented by one man, who is a trustee of an estate which owns it and he himself is the owner of one-half of such trust estate. He or the estate have no preferred stock whatever. He is also a director of the Reading Company and as such favored the plan. By his counsel he appeared at the hearing and strongly urged its adoption, asserting his consent to the preferred stock sharing equally with the common in the disposition of the shares of the Coal Company. His contention was that this equal participation by common and preferred stockholders was not only fair, legal, and equitable, but that such a proportionate division tended to the welfare of all parties concerned and indeed was a course which made the plan possible. When it is considered that the nonparticipation of the preferred stockholders in the shares of the Coal Company, and the absorption of all the stock by the common shareholders would have benefited this particular 100,000 shares by a large sum, this court may rest assured that the proposed plan by its equality works equity.

Without entering upon a further discussion of the questions involved, we are of opinion, after careful and matured consideration, that the plan as amended should be approved, and we therefore direct the preparation of a formal decree embodying its terms. We deem it proper to add that such decree shall provide for the creation of a new corporation, to which shall be sold the equities in the shares of the Philadelphia & Reading Coal & Iron Company held by the Reading Company. The rights to purchase the stock of this newly created com-

pany will be sold to the preferred and common stockholders of the Reading Company share and share alike. In the creation of such a corporation by this court's order, we follow a general course pursued in the case of United States v. Du Pont et al. (C. C.) 188 Fed. 127, and the wisdom of so doing will be seen by an examination of the opinion lately filed in that case, where the purpose of such procedure is fully explained. By the creation of this new corporation by the directions of this court, and by its retention of jurisdiction to enforce this decree as therein provided, the court can, if such contingency should arise, by its control of this newly formed corporation, control all of its stockholders, and prevent such stock from ever being used to thwart the decree made in pursuance of the plan.

[2] The paragraph of the original Reading plan numbered 8, which is paragraph numbered 7 of the plan as modified in accordance with the agreement between Reading Company and the Attorney General of the United States as of May 12, 1921, contains the only provision in the plan proposed to carry out the mandate of the Supreme Court of the United States which is not agreed to in all of its details by the Reading Company and the Attorney General, and as to this provision of the plan the disagreement relates only to a matter of time.

The section referred to concerns the disposition by the Reading Company of the stock of the Central Railroad of New Jersey owned by the former, and as to this disposition Reading Company and the Attorney General agree, that the stock shall be transferred to one or more trustees, individual or corporate, to be held and voted under the terms of the trust until sold to a purchaser other than the parties defendant in this cause.

Reading Company contends that the spirit and the letter of section 5 of the Interstate Commerce Act, as amended by the Transportation Act of 1920 (40 Stat. 456), justifies its prayer that the value of this stock of the Central Railroad Company of New Jersey shall not be subjected to possible sacrifice by a sale until the Interstate Commerce Commission shall adopt a consolidation plan which will designate the several railroads of the East with which the Central Railroad Company of New Jersey may be consolidated, so that assurance may be given to a railroad company purchaser of this stock that the holding of it by such purchaser will not be objectionable.

The Attorney General has contended that the stock should be placed in the hands of a trustee or trustees under a decree of this court, which shall direct Reading Company to proceed with all due diligence to offer the same for sale within a definite period, and if at the expiration of such period a purchaser has not been found by Reading Company, then upon the application of the Attorney General the court may decree a sale of this stock at public auction or in such manner as the court shall then provide.

The court is of opinion that because of the provisions of the Transportation Act of 1920 there is presently no prospective purchaser of the Jersey Central stock at a fair price, and so long as the control of the voting power of this stock is taken from Reading Company and

lodged with a trustee or trustees, acting under the supervision of this court, there is full compliance with the mandate of the Supreme Court, which requires that there shall be established entire independence between these two companies, and we are also of opinion there is no good reason why the decree of this court shall now subject the stock to the possible sacrifice of a forced sale, to the detriment, not only of the Reading Company, but also to the almost equal number of other shareholders of the Jersey Central who are not parties to this record, who have no right to be heard, and yet who may be very seriously affected by a decree of this court ordering at the present time, a forced sale of this majority stock.

The final decree to be entered herein, therefore, will direct the transfer of the stock of the Central Railroad Company of New Jersey, owned by Reading Company, to such trustee or trustees, individual or corporate, as the court may name, and shall contain the terms of the trust, which in substance shall provide that the stock shall be voted by the trustee or trustees, so that at all times there shall be entire independence of directors and management between Reading Company, as it shall be hereafter merged with Reading Railway Company, and the Central Railroad Company of New Jersey, and that pending a sale of the stock all dividends received by the trustee or trustees upon the same shall be paid to Reading Company, or as it shall direct, and that the actual sale of the stock of the Central Railroad Company of New Jersey shall be deferred, in view of the possible grouping of railroads by the Interstate Commerce Commission under the Transportation Act of 1920, subject, however, to a provision in the decree that on motion of the United States or other party, or upon the court's own initiative, that, without awaiting such action by the Interstate Commerce Commission, an order may be entered hereafter for the sale of such stock, if and when it shall appear to the court that the facts require it, or the situation makes it possible.

It is therefore ordered that counsel for the Reading Company and the Attorney General of the United States shall prepare and submit to the court within 15 days a form of decree to make effective the mandate of the Supreme Court of the United States in the above-entitled cause, in accordance with the provisions of the modified plan agreed to by the Reading Company and the Attorney General of the United States and in conformity with this opinion.

Decree.

PER CURIAM. A decree of this court having been entered in the above cause on October 28, 1915, and the said cause having been appealed by both parties to the Supreme Court of the United States, and that court having affirmed in part and in part reversed the decree of this court, a mandate from the Supreme Court containing directions as to the decree to be entered was filed herein on the 13th day of August, 1920.

On October 8, 1920, this court entered an interlocutory decree by which it was ordered:

"That within 90 days from the entry of this decree the defendants shall submit to this court a plan for the dissolution of the unlawful combination between Reading Company, the Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, the Central Railroad Company of New Jersey, and the Lehigh & Wilkes-Barre Coal Company, existing and maintained through the Reading Company, with such provision for the disposition of the shares of stock and bonds and other property of the various companies, held by the Reading Company, as may be necessary to establish the entire independence from that company and from each other of the Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, the Central Railroad Company of New Jersey, and the Lehigh & Wilkes-Barre Coal Company, to the end that the affairs of all these now combined companies may be conducted in harmony with the law."

Thereafter the time within which to present said plan was extended by this court until February 14, 1921, on which date a plan was filed herein pursuant to said interlocutory decree, a counter proposal filed by the United States to paragraph 8 of said plan (paragraph 7 of the modified plan), and an order entered directing that a copy of said plan be served upon the Central Union Trust Company of New York, trustee under the general mortgage referred to therein, and that copies be open to the inspection of all stockholders of the defendant companies. The said counter proposal of the United States was as follows:

"Reading Company shall, with all due diligence, offer for sale at a reasonable price and upon reasonable terms the stock of the Central Railroad Company of New Jersey now owned by it for a period of ——— years. If at the expiration of such period a sale of such stock has not been made, then, upon application of the Attorney General, the court may decree a sale at public auction at a price not less than a minimum price to be agreed upon between the Reading Company and the Attorney General. During this period Reading Company shall accept any offer by a responsible purchaser made in good faith and at a reasonable price, and in the event of any disagreement between an intending purchaser, who has complied with the foregoing provisions, and the Reading Company, then the matter shall be referred to the Attorney General for his advice, and if the parties shall still be at a disagreement, then any party (Reading Company, the United States, or the intending purchaser) may bring the matter to the attention of the court for its decision. A purchaser under this provision must be approved by the Attorney General and, if a railroad company, shall apply to the Interstate Commerce Commission for its authority to make such purchase under paragraphs 2 and 3 of section 407 of the Transportation Act of 1920.

"For the purpose of carrying out such a provision, jurisdiction of the case shall be retained by the court."

This cause came on for further hearing on March 1, 1921, and leave was given by this court to all persons alleging interest herein to petition for leave to intervene. By permission of this court the United States filed a supplemental bill to make said Central Union Trust Company of New York, trustee under said general mortgage, a party defendant in this cause, and said Trust Company filed an answer thereto on March 18, 1921. Holders of general mortgage bonds and of preferred and common stock of defendant Reading Company filed petitions for leave to intervene, and the Reading Company duly filed its answer to the petitions of intervening common stockholders and cross-petition dated April 5, 1921.

By order entered herein on April 12, 1921, leave to intervene as parties defendant herein was granted to all who had petitioned for leave to intervene and Central Union Trust Company of New York was made a party herein. By order entered herein on April 12, 1921, the court directed that it would on May 2, 1921, hear argument upon the following questions:

"1. (a) Whether the sale provided for in paragraph 5 of the Reading plan is such a disposition of the interest of Reading Company in the stock of the Philadelphia & Reading Coal & Iron Company as accomplishes the express purpose of the mandate of the Supreme Court of the United States requiring disposition by Reading Company of such stock because the holding of it has been and would be unlawful; (b) and, if the mandate is thereby complied with, whether such disposition confers upon any one class of stockholders of Reading Company any benefit to the prejudice of the legal rights of any other class of stockholders.

"2. Whether the stock of the Coal Company should be sold free from the lien of the general mortgage, or whether a sale of certificates of interest therein would be a compliance with the provisions aforesaid of the mandate of the Supreme Court of the United States.

"3. Whether the Reading Company should offer a premium of 10 per cent. to the general mortgage bondholders for release of the Coal Company's property from the lien of the mortgage, or whether the requirements of the mandate of the Supreme Court of the United States may be fulfilled by proper injunctive provisions in the decree to be entered in this cause"

—and directed that all parties who desired to be heard should file briefs on April 30, 1921, containing in substance their proposed arguments.

This cause came on for further hearing on May 2, 1921, and the defendant Reading Company, with the approval of the Attorney General of the United States, submitted, in open court, modifications of the plan, which met the objections of the bondholders and trustee under the general mortgage, and all parties desiring to be heard were duly heard. Such modifications were thereafter reduced to writing by defendant Reading Company and the Attorney General of the United States and filed herein on May 12, 1921. The objection of the Attorney General of the United States to the provisions of paragraph 8 of the plan (paragraph 7 of the modified plan), however, remained.

The modified plan, providing for the dissolution of the unlawful combination between Reading Company, Philadelphia & Reading Railway Company (hereinafter called the Railway Company), the Philadelphia & Reading Coal & Iron Company (hereinafter called the Coal Company), and the Central Railroad Company of New Jersey (hereinafter called the Jersey Central), is as follows:

"1. The Reading Company will assume the $96,524,000 general mortgage 4 per cent. bonds, which are a joint obligation of the Reading Company and the Philadelphia & Reading Coal & Iron Company (hereinafter called the Coal Company), and will agree to save the Coal Company and its property harmless therefrom.

"2. The Coal Company will pay to the Reading Company $10,000,000 in cash, or current assets at market value, and $25,000,000 in 4 per cent. mortgage bonds of the Coal Company. The mortgage under which they are to be issued may contain provision for the issue thereunder of additional bonds to provide for additions, betterments, and improvements to a limited amount, to be determined by the Reading Company and the Coal Company

prior to the creation of the mortgage, and shall contain provision for a proper sinking fund for the retirement of bonds issued thereunder. The $25,000,000 bonds issued by the Coal Company to the Reading Company shall mature on January 1, 1997, the same date as the general mortgage bonds. The bonds issued by the Coal Company shall be subject to redemption at par and accrued interest on any semiannual interest date as a whole but not in part, except out of the moneys in the sinking fund.

"3. Except as otherwise herein expressly provided, general releases of all claims and liabilities as between the Reading Company and the Coal Company, including the claim of approximately $70,000,000 carried on the books of the Reading Company as an asset and on the books of the Coal Company as a liability, will be exchanged.

"4. The Reading Company will agree with the Coal Company that, at or before the maturity of the general mortgage bonds, it will obtain the release of the Coal Company's property from the lien of the general mortgage and the discharge of the Coal Company from liability on the general mortgage bonds.

"5. If the court so orders, the Reading Company will, subject to the lien of the general mortgage, sell, assign and transfer all its right, title and interest in and to the stock of the Coal Company, including the present right to vote and receive dividends thereon, to a new corporation to be formed with appropriate powers, and will agree to save the new corporation and said stock harmless from the lien of the general mortgage, and will agree to obtain, at or before the maturity of the general mortgage, the release of the stock of the Coal Company from the lien of the general mortgage and the assignment, transfer, and delivery of said stock to the new corporation—all in consideration of the payment by the new corporation to the Reading Company of the sum of $5,600,000, and its agreement to issue its shares to the stockholders of the Reading Company as hereinafter provided.

"The new corporation will issue 1,400,000 shares of stock without par value. Such no par value stock will be sold by the new corporation to the stockholders of the Reading Company, preferred and common, share and share alike, for $5,600,000, or $2 for each share of Reading stock. Provision will be made for the disposition by the Reading Company of any rights to subscribe which may not be availed of by the Reading stockholders within such period as may be fixed by the court, to the end that the new corporation shall receive the full purchase price of $5,600,000. It is proposed to carry out this sale in accordance with the precedent established by the Union Pacific-Southern Pacific case, by issuing to Reading stockhholders, with or without the intervention of a trustee, as may be provided for in the final decree of the court, assignable certificates of interest in the stock of the new corporation exchangeable for such stock only when accompanied by an affidavit that the holder is not the owner of any stock of the Reading Company.

"In addition there will be embodied in the final decree a permanent injunction against the new corporation exercising its voting power on the stock of the Coal Company in such a way as to bring about any new relations between the Coal Company and the Reading Company of the character complained of in the present suit. Any further steps, which may be deemed necessary by the court, will be taken to the end that an independent board and management to be approved by it will be maintained for the Coal Company, so that the independence of this company need not await the necessarily gradual process of the distribution of the no par value stock of the new corporation among persons not holders of stock in the Reading Company.

"The final decree may provide that if, by reason of default on the general mortgage bonds, the trustee, the Central Union Trust Company, shall exercise the right to vote the stock of Reading Coal Company, it shall so exercise that right as not to bring about unity of management between said Coal Company and Reading Company, and the final decree may further provide that, in the event the trustee at any time is obliged to sell the stock or properties of Reading Coal Company, it shall dispose of such stock and properties separately from the properties of Reading Company and to different interests.

"6. The Reading Company will merge the Philadelphia & Reading Railway Company under the authority contained in the present charter of the Reading Company, and will subject the railway property to the direct lien of the general mortgage. The name of the Reading Company, after merger, will not be changed. The Reading Company will accept the Pennsylvania Constitution of 1874, and it will proceed under the act of 1856 to surrender those of its powers which are inappropriate for a railroad corporation of Pennsylvania. Thus the Reading Company will be in all respects subject to the regulation of state and federal authorities as a common carrier, and the relation of the Reading Company, as a specially chartered holding company, to the Philadelphia & Reading Railway Company will be terminated.

"7. The court will be asked to defer the actual sale of the stock held by the Reading Company in the Central Railroad of New Jersey pending the grouping of railroads by the Interstate Commerce Commission under the Transportation Act, but subject to the further order of the court. It is assumed that the Attorney General will ask the court to make an order assuring the voting of the stock pending such sale in the manner approved by the court. A detailed plan for the prompt disposition of the stock of the Lehigh & Wilkes-Barre Coal Company by the Central Railroad of New Jersey has been submitted separately."

The plan for the disposition of the stock of the Lehigh & Wilkes-Barre Coal Company by the Jersey Central was submitted in a form to be embodied in a decree and is incorporated herein in section 8 hereof.

After consideration of the petitions, answer, briefs, and oral arguments, the court filed on May 21, 1921, its opinion in this cause.

It is ordered, adjudged and decreed that:

1. The above-recited modified plan is hereby approved, as supplemented by the provisions of this decree.

2. The Reading Company, the Railway Company, and the Coal Company shall consummate the provisions of the modified plan as so supplemented.

3. The Reading Company shall, subject to the lien of the general mortgage, sell, assign, and transfer all its right, title, and interest in and to the stock of the Coal Company, including the present right to vote and receive dividends thereon, to a new corporation, to be formed with appropriate powers, and shall execute and deliver to Central Union Trust Company of New York, trustee under the general mortgage, and defendant Central Union Trust Company of New York shall honor (unless default shall be made and continue as provided in the general mortgage), an irrevocable order directing it to execute and deliver to such new corporation suitable powers of attorney or proxies to vote such stock and orders for the payment of dividends thereon. Section 5 of the modified plan is supplemented as follows:

(a) The names of the officers and directors of the new corporation to be elected and appointed in the first instance shall be submitted to the court for its approval, and no officer or director of the new corporation shall be an officer or director of the Reading Company.

(b) The Reading Company shall not sell, assign, or transfer its right, title, and interest in the stock of the Coal Company to the new corporation, unless and until the new corporation shall enter its appearance herein by counsel and thereby submit itself to the jurisdiction of this court for all purposes of this cause, and it shall thereupon become a party defendant in this cause and subject to the provisions of this decree. No dividends shall be declared or

paid on the stock of the Coal Company, prior to the sale, assignment, and transfer by the Reading Company of its right, title, and interest therein to the new corporation, except from current earnings subsequent to December 31, 1920.

(c) The stock of the new corporation shall be issued to a trustee or trustees appointed by the court. Such trustee or trustees shall issue certificates of interest therein as contemplated by the modified plan and as hereinafter provided. The Reading Company shall offer such certificates of interest for subscription to its stockholders, preferred and common, share and share alike, and may issue to them assignable warrants evidencing their right to subscribe for said certificates of interest. Neither the defendant Reading Company, nor any corporation controlled by it, nor any person acting in its interest, shall acquire by purchase or otherwise any of said certificates of interest. Such certificates of interest shall be delivered to the subscribers therefor upon payment in full of the subscription price and compliance in all respects with the terms prescribed in the offer. All such certificates shall be registered by the trustee or trustees in the names of the purchasers. They shall be substantially in the form hereto annexed, marked "Form A."

(d) The trustee or trustees shall be entitled, and it shall be their duty, to vote or issue proxies for voting in respect of any and all of said shares of the new corporation held by the said trustee or trustees unless otherwise hereafter directed by this court.

(e) The trustee or trustees shall collect and receive any and all cash dividends paid on the stock of the new corporation held by the trustee or trustees. Upon the exchange, as hereinafter set forth, of any certificate of interest for shares of capital stock of the new corporation held by the trustee or trustees, the trustee or trustees shall pay in cash to the owner of the certificate of interest so exchanged or upon his order the amount of all cash dividends collected by the trustee or trustees, in respect of the number of shares represented by such certificate of interest, but without interest thereon, and shall execute and deliver to such owner or upon his order a dividend order or assignment for the amount of any dividends declared, but not then payable, in respect of shares vested at the time of such exchange in the trustee or trustees as the registered stockholder entitled thereto. Any interest realized or allowed by the trustee or trustees upon funds paid to the trustee or trustees as dividends shall be applicable to the payment of the compensation of the trustee or trustees and the expenses of the administration of the trust, and any balance thereof remaining shall be paid to the defendant Reading Company unless otherwise ordered by the court.

All dividends payable otherwise than in cash, which shall be declared by the new corporation, shall be received and held by the trustee or trustees for the pro rata benefit of said registered owners, from time to time, of the certificates of interest, upon the same terms and conditions as the shares originally deposited, and shall be distributed to the persons who shall be the respective owners of the certificates of interest when and as, and only when and as, the shares originally deposited are distributed to them respectively, subject to any necessary adjustment by scrip or otherwise, in the discretion of the trustee or trustees, in respect of fractional shares.

No deduction shall be made by the trustee or trustees in the distribution of such dividends or subscription rights for any commissions or expenses of the trustee or other costs of collection or payment.

(f) Upon surrender of any outstanding certificates of interest by the registered owner thereof or his assignee, the trustee or trustees shall deliver to him stock certificates for the number of shares of the new corporation represented by the surrendered certificate of interest, which stock certificates shall be issued by the new corporation and registered on its books in the name of the new holder, upon condition, however, that the applicant for such exchange shall file with the trustee a duly executed affidavit in one of the forms hereto annexed.

The affidavit in the case of an individual applying for such exchange in his own right shall be substantially in the form annexed hereto, marked "Form B."

If the applicant is a corporation or joint-stock company, the affidavit shall be executed by its president, vice president, comptroller, secretary, or treasurer, or, in the case of a corporation of a foreign country, by one of its managing officers, and shall be substantially in the form annexed hereto, marked "Form C."

If the applicant is a partnership, the affidavit shall be executed by one of the partners, and shall be substantially in the form annexed hereto, marked "Form D."

If the applicant is an executor, administrator, guardian, or testamentary or other trustee of an express trust, the affidavit shall be made by such executor, administrator, guardian, or trustee, as the case may be, or by one of such if the application is made on behalf of joint representatives, or, if such representative is a corporation or joint-stock company, by its president, vice president, comptroller, secretary, or treasurer, or, in the case of a corporation of a foreign country, by one of its managing officers, and shall be substantially in the form annexed hereto, marked "Form E."

The trustee or trustees shall make such appropriate provisions for the registration and transfer of the certificates of interest issued hereunder as are usual with respect to shares of stock.

All certificates of interest surrendered for exchange for stock shall forthwith be canceled by the trustee or trustees and shall not be reissued.

(g) The amount of certificates of interest surrendered for exchange shall be reported monthly by the trustee or trustees to the Attorney General of the United States, and at any time upon the request of the Attorney General of the United States the trustee or trustees shall furnish him with any additional information which he may require relating to the carrying out of this decree.

(h) If, at any time after July 1, 1924, any of such certificates of interest shall remain outstanding, the court, in its discretion, after a hearing, upon such notice to holders of certificates of interest as it may direct, may order the shares of the new corporation, represented by said certificates, to be sold and the proceeds distributed to the registered owners of such certificates.

(i) During the period allowed for the conversion of the certificates of interest into stock of the new corporation, no present stockholder of the Reading Company shall be a purchaser of stock of the new corporation if still a stockholder of the Reading Company, and the Attorney General of the United States shall have access to the stock transfer books of the Reading Company and the new corporation, for the purpose of enabling him to enforce compliance by such stockholders with this provision of this decree; but nothing herein contained shall extend to holdings as broker, pledgee, trustee, agent, or otherwise in a representative capacity.

(j) Effective upon its becoming a party defendant in this cause, as hereinbefore provided, the new corporation, its officers and directors, are hereby enjoined and restrained from exercising the voting power on the stock of the Coal Company, so as to form such a combination between the Coal Company and the defendant Reading Company as has been adjudged unlawful in this cause.

(k) The Reading Company, and all persons acting for or in its interest, are hereby perpetually enjoined from acquiring, receiving, holding, voting, or in any manner acting as the owner of any of the shares of the capital stock of the new corporation, and the new corporation, and all persons acting for or in its interest, are hereby perpetually enjoined from acquiring, receiving, holding, voting, or in any manner acting as the owner of any of the shares of the capital stock of the Reading Company.

4. The provisions of section 7 of the modified plan shall be consummated as follows:

(a) The Reading Company shall transfer to a trustee or trustees to be appointed by this court (hereinafter called the Jersey Central Trustee), subject to the lien of the Jersey Central collateral trust mortgage dated April 1, 1901 (hereinafter called the Jersey Central Collateral Trust), from Reading Company to the Pennsylvania Company for Insurances on Lives & Granting Annuities, trustee (hereinafter called the Pennsylvania Company), its right, title, and interest in the stock of the Jersey Central.

(b) The Jersey Central Trustee shall hold said right, title, and interest in said shares of stock transferred to it as hereinabove provided, subject to the order of this court. The final disposition of said stock shall be deferred in view of the possible groupings of railroads by the Interstate Commerce Commission under the Transportation Act of 1920, until ordered by this court. The court may in its discretion, upon its own initiative or upon motion of the United States or the Reading Company, without waiting such action by the Interstate Commerce Commission, enter an order for the sale of such stock, if and when it shall appear that the facts require it, or the situation makes it possible.

(c) The Jersey Central Trustee shall be entitled, and it shall be its duty, to vote or cause to be voted all said shares of the Jersey Central, unless otherwise hereafter directed by the court. The Reading Company is hereby enjoined and restrained from voting upon any such shares of stock of the Jersey Central. The Reading Company shall from time to time direct the Pennsylvania Company, pursuant to the provisions of said Jersey Central Collateral Trust, to execute and deliver to the Jersey Central Trustee or its nominees suitable powers of attorney or proxies to vote upon such shares of stock.

(d) Pending the entry of an order by this court directing the final disposition of the Jersey Central stock, the Jersey Central Trustee is hereby enjoined and restrained from exercising the voting power on the Jersey Central stock in such a way as to cause any dependence or intercorporate relations between the defendants Reading Company and the Jersey Central, and in particular from voting so that any officer or director of the Reading Company shall be elected an officer or director of the Jersey Central.

(e) Pending the final disposition of the Jersey Central stock the Reading Company shall be entitled to receive all cash dividends on the stock of the Jersey Central. All dividends payable otherwise than in cash which shall be declared by the Jersey Central shall be received and held by the Jersey Central trustee upon the same terms and conditions as the right, title, and interest of Reading Company in the shares of stock in the Jersey Central originally transferred until finally disposed of as may be directed by order of this court.

5. The defendants Reading Company, the Railway Company, and the Coal Company shall proceed with due diligence to carry out the provisions of this decree, and shall issue calls for meetings of their respective stockholders according to law for the purpose of submitting to the stockholders for their approval such action as may be appropriate to carry out the provisions of the modified plan as approved and supplemented by this decree or in connection therewith. As stockholder of the Railway Company and the Coal Company, the Reading Company shall exercise its right to vote upon the stock of said companies, respectively, for the purpose aforesaid, and shall demand, and the defendant Central Union Trust Company of New York shall execute and deliver to it or its nominees, suitable powers of attorney or proxies for such purpose. Within six months from the date of this decree the defendants Reading Company, the Railway Company, and the Coal Company

shall report in writing to the court what has been accomplished in carrying out the provisions of this decree.

6. If by reason of default on the general mortgage bonds Central Union Trust Company of New York, the trustee under the general mortgage, shall exercise the right to vote the stock of the Coal Company, it shall so exercise that right as not to bring about unity of management between the Coal Company and the Reading Company, and in the event that said trustee at any time is obliged to sell the stock or properties of the Coal Company, it shall dispose of such stock and properties separately from the properties of the Reading Company and to different interests.

7. The Coal Company is hereby permanently enjoined from issuing to the Reading Company, and the Reading Company is enjoined from receiving, any stock, bonds, or other evidences of corporate indebtedness of the Coal Company, in addition to the $25,000,000 of 4 per cent. bonds provided for in paragraph 2 of the modified plan, except such evidences of current indebtedness as may be lawful between shipper and carrier.

8. The Central Railroad Company of New Jersey shall dispose of all the capital stock of the Lehigh & Wilkes-Barre Coal Company now owned by it to persons or corporations who are not its own stockholders or stockholders in either the Reading Company, the Railway Company, or the Coal Company, and who previous to or at the time of purchase shall qualify as purchasers by a duly executed affidavit in one of the forms hereto annexed.

The affidavit in the case of an individual purchasing in his own right shall be substantially in the form hereto annexed, marked "Form F."

If the purchaser is a corporation or a joint-stock company, the affidavit shall be executed by its president, vice president, secretary, or treasurer, or, in the case of a corporation of a foreign country, by one of its managing officers, and shall be substantially in the form hereto annexed, marked "Form G."

If the purchaser is a partnership, the affidavit shall be executed by one of the partners, and shall be substantially in the form hereto annexed, marked "Form H."

If the purchaser is an executor, administrator, guardian, or testamentary or other trustee of an express trust, the affidavit shall be executed by such executor, administrator, guardian, or trustee as the case may be, or by one of such if the application is made on behalf of joint representatives, or, if such representative is a corporation or joint-stock company, by its president, vice president, secretary, or treasurer, or, in the case of a corporation of a foreign country, by one of its managing officers, and shall be substantially in the form hereto annexed, marked "Form I."

All of the said stock shall be disposed of within six months after the entry of this decree, or previous to any other later date which may be fixed by the court. Stock may be disposed of in such manner and upon such terms as the Jersey Central may determine: Provided, however, that it shall only be acquired by persons or corporations qualified

to receive it under the terms of the said affidavits; and provided, further, not less than 20 per cent. shall be paid in cash at the time of its disposition by persons or corporations acquiring it.

On or before the date fixed by the court before which the disposal of such stock shall be completed, the Jersey Central shall file or cause to be filed with the clerk of this court a statement containing the names of the persons, corporations, or partnerships to whom such stock has been disposed of and the number of shares acquired by each, to which statement shall be annexed the said affidavits.

Should all of the said stock not be disposed of before the expiration of six months after entry of this decree or previous to any later date which may be fixed by the court, the remainder shall be then transferred to the Central Union Trust Company of New York (hereinafter called the Wilkes-Barre Trustee), as the custodian and depository of the court, subject to the provisions of this decree and to the further orders and decrees of the court herein. Such stock shall be registered in the name of the Wilkes-Barre Trustee on the books of the Lehigh & Wilkes-Barre Coal Company and certificates therefor delivered to the Wilkes-Barre Trustee.

Such stock, together with any dividends received by the Wilkes-Barre Trustee thereon, shall be transferred by the Wilkes-Barre Trustee from time to time to persons to whom the Central Railroad Company of New Jersey may have sold the same and who are qualified to receive it under the terms of this decree.

Pending transfer the Wilkes-Barre Trustee shall receive such dividends declared on any stock standing in its name and may vote thereon at any stockholders' meeting.

The said Wilkes-Barre Trustee, having declared its submission to the jurisdiction of this court for the purpose of carrying out this provision of this decree and having entered its appearance herein by counsel, is made a party hereto.

The Jersey Central shall from time to time, upon the request of the Attorney General of the United States, furnish him with any information which he may require relating to the carrying out of this decree.

In order to enable the Jersey Central to dispose of the said stock of the Lehigh & Wilkes-Barre Coal Company to the greatest advantage without any accumulated dividends, the injunction heretofore granted in this suit is hereby modified, so as to permit the Jersey Central to collect and receive any dividends which have been or may be declared upon the stock of the Lehigh & Wilkes-Barre Coal Company previous to disposition thereof.

9. All trustees appointed by or pursuant to the foregoing provisions of this decree shall be entitled to reasonable compensation, the amount thereof to be approved by the court, for all services rendered by them as such trustees. The compensation of the trustees appointed pursuant to sections 3 and 4 hereof, together with counsel fees, taxes and other expenses incurred hereunder and approved by the court, shall be paid by the defendant Reading Company except so far as provided for under the provisions of paragraph (e) of section 3 hereof. The compensation of the trustee appointed by section 8 hereof, together with counsel fees,

taxes, and other expenses incurred hereunder and approved by the court, shall be paid by the Jersey Central.

Any trustee or trustees appointed by or pursuant to any provisions of this decree may at any time or from time to time appoint an agent or agents, and may delegate to any such agent or agents the performance of any administrative duties of such trustee or trustees.

10. Any individual or corporation appointed as trustee by or pursuant to this decree shall be subject to removal by this court in its discretion, and, in the event of such removal, the court shall appoint any other individual or corporation as successor.

11. Any individual, or corporation, appointed as trustee by or pursuant to this decree, or any agent of any such trustee, shall be accountable for action hereunder only in proceedings in this cause and any order of this court entered upon notice to such trustee, or such agent, to the Attorney General of the United States, and to the defendants, the Reading Company, the Railway Company, the Coal Company, the Jersey Central, and the Lehigh & Wilkes-Barre Coal Company, and to the new corporation, shall be full protection for any action taken pursuant thereto.

12. Any such trustee or any of the parties to this cause mentioned in section 11 may make application to the court at any time for such further orders and directions as may be necessary or proper in relation to the carrying out of the provisions of this decree, and jurisdiction of this cause is retained for the purpose of giving full effect to this decree and the decree entered herein on October 8, 1920, and for the purpose of making such other and further orders and decrees, or taking such other action, if any, as may be necessary or appropriate to the carrying out and enforcement of said decrees and the directions of the Supreme Court.

Form A.

No. ———. ——— Shares.

Certificate of Interest in Company Stock.

This is to certify that the undersigned (hereinafter designated as the "Trustee") has received and now holds for ———, or assigns, certificates representing ——— shares of the capital stock of the ——— Company, a corporation of the state of ———, without par value, subject to the terms of a decree entered the ——— day of June, 1921, by the District Court of the United States for the Eastern District of Pennsylvania, in the suit of the United States of America against Reading Company and others, to which decree reference is hereby made for a statement of the terms and conditions upon which this certificate is issued and of the rights of the holder hereof, and to which decree the holder of this certificate assents by acceptance hereof.

This certificate is one of a series of certificates issued by the undersigned in accordance with the terms of said decree, representing in the aggregate not exceeding 1,400,000 shares of the capital stock of said ——— Company.

The registered owner hereof, or his assigns, is entitled, upon the surrender of this certificate and upon filing with the trustee an affidavit in the form required by section 3f of said decree (to the effect, in substance, that the applicant does not own any shares of the capital stock of the Reading Company and is not acting for or on behalf of any stockholders of the Reading Company, or in concert, agreement, or understanding with any other person, firm, or corporation for the control of the ——— Company in the interest of the Reading Company, but in his own behalf in good faith) to receive a stock certificate for the number of shares of the capital stock of said ———

Company represented by this certificate and to receive the amount of all dividends (but without interest thereon) appertaining to the number of shares represented by this certificate collected and received by the trustee prior to such exchange; also to receive a dividend order or assignment executed by the trustee for any dividend declared but not then payable, appertaining to said shares which shall be vested, at the time of such conversion, in the trustee as the registered holder of said shares.

This certificate is transferable by the registered owner hereof, in person or by his duly authorized attorney, at the office or agency of the trustee in the city of New York upon surrender and cancellation hereof, and thereupon one or more new certificates for a like number of shares will be issued to the transferee in exchange therefor.

This certificate is not valid until countersigned by the registrar.

In witness whereof, ———, as trustee, has caused this certificate to be executed by ——— this ——— day of ———, 1921.

———, Trustee,
By ———.

Countersigned: ———, Registrar.

Form of Assignment.

For value received the undersigned hereby sells, assigns, and transfers unto ——— the interest in ——— company shares and dividends thereon represented by the within certificate and does hereby irrevocably constitute and appoint ——— attorney to transfer the same on the books of the ———, trustee, with full power of substitution in the premises.

"Dated ———.

In the presence of:

———.

———.

Form B.

State of ———, County of ———, ss.:

———, being duly sworn, deposes and says:

That deponent is a bona fide owner in his (or her) proper right of a certificate or certificates of interest numbered ——— for ——— shares registered in the name of ———, issued by ———, as trustee, under a decree entered on the ——— day of June, 1921, by the District Court of the United States for the Eastern District of Pennsylvania, in the suit of the United States of America against Reading Company and others, and makes this affidavit for the purpose of procuring the issue of shares of the capital stock of the ——— Company held by said trustee, in exchange for said certificate (or certificates) of interest. That deponent does not own in his (or her) own right any shares of the capital stock of the Reading Company, a corporation of the commonwealth of Pennsylvania, whether registered in his (or her) own name on the books of said Reading Company or registered in the names of others for deponent's use and benefit. That deponent, in making this application, is not acting for or on behalf of any stockholder of the Reading Company, or in concert, agreement, or understanding with any other person, firm, or corporation for the control of the ——— Company in the interest of the Reading Company, but in his (or her) own behalf in good faith.

Sworn to before me this ——— day of ———, 1921.

Form C.

State of ———, County of ———, ss.:

———, being duly sworn, deposes and says:

That he is ——— of the ——— Company, a corporation (or a joint-stock company), hereinafter called the "applicant." That said applicant is the bona fide owner in its own proper right of a certificate or certificates of interest numbered ——— for ——— shares, registered in the name of ———, issued by ———, as trustee, under a decree entered on the ——— day of June, 1921, by the District Court of the United States for the Eastern District of Pennsylvania, in the suit of the United States of America against

Reading Company and others, and that deponent makes this affidavit for the purpose of procuring the issue of shares of the capital stock of the ——— Company held by said trustee, in exchange for said certificate (or certificates) of interest. That said applicant does not own in its own right any shares of the capital stock of the Reading Company, a corporation of the commonwealth of Pennsylvania, whether registered in its own name on the books of said Reading Company or registered in the names of others for said applicant's use and benefit. That said applicant, in making this application, is not acting for or on behalf of any stockholder of the Reading Company, or in concert, agreement, or understanding with any other person, firm, or corporation for the control of the ——— Company in the interest of the Reading Company, but in its own behalf in good faith.

Sworn to before me this ——— day of ———, 1921.

Form D.

State of ———, County of ———, ss.:

———, being duly sworn, deposes and says:

That he is a member of the partnership of ———, hereinafter called the "applicants"; that said applicants are the bona fide owners in their own proper right of a certificate or certificates of interest numbered ——— for ——— shares, registered in the name of ———, issued by ——— as trustee, under a decree entered on the ——— day of June, 1921, by the District Court of the United States for the Eastern District of Pennsylvania, in the suit of the United States of America against Reading Company and others, and deponent makes this affidavit for the purpose of procuring the issue of shares of the capital stock of the ——— Company held by said trustee in exchange for said certificate (or certificates) of interest. That said applicants do not own in their own right any shares of the capital stock of the Reading Company, a corporation of the commonwealth of Pennsylvania, whether registered in the applicants' own name on the books of said Reading Company or registered in the names of others for their use and benefit. That said applicants, in making this application, are not acting for or on behalf of any stockholder of the Reading Company, or in concert, agreement, or understanding with any other person, firm, or corporation for the control of the ——— Company in the interest of the Reading Company, but in their own behalf in good faith.

Sworn to before me this ——— day of ———, 1921.

Form E.

State of ———, County of ———, ss.:

———, being duly sworn, deposes and says:

That is he is ——— of ———. That the trust estate represented by deponent is the bona fide owner in its proper right of a certificate or certificates of interest numbered ——— for ——— shares, registered in the name of ———, issued by ———, as trustee, under a decree entered on the ——— day of June, 1921, by the District Court of the United States for the Eastern District of Pennsylvania, in the suit of the United States of America against Reading Company and others. That deponent makes this affidavit for the purpose of procuring the issue of shares of the capital stock of ——— Company held by said trustee, in exchange for said certificate (or certificates) of interest. That said trust estate does not own any shares of the capital stock of the Reading Company, a corporation of the commonwealth of Pennsylvania, whether registered in the name of said trust estate on the books of said Reading Company or registered in the names of others for the use and benefit of said trust estate. That said trust estate, in making this application, is not acting for or on behalf of any stockholder of the Reading Company, or in concert, agreement, or understanding with any other person, firm, or corporation for the control of the ——— Company in the interest of the Reading Company, but in its own behalf in good faith.

Sworn to before me this ——— day of ———, 1921.

Form F.

State of ———, County of ———, ss.:

———, being duly sworn, deposes and says: That deponent is the bona fide purchaser in his (or her) own proper right of a certificate or certificates for ——— shares of the capital stock of the Lehigh & Wilkes-Barre Coal Company, transferred to him (or her) by the Central Railroad Company of New Jersey under a decree entered on the ——— day of ———, 1921, in the suit of the United States of America v. Reading Company, Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, the Central Railroad Company of New Jersey, the Lehigh & Wilkes-Barre Coal Company, et al., and makes this affidavit at or previous to the time or the issuance to him (or her) of such certificate or certificates for the purpose of evidencing his (or her) right to receive the same. That deponent does not own in his (or her) own right any shares of the capital stock of the Central Railroad Company of New Jersey, Reading Company, Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, whether registered in his (or her) own name on the books of said companies or any of them or registered in the names of others for deponent's use and benefit. That deponent in receiving the said certificate or certificates is not acting for or on behalf of any stockholder of the Central Railroad Company of New Jersey or of any other of the said companies or in concert, agreement or understanding with any other person, firm or corporation for the control of the Lehigh & Wilkes-Barre Coal Company in the interest of the Central Railroad Company of New Jersey or of any other of the said companies, but is acting in his (or her) own behalf in good faith.

Sworn to before me this ——— day of ———, 1921.

Form G.

State of ———, County of ———, ss.:

———, being duly sworn, deposes and says: That he is ——— of ———, a corporation (or a joint-stock company). That said corporation is the bona fide purchaser in its own proper right of a certificate or certificates for ——— shares of the capital stock of the Lehigh & Wilkes-Barre Coal Company, transferred to it by the Central Railroad Company of New Jersey under a decree entered on the ——— day of ———, 1921, in the suit of the United States of America v. Reading Company, Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, the Central Railroad Company of New Jersey, the Lehigh & Wilkes-Barre Coal Company, et al., and makes this affidavit at or previous to the time of the issuance to it of such certificate or certificates for the purpose of evidencing its right to receive the same. That said corporation does not own in its own right any shares of the capital stock of the Central Railroad Company of New Jersey, Reading Company, Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, whether registered in its own name on the books of said companies or any of them or registered in the names of others for its use and benefit. That said corporation in receiving the said certificate or certificates is not acting for or on behalf of any stockholder of the Central Railroad Company of New Jersey or of any other of the said companies or in concert, agreement or understanding with any other person, firm or corporation for the control of the Lehigh & Wilkes-Barre Coal Company in the interest of the Central Railroad Company of New Jersey or of any other of the said companies, but is acting in its own behalf in good faith.

Sworn to before me this ——— day of ———, 1921.

Form H.

State of ———, County of ———, ss.:

———, being duly sworn, deposes and says: That he is a member of the partnership of ——— (hereinafter called the "partnership"). That said partnership are the bona fide purchasers in their own proper right of a certificate or certificates for ——— shares of the capital stock of the Lehigh &

Wilkes-Barre Coal Company, transferred to them by the Central Railroad Company of New Jersey under a decree entered on the ——— day of ———, 1921, in the suit of the United States of America v. Reading Company, Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, the Central Railroad Company of New Jersey, the Lehigh & Wilkes-Barre Coal Company, et al., and makes this affidavit at or previous to the time of the issuance to them of such certificate or certificates for the purpose of evidencing their right to receive the same. That said partnership does not own in their own right any shares of the capital stock of the Central Railroad Company of New Jersey, Reading Company, Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, whether registered in their own name on the books of said companies or any of them or registered in the names of others for their use and benefit. That said partnership in receiving the said certificate or certificates is not acting for or on behalf of any stockholder of the Central Railroad Company of New Jersey or or any other of the said companies or in concert, agreement or understanding with any other person, firm or corporation for the control of the Lehigh & Wilkes-Barre Coal Company in the interest of the Central Railroad Company of New Jersey or of any other of the said companies, but is acting in their own behalf in good faith.

Sworn to before me this ——— day of ———, 1921.

Form I.

State of ———, County of ———, ss.:

———, being duly sworn, deposes and says: That he is ——— of ———. That the trust estate represented by deponent is the bona fide purchaser in its own proper right of a certificate or certificates for ——— shares of the capital stock of the Lehigh & Wilkes-Barre Coal Company transferred to him by the Central Railroad of New Jersey under a decree entered on the ——— day of June, 1921, in the suit of the United States of America v. Reading Company, Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, the Central Railroad Company of New Jersey, the Lehigh & Wilkes-Barre Coal Company, et al., and makes this affidavit at or previous to the time of the issuance to him of such certificate or certificates for the purpose of evidencing his right to receive the same. That said trust estate does not own any shares of the capital stock of the Central Railroad Company of New Jersey, the Reading Company, Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, whether registered in the name of said trust estate on the books of said companies or any of them or registered in the names of others for the use and benefit of said trust estate. That said trust estate in receiving the said certificate or certificates is not acting for or on behalf of any stockholder of the Central Railroad of New Jersey or of any other of the said companies, or in concert, agreement, or understanding with any other person, firm, or corporation for the control of the Lehigh & Wilkes-Barre Coal Company in the interest of the Central Railroad of New Jersey or of any other of the said companies, but is acting in its own behalf in good faith.

Sworn to before me this ——— day of ———, 1921.

UNITED STATES v. E. I. DU PONT DE NEMOURS & CO. et al.

Petition of HERCULES POWDER CO.

(District Court, D. Delaware. May 4, 1921.)

No. 280.

1. **Equity ⇐429—Modification of decree within jurisdiction of court.**
A court of equity, which entered a decree in a suit brought by the United States under Sherman Anti-Trust Act July 2, 1890, § 4 (Comp. St. § 8823), for dissolution of a combination as in restraint of trade, by which decree it authorized the creation of two new corporations to take over certain of the business of the combination to insure competition, making such corporations parties to the decree, and retaining jurisdiction "for the purpose of making such other and further orders and decrees as may become necessary for carrying out the plan herein set forth," *held* to have power to modify the decree on petition of one of such corporations as affecting that corporation, where no revision is made on the merits or with respect to any defendant concluded thereby, but where the modification is consistent with the purpose for which jurisdiction was reserved.

2. **Monopolies ⇐26(1)—Petition by corporation created pursuant to decree dissolving combination to construe or modify decree held appropriate procedure.**
Where a decree dissolving a combination as in restraint of trade required the creation of two new corporations to take over and operate certain plants of the combination, to insure and maintain competition, making them parties to the decree, one of such corporations, desiring to purchase certain additional plants, *held* to have properly applied to the court for a construction of the decree or its modification, if necessary, to permit the purchase.

In Equity. Suit by the United States against E. I. Du Pont de Nemours & Co. and others. On petition of the Hercules Powder Company, and motion to dismiss the same. Motion to dismiss overruled, and petition granted.

For prior opinion, see 188 Fed. 127.

Robert H. Richards, of Wilmington, Del., and J. Harry Covington and Edward B. Burling, both of Washington, D. C., for petitioner.

Henry S. Mitchell, of Washington, D. C., Sp. Asst. Atty. Gen., for the United States.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

WOOLLEY, Circuit Judge. Hercules Powder Company asks the court to modify the final decree in United States v. E. I. Du Pont de Nemours & Co. (C. C.) 188 Fed. 127, in a manner that will permit it to acquire the physical properties and other assets of the Ætna Explosives Company, Inc. The unusual character of this petition arises out of the unusual plan adopted by this court to effect the separation and thereafter to maintain the disassociation of a number of explosives companies found to comprise a combination in violation of the Sherman Anti-Trust Law. Act of July 2, 1890, c. 647, 26 Stat. 209 (Comp. St. §§ 8820–8823, 8827–8830).

In order to distinguish an application which upon first view would seem to lack jurisdictional warrant from one that may in the circumstances be entirely valid, it becomes necessary first to examine the decree sought to be modified and then to consider the reasons advanced for its modification. To this end, we shall give in outline only so much of the decree in the Du Pont Case and of the elaborate record made upon the petition of the Hercules Powder Company as will bring to view the matter on which we think the case turns and will show the reason for our judgment.

Shortly stated, the District Court of the United States for the District of Delaware, on June 13, 1912, entered a final decree in an action brought by the United States against forty parties, personal and corporate, for forming and maintaining an unlawful combination in restraint of interstate commerce. United States v. E. I. Du Pont de Nemours & Co. et al. (C. C.) 188 Fed. 127. The court, finding a combination and monopoly comprising twenty-seven of the defendants, nine of whom were corporations engaged in the manufacture of explosives, decreed its dissolution. At the time of the decree the Du Pont Company owned or by stock ownership controlled over forty plants for the manufacture of dynamite, black blasting powder, black sporting powder, smokeless sporting powder and government smokeless powder, so distributed throughout the United States as to cover every field of consumption and to restrain competition therein. In order to dissolve this combination and take away its control of the industry without at the same time confiscating or destroying the property of its owners, the court in its plan of dissolution conceived the idea of breaking up the combination and restoring competition by establishing two entirely new explosives corporations adequately equipped with plants strategically distributed with reference to competitive conditions. The theory of distribution which the court evolved for breaking the control of the combination is clear only to those familiar with the explosives industry. In order to understand this quite relevant matter it becomes necessary to digress for a moment.

The explosives industry is divided into two fields; that of production and that of consumption. The highly dangerous character of the product is a controlling factor in its movement from one field to the other. Aside from the factor of danger there also enters the economic element of cost. Sales prices in the explosives industry are, because of the nature of the product, arrived at on a basis precisely opposite from that which prevails in almost every other industry. In an ordinary business sales prices are based primarily on cost prices, and in almost every business cost prices are kept down by locating the producing plant at a point as near as practicable to the source of power or of raw material. This is due to the fact that ordinarily freight charges on fuel and raw materials are greater in the aggregate than on finished products. In the explosives industry, however, freight charges on raw materials are inconsiderable in comparison with freight charges on the finished product. The reason for this is obvious. Hence there arises the necessity of making dynamite and blasting powder as near

points of consumption as is possible and of having as many plants as there are areas to be served.

The field of competition of an explosives plant is coextensive with its trade. Trade of a given plant spreads in all directions toward its nearest competitors until points are reached where prohibitive traffic charges transform profits into losses. There the trade of that plant stops and competition ends. Beyond, trade and competition are taken up and carried on by other plants advantageously located with reference to freight rates until in turn their trade and competition dwindle and finally end for the same reason. It thus appears that control of the explosives industry is not gauged so much by the size and number of plants as by their distribution in regions of consumption. In other words, control of the industry is not so much numerical as it is territorial.

Returning to the decree, the court, having this basic fact in mind, attacked the defendant combination in its geographical control by causing to be brought into existence the two corporations referred to, one the Hercules Powder Company, the present petitioner, the other the Atlas Powder Company, and by decreeing that of the many widely distributed plants of the combination three dynamite plants situated respectively in New Jersey, Michigan and California, seven black blasting powder plants situated respectively in New York, Pennsylvania, Ohio, Wisconsin, Kansas and California, and two black sporting powder plants situated respectively in Connecticut and New York, should be transferred and conveyed to the Hercules Powder Company. It was likewise decreed that conveyance of other plants of the combination, varying in number and location, should be made to the Atlas Powder Company. The Du Pont Company was then permitted to retain its remaining plants which, in the scheme of things, were located in states where it was arranged the two new corporations should enter and become its principal competitors. That these two artificially created competitors should be potential in competition and thereby effective in carrying out the court's scheme of re-establishing competition in the explosives industry, the decree further provided that the Du Pont Company should not only give to them the plants in the number and regions prescribed but it should equip them with ample capital, man them with experts and officials equal to its own, and supply them initially with business.

The stock of these corporations was issued to stockholders of the companies out of whose properties they were capitalized, with certain limitations as to voting power, upon the theory that in time—as was later justified by events—stock ownership of the new corporations would pass into other hands.

In formulating this plan the court expressly made the newly created corporations "parties to this cause and subject to the provisions of this decree and bound by the injunctions herein granted," and by another provision of the decree retained jurisdiction of the cause "for the purpose of making such other and further orders and decrees as may become necessary for carrying out the plan herein set forth."

The Hercules Powder Company, by the petition now before the

court, represents that it has contracted to purchase from the Ætna Explosives Company, Inc., its physical properties and other assets, comprising technically five, but geographically considered four, dynamite plants, two blasting powder plants, and plants for the manufacture of blasting caps and their ingredients, located in various regions of consumption where in some of them competition with the Hercules Powder Company, though present, is inconsiderable, and in others where there is no competition at all, and asks the court whether the consummation of the proposed transaction of purchase would be in violation of its final decree in the Du Pont Case, either in spirit, language, or the particular purpose for which it, the Hercules Powder Company, was made a party, and prays the court so to modify its decree as to permit such acquisition.

To distinguish this case from others—Central West Publishing Company, American Press Association and Western Newspaper Union v. United States, 245 Fed. 91, 157 C. C. A. 387, L. R. A. 1918A, 1039; Petition of Moon-Hopkins Billing Machine Co., United States v. Burroughs Adding Machine Co. (oral opinion, District Court for the Eastern District of Michigan, decided March 3, 1913)—it should first be noted that neither the Ætna Explosives Company nor the Hercules Powder Company was a party to the action against the combination found unlawful. Although the Hercules Powder Company became a party to the court's decree and is bound by its injunctions, this is so by reason of the circumstances recited, not because of wrongdoing on its part. It should also be noted that if the prayer of the petition of the Hercules Powder Company be granted it will not change any term or provision of the final decree as it bears on the issues decided or on the parties concluded thereby. We are therefore presently concerned with the decree only as it affects the Hercules Powder Company and with the proposed transaction only as it affects the decree.

The United States moves to dismiss the petition upon several grounds, the one which we regard as the most important being:

"For lack of jurisdiction in a suit in equity under the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. 209), to make orders and decrees other than to prevent and restrain violations of the said Act."

For support of this proposition the United States cites section 4 of the Sherman Act (Comp. St. § 8823), vesting the several Circuit Courts "with jurisdiction to prevent and restrain violations of this Act," and maintains that Congress thereby limited the jurisdiction of the courts to the entry of decrees to that end, and therefore (as urged by the second ground of its motion) the court lacks "jurisdiction after the entry of the final decree in a suit to make any further orders or decrees not necessary to carry out the provisions or plan of the said final decree."

The United States, by its interpretation of the petition in its third ground, further challenges the action of the court:

"For lack of jurisdiction in equity to make a decree or order declaring, in advance of a proposed transaction, that such transaction will not be in violation of a decree of the court."

These several grounds are so closely related that we may view them together, discussing them in reverse order.

[1] Addressing ourselves to the third ground on which the motion to dismiss is based, we hasten to say, that if there were nothing more in the case than an endeavor by a party to obtain an order declaring in advance that a proposed transaction would not violate the decree, the court would have no jurisdiction to make such order. But we are confronted with a different situation in which we think the jurisdiction of this court is not limited to the making of decrees initially to prevent and restrain violations of the Anti-Trust Act, but extends upon proper occasion to the modification of decrees looking to the continued prevention and restraint of violations. United States v. United States Steel Corporation (D. C.) 223 Fed. 55, 161; United States v. Keystone Watch Case Co. (D. C.) 218 Fed. 502, 509. This may the more readily be done where, as here, the modification proposed does not call for revision of the decree on the merits, or against any person concluded thereby. The matter now before the court involves only a modification of the decree as it affects a party not sued but created and brought into the decree merely as an instrument to carry out its purpose. By retaining jurisdiction of the case the court retains control over its decree for the purpose of making it certain that dissolution is effected and competition restored and, under varying conditions, that competition is maintained. Further action upon a decree, such as that now invoked, is but the exercise of the usual powers of a court of equity to make its enforcement conform to conditions. United States v. United States Steel Corporation, 251 U. S. 417, 452, 40 Sup. Ct. 293, 64 L. Ed. 343, 8 A. L. R. 1121; Root v. Woolworth, 150 U. S. 401, 14 Sup. Ct. 136, 37 L. Ed. 1123; Gardner v. Dering, 2 Edw. Ch. (N. Y.) 133.

[2] The capital idea of the final decree is, as we have seen, the creation and thereafter the competitive operation of two new industrial units. One of them, the Hercules Powder Company, now seeks to expand its business. It feels that it cannot do this by acquiring new plants in new territories without hazarding offense against the decree by appearing, at least, to disturb that plan of competitive trade intended in the decree to be brought about and maintained by the distribution of its plants in regions of consumption theretofore served only, or mainly, by plants of the Du Pont Company. The question therefore is resolved to this: Whether it is permissible under the decree in the Du Pont Case for the Hercules Powder Company to expand in substantial measure and whether this court has jurisdiction to say so.

The decree which brought forth the Hercules Powder Company immediately subjected it to all of its injunctions. The main note running through these injunctions, however termed and to whomever directed, was against conduct "the effect of which is or *will be* to restrain interstate commerce in explosives." Manifestly this does not mean restraint of interstate commerce in explosives in any degree or the lessening of competition in any measure, for the decisions on the Sherman Act do not go that far. Standard Oil Co. v. United States, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834,

Ann. Cas. 1912D, 734; United States v. Keystone Watch Case Co. (D. C.) 218 Fed. 502. It means unlawful restraint of trade and unlawful restraint upon competition. But just what constitutes unlawful conduct when performed by a corporation built from parts of an old combination and created for a particular purpose raises a question which can, we surmise, be answered with certainty only by those who conceived the purpose and are charged with the task of carrying it out.

That there may be no doubt as to the matter which distinguishes this case and on which we shall rest our decision, we again advert to the fact that the Hercules Powder Company is something more than a manufacturing and selling corporation. It is an integral and vital part of the court's scheme of dissolution and is made a potential instrument for breaking up and for keeping broken up a combination found unlawful. Into that combination, of which it never was a part, the court injected it. It is the wedge which the court first made and then drove into the combination to pry apart its offending members, and thereafter to keep them apart. By its decree the court not only put the Hercules Powder Company there, but it still holds it there and, doubtless, intends to keep it there. Such being its position in relation to the many defendants in this litigation, the Hercules Powder Company hesitates to move in a transaction of this kind, disturbing, as it may, the principle on which the allocation of competitive producers in varying fields was made, lest it defeat the purpose for which the court used and still is using it. It therefore asks whether its intended purchase of the Ætna properties defeats or otherwise disturbs that purpose; in other words, it asks the court to interpret and, if need be, modify its own decree so that the transaction may not violate it. 10 Enc. Pl. & Pr. 1108; Wells F. & Co. v. Oregon R. & N. Co. (C. C.) 19 Fed. 20, 22; Rodgers v. Pitt (C. C.) 89 Fed. 424; Tornanses v. Melsing, 106 Fed. 775, 778, 45 C. C. A. 615; Magennis v. Parkhurst, 4 N. J. Eq. 433; 2 High on Injunctions, § 1416.

If the Hercules Powder Company had come into existence in an ordinary way and was concerned with nobody's business but its own, it doubtless could expand as any other corporation; that is, by building and acquiring properties in new fields, always, of course, with proper regard to the Sherman Anti-Trust Act. But the Hercules Powder Company is bound not by the Sherman Act alone but by the court's decree, demanding of it a function not acquired from its charter or from general law, but imposed by the court. Why should not the court in such case construe its decree? True, the Hercules Powder Company is bound to know the law, and this includes the Anti-Trust Law. If that company were not a party to the court's decree of the character we have been at pains to describe, it might not be heard to inquire whether the proposed transaction would violate the Sherman Act. But that is not the matter here. Rather it is but incidental to the matter. There is no representation by the United States that the proposed purchase of the Ætna properties by the Hercules Powder Company is in itself violative of the Sherman Act. Of course, the proposed purchase would be violative of the decree if it were violative

of the Sherman Act, as it would be violative of the decree if thereby the Hercules Powder Company lost its wedge-like function though the transaction were not violative of the Sherman Act. Plainly then we have jurisdiction to pass upon the proposed purchase and determine whether it would violate the decree in any of its aspects.

Having jurisdiction to entertain the petition, the next question is, whether the case calls for its exercise. The United States says that it does not, because of insufficient averments of fact.

Turning to the proposed transaction, it should be noted that the United States, while maintaining that the transaction would be opposed to the spirit of the final decree in the Du Pont Case and would have a tendency detrimental to the purpose of the Sherman Anti-Trust Law, does not take the position that if carried out it would violate that law. Unless we discern in the proposed transaction, considered with reference to the Hercules Powder Company in particular and to the industry in general, something at least suggestive of violation of the Anti-Trust Law, we are free to pass to a consideration of the lawfulness of the transaction with reference to the plan of the decree.

A careful review of the explosives industry set forth by the petitioner in elaborate detail with reference to areas of consumption, number and distribution of producing plants, and competitive conditions, the accuracy of which is in no particular challenged, has convinced us that in permitting the Hercules Powder Company to acquire the several properties of the Ætna Explosives Company actual competition in the industry within their respective regions will remain undiminished, though the number of competitors will, of course, be reduced by the withdrawal of one. Indeed, it is persuasively represented that competition will be increased by thus strengthening the Hercules Powder Company in its contest for business against the Du Pont Company, its strongest rival. However that may be, we are satisfied, after a careful study of a great volume of data gathered from authentic sources, a recital of which in this opinion is quite impracticable, that the proposed purchase of the Ætna properties by the Hercules Powder Company will not disturb the position in the industry which the court has made for the Hercules Powder Company; that it will not abridge the purpose for which the court employs that company in maintaining the separation of the offending members of the combination previously existing; and that it will not throw out of balance the competitive conditions in the industry which the court sought—and which evidently it has achieved—by the instrumentalities of the Hercules Powder Company and the Atlas Powder Company in its scheme of dissolution.

Of course, after the acquisition of the Ætna properties, the Hercules Powder Company will remain bound by all applicable injunctions of the main decree in the Du Pont Case, and, as always, it will continue bound in its business conduct to observe at its peril the inhibitions of the Sherman Anti-Trust Law. The modification of the decree which we shall direct will be in no sense a shield against the consequences of any unlawful conduct which the Hercules Powder Company may in the future pursue.

As the motion to dismiss is in the nature of a general demurrer, we direct that an order be drawn so modifying the final decree in the Du Pont Case that it may conform with the prayers of the amended petition of the Hercules Powder Company and with this opinion.

Ex parte LAWRENCE et al.
and four similar cases.

(District Court, D. Montana. June 25, 1921.)

No. 327.

Internal revenue ⇐2, 47—Provisions of internal revenue law not repealed by National Prohibition Act.

An indictment for having in possession and operating a still without registration or giving bond, in violation of Rev. St. §§ 3258, 3281 (Comp. St. §§ 5994, 6021), in the absence of language to that effect, will not be construed as charging that the still was being operated in making liquor for beverage purposes in violation of the National Prohibition Act, and with respect to operation not unlawful under that act it does not repeal said sections of the internal revenue law.

On petition by Charles Lawrence for writ of habeas corpus, heard with four other similar cases. Denied.

Wheeler & Baldwin, of Butte, Mont., for petitioner Lawrence.

A. W. Stangeland, Frank Lenz, and Geo. D. Toole, all of Butte, Mont., for petitioners in four like cases.

Geo. F. Shelton, of Butte, Mont., U. S. Atty., for respondent in Chas. Lawrence case.

John L. Slattery, U. S. Atty., and Ronald Higgins, Asst. U. S. Atty., both of Helena, Mont., for other respondents.

BOURQUIN, District Judge. The indictments upon which these applicants for habeas corpus were convicted and are imprisoned charge that they violated section 3258, R. S. (Comp. St. § 5994), in that they had in their possession stills set up and failed to register the same, section 3281, R. S. (Comp. St. § 6021), in that they carried on the business of distillers without having given bonds, and section 3282, R. S. (section 6022), in that they made mashes fit for the production of spirits on premises other than distilleries duly authorized, all of dates since the Volstead Act (41 Stat. 305).

The applications are based upon the contention that said sections of the revenue laws are repealed by said act, and in consequence the sentences are void and imprisonment illegal; and in support thereof the decision by the Supreme Court in the Yuginovich Case, 255 U. S. —, 41 Sup. Ct. 551, 65 L. Ed. —, of June 1, 1921, is cited. This decision has been anxiously awaited by courts hopelessly divided in respect to the extent that the Eighteenth Amendment and act repeal the old

revenue laws, and yet it little clarifies the problem. It determines that certain section of the old revenue laws, including two here involved, are partially repealed or superseded; but it is in view of circumstances that may or may not be present here and in any other case, dependent apparently upon the particular court's construction of the indictment before it and whether that construction is based on conjecture or surmise, or on the language in the indictment used. The indictment in the Yuginovich Case is like those here involved, in all material and essential averments. There, as here, the charge relates to and is limited to acts that are yet lawful, viz. distillation of intoxicating liquors, imputing criminality thereto only because done in unlawful circumstances, viz. without compliance with the old revenue laws.

The gist of the offenses charged are not the accuseds' acts of commission, but are their acts of omission. And why it is conjectured that the Yuginovich indictment intends to charge only acts of commission that are unlawful in any circumstances, viz. distillation of intoxicating liquor for beverage purposes, is also conjectured.

Neither that indictment nor any of these at bar contains a word or fair inference that the object of the offenses otherwise fully charged is to devote the liquor to beverage purposes. If any of them did, either it or much other matter therein would be superfluous matter to be ignored, and any such inference would violate the principles of criminal pleading. It hardly needs be pointed out that in respect to charges of making liquor for beverage purposes, all these indictments are fatally defective by reason of failure to expressly aver the essential element that the liquor was made for "beverage purposes." Otherwise, the Yuginovich indictment would have been sustained as a sufficient charge of violation of the Volstead Act, even though brought in view of the old revenue laws. See Williams v. U. S., 168 U. S. 389, 18 Sup. Ct. 92, 42 L. Ed. 509. For all that appears, Yuginovich and these applicants may have been proceeding in strict compliance with the Volstead Act.

If indictments are subject to the method of construction that the Supreme Court finds the trial court adopted in the Yuginovich Case, amongst other things it tends to the novel principle that an accused, fully charged of one offense, may escape on plea of his own wrong, viz. that he did what was charged, but with intent to commit and did commit another offense; for if it is a defense when averred or inferred in the indictment, it ought equally to be a defense to be proven by accused when not in the indictment. The rule is otherwise. Acts as here capable of being done lawfully may be done unlawfully for various reasons and objects, and in violation of several statutes; and it is no defense that the act charged to be unlawful for one reason and object, and against one statute, is also unlawful for other reasons and objects, and against other statutes. See Gavieres v. U. S., 220 U. S. 342, 31 Sup. Ct. 421, 55 L. Ed. 489.

It is true revenue and other regulations are not to sanction unlawful acts and business. They are applied to lawful acts and business, but always such acts and business are capable of also being done unlawfully or to unlawful ends. When so done, what principle avoids the tax, reg-

ulations, and penalties? Clearly the owner of an auto cannot thus escape upon the plea his car was intended for and devoted to only unlawful transportation of intoxicants. Yet he could not register and secure license for this unlawful object and use. So of a pawnbroker who would attempt to plead he loaned only upon stolen goods.

The Yuginovich Case is not controlling here. The Supreme Court emphasizes that it is bound to construe the indictment as did the trial court, and so is restricted to narrow limits. It confines its decision to a charge relating to manufacture of intoxicants for beverage purposes, and in respect thereto finds that the intent of the Volstead Act is to partially repeal or supersede some of the old revenue laws. In a like case it will control. These at bar are not like cases. These indictments are not construed in violation of language and principle to charge offenses consisting of acts of commission unlawful in any circumstances, viz. distillation of intoxicating liquors for beverage purposes, but are construed in obedience to both to charge offenses consisting of acts of commission in themselves lawful, but done under unlawful circumstances of omission, viz. distillation of intoxicating liquor without compliance with the old revenue laws.

This court held in Sohm's Case, 265 Fed. 910, that in cases like these at bar the Volstead Act did not repeal the old revenue laws so far as herein involved. The reasons for that view, and to which the court adheres, appear in Sohm's Case and in others of like tenor, and need not be repeated. It is believed the Supreme Court's decision in Yuginovich's Case does not militate against the rule of Sohm's Case, even if it does not tend to support it. It follows that applicants' sentences and imprisonment are legal, and habeas corpus is denied.

At hearing applicants were enlarged upon their own recognizance, and may so continue for 30 days, to give opportunity to seek review on appeal, and until any appeal taken is determined.

CADWALADER v. LEDERER, Collector of Internal Revenue.

(District Court, E. D. Pennsylvania. January 24, 1921.)

No. 7026.

1. **Internal revenue ⟸7—That excise tax is measured by income return does not make it an income tax.**
   That the excise tax levied by Congress on all those engaged in any kind of business is measured by the income return does not make an income tax of what is really an excise tax, or charge made for the privilege enjoyed.

2. **Internal revenue ⟸9—Attorney receiving commissions for acting as executor, but not making a business of so acting, not subject to excise tax.**
   Under the act of Congress imposing an excise tax on all those engaged in any kind of business, and the regulations thereunder, the question of liability to the excise tax depends upon whether the taxpayer made a business of doing what he did do, and not on the distinction made by some political economists between earned and unearned income, or in the fact as to whether the income comes from a taxpayer's personal labor or from investments, and hence an attorney, acting as executor and receiving commissions as such, but not making a business of so acting, is not subject to the excise tax.

3. **Internal revenue ⟸38—Plaintiff, suing to recover excise tax, has burden of making out case.**
   One bringing suit to determine the lawfulness of a tax payment exacted of him had the burden of making out his case, by showing that he was not subject to the excise tax exacted.

4. **New trial ⟸5—Not granted when case substantially a case stated and is to be appealed.**
   Where the case is substantially a case stated, and is to have an appellate experience, a new trial will not be granted, as the only difference would be in the party appealing.

At law. Action by John Cadwalader, Jr., against Ephraim Lederer, Collector of Internal Revenue. On motion for a new trial after verdict for plaintiff. Motion denied.

Thomas Raeburn White, of Philadelphia, Pa., for plaintiff.
Charles D. McAvoy, of Philadelphia, Pa., U. S. Atty., for defendant.

DICKINSON, District Judge. This action was brought to determine the lawfulness of a tax payment exacted of plaintiff. No other question is raised. Although no longer of as much practical importance as formerly, the distinction between an excise and direct tax remains. It is preserved in our current tax laws. It is the distinction (if not difference) between an income or direct tax and an excise tax, based upon the privilege of following some trade, profession, occupation, calling, or business. We now have both taxes, but the rate of assessment differs. To this difference in rate is due the present controversy. The plaintiff asserts that he should pay at the income rate; the defendant insists that the excise rate governs.

[1] There is another line of distinction, not easy to draw, but commonly recognized. It marks the line which separates those who are engaged in the profession or business of doing certain things and those who occasionally do the same things, but who do not make a profession or business of doing them. It was upon this distinction that the instant case was tried. The plaintiff makes a profession of the practice of the law. Speaking in commercial terms, that is his business. Congress has levied an excise tax, to be paid by all who are thus engaged in any kind of business. It happens that the tax is measured by the income return. This is a mere coincidence, and this mere circumstance does not make an income tax of what is really an excise tax, which might be levied in the form of a flat sum. An excise tax is in a very real sense a charge made for the privilege enjoyed. Of course, in the sense of benefits received, this is also true of every tax.

The plaintiff made return of the income derived from the practice of his profession, and based on this paid what we have called the excise tax. It happens that he is also executor and trustee of the estate of a deceased friend, and as such received a commission. Of this he also made a return, including it with other income received as income from other sources than his profession. Upon this he admits he should pay what we have called an income tax. The defendant, however, exacted payment, upon this part of his income, on the excise tax basis. The theory upon which the defendant justifies the tax levy made by him is evolved out of the following propositions:

(1) There is now a known business, in which trust companies, at least, engage, known as the business of acting in any fiduciary relation. This is undisputed.

(2) The plaintiff received an income for doing one of the things which trust companies make a business of doing. This also is undenied.

(3) The plaintiff was engaged in a recognized business, and we need not concern ourselves with the inquiry of how limited or extensive the business was, except in so far as this measures the amount of the tax.

It is over the third proposition the parties lock horns. The argument of the plaintiff is that, although it is true that trust companies, and perhaps individuals, make a business of acting as executors and trustee, it does not follow that the plaintiff does so. Whether he does so is a fact to be found, and liability to an excise tax depends upon that finding.

The jury found for the plaintiff. We have in consequence this fact in the case that the plaintiff does not make acting as executor and trustee any part of his profession or business. There might be some doubt of the propriety of submitting this question to the jury. The plaintiff asked the trial judge so to do, and it was done on the theory that it did the defendant no possible harm, as he was asking for a directed verdict in his favor.

[2] As the case was tried, it now turns upon the question of law of whether liability to an excise tax depends upon the fact that the

taxpayer was doing what it is the recognized business of some people to do, or whether it depends upon the fact that the taxpayer made a business of doing what he did do. If the latter is the turning point of the case, we see no reason to disturb the verdict.

The decisive proposition as now urged, however, is somewhat different. It is, as nearly as we can phrase it, that Congress has imposed the excise rate of tax upon all income, the source of which in whole or part is the personal labor of the taxpayer, as distinguished from income derived from rents, interest, dividends, or other sources commonly spoken of as investments. In other words, the difference in the rate is not based upon the distinction between direct and excise taxes, but upon the distinction which some political economists make between "the earned and the unearned increment," using the latter term in the broad sense of any income toward which personal service has contributed nothing.

Another example of the distinction is that made between a business to which those engaged in it devote their personal services, but employ only "a nominal capital," or none at all, and the same kind of a business in which a substantial capital is employed.

With respect to the theory on which the case was tried, it seems to us that it is very fairly and clearly stated in article 8 of the regulations. A contrast is there drawn, or at least distinction made, between what a person makes it his trade, profession, business, or emphatically vocation to do, what he holds himself out as prepared to do, and some particular thing of the same kind, which he does, but which is an incidental, accidental, isolated, particular thing, which he happened to do. We confess, however, our inability to grasp the thought of a distinction between such isolated things, growing out of the importance of the thing done or the demands which it makes upon the time of the person doing it. It seems to us that this works confusion in the thought of the real distinction as expressed in the regulations.

The whole thought is conveyed in an expression which is not uncommon when a person is asked to do something which, as another expression goes, is "out of his line." The expression first referred to is, "I don't make a business of doing this, but I will do it for you." The doing of it may result in such person devoting practically his whole time to it, without involving the thought of making it his business. There is much the same distinction made between amateurs and professionals in athletics, although the test usually applied there is the commercial test. Nevertheless the distinction referred to exists. The amateur does not make, as the professional ex vi termini does, the sport his trade, occupation, business, or profession, even although he, as he not infrequently does, devotes more time in developing and perfecting skill in it than the avowed professional does. The difference is suggestive of a difference in motive, but there is the other thought also.

[3] This case, however, has taken a turn which compels us to take an altogether practical view of the disposition to be made of it. The burden was, of course, upon the plaintiff to make out his case. This

he did, if the theory, upon which the case was submitted, was the true theory, by his testimony that his profession was that of a lawyer, and that he did not make a business of acting as executor, although he had so acted in one isolated case, wholly disassociated from his professional work.

There was no controversy over any of the evidentiary facts, except as to their relevancy. Some evidence was offered, and objected to as irrelevant. The trial judge had in mind the expectation that he would be asked to direct a verdict for the plaintiff or the defendant. The question of the admission or rejection of evidence was in this view of no practical importance, as all the questions could be considered at the same time. The evidence was in consequence all admitted, subject to the objection, and the parties were protected in their rights by acting on the suggestion to move to strike out. Everything either party had to offer was permitted to go in under this arrangement, and it was given no attention. When, however, the case unexpectedly took the turn of a jury case, the evidence became of at least technical importance. No one recalled definitely what evidence was subject to objection. The situation was summarily and perfunctorily met by granting or refusing (whichever was done) all motions to strike out. There were no trial rulings of any real importance. Both parties have their respective positions presented in the admitted facts.

The question raised, as before stated, is essentially one of law. There is nothing to be gained by a retrial of the case. It is substantially a case stated, and the practically sensible thing to do is to dispose of it as such.

[4] We find no trial errors, if the case was submitted upon the right theory, and, as already found, we see no reason to disturb the verdict. We are by no means so clear that the trial theory is the right theory upon which to enter judgment. If the case is to have an appellate experience, the only difference which the judgment entered makes is in the party appellant and appellee. There is no value in this difference which would justify a new trial.

The motion for a new trial is denied, and plaintiff has leave to enter judgment on the verdict.

In re TAYLOR-LOGAN CO.

(Court of Appeals of District of Columbia. Submitted May 10, 1921. Decided June 6, 1921.)

No. 1417.

Trade-marks and trade-names and unfair competition ⊂=43—"Mail Order" as trade-mark is apt to be confused with "Mail."

An application to register the words "Mail Order" as a trade-mark for various kinds and grades of paper was properly denied as being so similar to an existing trade-mark, consisting of the word "Mail" either alone or printed on a representation of a mail box, as likely to cause confusion or mistake in the minds of the public, or to deceive purchasers, under Act Feb. 20, 1905, § 5 (Comp. St. § 9490).

Appeal from the Commissioner of Patents.

Application by the Taylor-Logan Company for registration of a trade-mark. Application denied, and applicant appeals. Affirmed.

George H. Kennedy, Jr., of Worcester, Mass., for appellant.

T. A. Hostetler, of Washington, D. C., for the Commissioner of Patents.

SMYTH, Chief Justice. Appellant asked the Commissioner of Patents to register the words "Mail Order" as a trade-mark for various kinds and grades of paper manufactured by it. The request was denied on the ground that there were registered for J. C. Blair Company two similar marks, which were applied to the same class of goods, namely, paper of different kinds, and that if appellant's mark were granted registration it would "be likely," in the language of the statute, "to cause confusion or mistake in the mind of the public, or to deceive purchasers. * * *" 33 Stat. 725 (Comp. St. § 9490).

The Blair Company's marks consist, in one case, of a representation of a mail box with the word "Mail" on it, and, in the other, of the word "Mail" printed in a special manner. The word "Mail," then, is common to all the marks and is prominent in each. Appellant takes a part of the Blair Company's mark in one case and the entire mark in the other and adds to it the word "Order." The word "Mail" is the principal element in each case, and the appellant, by appropriating it, has formed a mark which, in our judgment, is deceptively similar to each of the Blair Company's marks.

"It is not necessary to constitute an infringement that every word of a trade-mark shall be appropriated. It is sufficient that enough be taken to deceive the public in the purchase of a protected article." Saxlehner v. Eisner & Mendelson, 179 U. S. 19, 33, 21 Sup. Ct. 7, 45 L. Ed. 60.

Marks which have been held to be deceptively similar are "Autonoisettes" and "Auto" (Walter Baker & Co. v. Delapenha et al. [C. C.] 160 Fed. 746); "Pride" and "Pride of Syracuse" (Hier v. Abrahams, 82 N. Y. 519, 37 Am. Rep. 589); "Queen" and "Queen of the West" (Ammon & Person v. Narragansett Dairy Co. [D. C.] 252 Fed. 276; "Chancellor Club" and "Club Cocktails" (In re S. C. Herbst Importing Co., 30 App. D. C. 297); "Orchestrola" and "Orchestrelle" (Thomas Manufacturing Co. v. Æolian Co., 47 App. D. C. 376); "Mentho-

listine" and "Listerine" (Lambert Pharmacal Company v. Mentho-Listine Chemical Company, 47 App. D. C. 197); and "U-Lavo" and "Lava" (William Waltke & Co. v. Geo. H. Schafer & Co., 49 App. D. C. 254, 263 Fed. 650).

The principles governing the solution of the question as to whether or not trade-marks applied to the same class of goods are likely to produce confusion have been so often discussed and applied by this court that we do not think it necessary to do more than to direct attention to the decisions just referred to and to those cited by the Commissioner of Patents in his opinion, which we affirm.

Affirmed.

LEE v. BURWELL.

(Court of Appeals of District of Columbia. Submitted February 7, 1921. Decided June 6, 1921.)

No. 3477.

Landlord and tenant ⇐278½, New, vol. 11A Key-No. Series—Lessee's affidavit of defense held sufficient.

In summary proceedings between a landlord and tenant, an affidavit of defense by the tenant, denying that the landlord was a bona fide purchaser of the premises for her own use and occupancy as a home, and alleging that she conspired with the former owner to aid him in securing possession of the property, and that the tenant had rented the property from the United States Housing Corporation for a period not yet expired, and had received no notice from the Housing Corporation to vacate, states a sufficient defense under the nineteenth rule to justify the submission of the case to a jury.

Appeal from the Supreme Court of the District of Columbia.

Landlord and tenant proceeding by Maud E. Lee against Martha Burwell. From a judgment of the Supreme Court, on appeal from the municipal court, holding the affidavit of defense sufficient to present an issue to be tried by a jury, the landlord appeals. Judgment affirmed, and cause remanded for further proceedings.

W. W. Millan and R. E. L. Smith, both of Washington, D. C., for appellant.

Matthew E. O'Brien, of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. This is a landlord and tenant proceeding, here on special appeal from a decision of the Supreme Court of the District of Columbia, holding appellee's affidavit of defense sufficient under rule 19 to present an issue of fact to be tried by a jury.

The case reached the Supreme Court from the municipal court in the usual way. In the affidavit of merit the landlord, Lee, set out the purchase of the premises in question for her own use and occupancy as a home. The tenant, Burwell, denied that Lee is a bona fide purchaser, and charged that the latter is a co-conspirator with one McDonald, the former owner, to aid him in securing possession of the property. She

also averred that she rented the property from the United States Housing Corporation for a period to terminate 90 days after the proclamation of peace with Germany, and that she still holds under said lease and has received no notice from the Housing Corporation to vacate.

This, we think, if shown to be true, constituted a sufficient defense to justify the submission of the case to a jury, and the court was right in denying appellant's motion for judgment.

The judgment is affirmed, with costs, and the cause remanded for further proceedings.

Affirmed 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.

COMPAGNIE FRANCO-INDOCHINOISE v. BENSON, Rear Admiral, et al.

(Court of Appeals of District of Columbia. Submitted April 4, 1921. Decided June 6, 1921.)

No. 3448.

Judgment ⇐793(5)—Holder of judgment lien against vessel seized and sold by shipping board not entitled to relief in equity.

The holder of a judgment lien against a German-owned vessel, which was subsequently seized by the United States Shipping Board and sold to private purchasers, is not entitled to equitable relief for the protection of its lien, since, if the lien was not affected by seizure, it can be enforced against the vessel in the hands of the purchasers, and, if the seizure extinguished the lien, the creditor's remedy is not in equity.

Appeal from the Supreme Court of the District of Columbia.

Suit by the Compagnie Franco-Indochinoise against Rear Admiral B. N. Benson and others, comprising the United States Shipping Board and the Emergency Fleet Corporation. From a decree sustaining defendants' motion to dismiss bill, complainant appeals. Affirmed.

E. F. Colladay, of Washington, D. C., for appellant.

J. E. Laskey, of Washington, D. C., for appellees.

ROBB, Associate Justice. Appeal from a decree in the Supreme Court of the District, sustaining appellees' motion to dismiss the bill of complaint.

In the bill appellant sets forth that it had obtained a judgment lien upon the Esslingen, a German-owned vessel, for $43,888.78, and that thereafter, on June 3, 1917, the President of the United States, by executive order under authority of a joint resolution of Congress approved May 12, 1917, took over the possession of the vessel. It is further alleged that, although this vessel remained subject to appellant's lien, appellees refused to recognize any rights of appellant in the vessel and were about to sell her.

The prayers of the bill seek an order restraining the sale pendente lite and permanently, or, in the alternative, if the court be of opinion that appellees may make the sale, to declare the proceeds impressed with a trust for appellant's benefit to the extent of its lien.

In the affidavit filed with the motion to dismiss or affirm, it is set forth that, through the United States Shipping Board, the Esslingen, now called the Nyanza, has been sold and delivered at the port of Philadelphia, Pa., to the Nyanza Steamship Company, Limited. Appellant, in a supplemental answer to the motion to dismiss or affirm, alleges that there remains due on the purchase price of the vesssel a sum greatly in excess of the amount of the judgment lien.

We are of the view that appellant has not made out a case for equitable relief. If, as contended by appellant, its lien was not affected by the action of the government in taking over the vessel, the purchaser took subject to the lien and appellant's remedy is unimpaired. On the other hand, if, as alleged by appellees, the taking by the government extinguished the lien, appellant's remedy is not in equity. It therefore is unnecessary to pass upon the question whether this is a suit against the United States.

The decree must be affirmed, with costs.

Affirmed.

EICHBERG v. UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION.

(Court of Appeals of District of Columbia. Submitted March 7, 1921. Decided June 6, 1921.)

No. 3447.

1. **Reference ⟸24—Court has inherent power to refer case with consent of the parties.**
   A court has power with consent of the parties to refer a case pending before it for the ascertainment of the facts and the pronouncement of the law.

2. **Reference ⟸24—Reference without objection may be considered as reference by consent.**
   Reference by consent may be made either by written stipulation or by an order agreed to in open court, and a reference made without objection by the parties may be treated as equivalent to a reference by consent.

3. **Reference ⟸8(1)—Code provision in law actions applies only to mutual accounting.**
   Code of Law, § 254, providing for reference of actions at common law founded upon account, applies only to actions wherein a mutual accounting between the parties is involved.

4. **Courts ⟸352—Jury ⟸31(8)—Federal courts have inherent power to make references in common-law actions; compulsory reference to determine issue not authorized.**
   In the federal courts inherent power resides to make references in actions at law to the same extent as in equity, though a compulsory reference to determine the issues is impossible in such courts because of Const. Amend. 7.

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5. Reference ⟸3—Statute authorizing reference in case of mutual accounting does not prohibit reference in other cases.
Code of Law, § 254, authorizing reference in common-law action founded on account, does not exclude references in other actions at law under the inherent power of the court.

6. Reference ⟸99(6)—Auditor's report without exception is prima facie evidence before jury.
Under a general submission of issues in a common-law action to an auditor, the auditor's report, when admitted on trial before the jury, is prima facie evidence, in the absence of exceptions, both of the facts and of the conclusions of fact therein contained.

7. Reference ⟸102(4)—Admission of report in evidence before jury is acceptance by court.
The admission of auditor's report in evidence before the jury amounts to an acceptance of the report by the court.

8. Reference ⟸100(4)—Exceptions to auditor's report must correspond to issues made by pleading.
The exceptions to an auditor's report in a common-law action, to be sufficient to avoid judgment on the report, must respond to the original issues made by the pleadings, as further defined and limited by the approved findings of the auditor.

9. Reference ⟸100(4)—Exceptions disputing auditor's report on facts raise issue for trial by jury.
Proper exceptions to an auditor's report in a common-law action, in so far as they dispute the findings of fact by the auditor, create issues to be submitted to the jury, on which the trial will proceed in all respects as if no reference or report had been made.

10. United States ⟸125—Emergency Fleet Corporation is not agency of government exempt from suit.
The Emergency Fleet Corporation is not such an agency of the government as to render it immune from suit.

11. United States ⟸125—Emergency Fleet Corporation is separate entity, notwithstanding delegation of authority by President.
The Emergency Fleet Corporation is an entity separate from the government, notwithstanding the delegation by the President of authority to exercise a portion of the power granted to him under Act June 15, 1917, and the delegation of such authority does not render the corporation immune from suit.

12. Reference ⟸100(4)—Exceptions to auditor's report must be precise and definite.
Exceptions to report of an auditor must be specific, and point out with the utmost care the particular point to which exception is made.

13. Sales ⟸22(4)—Correspondence held to show acceptance of offer notwithstanding request for larger shipments.
An exchange of letters and telegrams between a lumber company and the Emergency Fleet Corporation, whereby the lumber company agreed to furnish a stated quantity of timber each month, which offer was accepted by a telegram and letter, establishes a contract for the furnishing of the timber, notwithstanding a request in the letter of acceptance that more timber be furnished each month than was stated in the offer.

14. Corporations ⟸432(5)—Party contracting with purchasing agent need not prove agent's authority to bind corporation.
A party contracting with the purchasing agent of the Emergency Fleet Corporation can rely on the agent's authority to bind the corporation, and need not prove the agent had such authority in an action against the corporation for breach of the contract.

Smyth, Chief Justice, dissenting in part.

Appeal from the Supreme Court of the District of Columbia.

Action by Maurice H. Eichberg, trading as the National Timber Company, against the United States Shipping Board Emergency Fleet Corporation for damages resulting from an alleged breach of contract. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Ernest W. Roberts and Clinton Robb, both of Washington, D. C., for appellant.

J. E. Laskey and C. W. Arth, both of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. This is a suit for damages resulting from an alleged breach of contract. The contract consisted of the following proposal, submitted on August 2, 1917, by appellant, hereafter, for convenience, referred to as plaintiff:

"United States Shipping Board Emergency Fleet Corporation, Washington, D. C.:

"We will furnish two (2) schedules per month, as per attached sheet, at prices set opposite each item. Prices understood to be f. o. b. loading point, inspection at loading point as required; payments to be arranged at the time of inspection.

"Stock to be sound, square edge, water oak or white oak, and to be inspected according to the rules of the Hardware Manufacturers' Association for sound and square edge timber, except that 1" shall be allowed and paid for in excess of the sizes specified, and further, in case of any flitches, the stock shall be measured as an average of both faces inside the bark.

"It is possible that, after the writer returns to Alabama, and has organized the necessary crews to get this matter out, we may find that we can produce a greater quantity than herein submitted. In such a case we will be pleased to advise you of the fact and get out a greater number of schedules if required.

"Yours truly, National Timber Company."

Defendant Fleet Corporation, on August 3, 1917, through its purchasing agent, telegraphed plaintiff as follows:

"As per our conversation yesterday, you may proceed to make arrangements to get out enough timber for twenty schedules as per list furnished. Writing you to-day. R. E. Wood,

"Emergency Fleet Corporation."

The letter referred to was as follows:

"August 3, 1917.

"Mr. M. H. Eichberg, National Timber Company, Mobile, Ala.—My Dear Mr. Eichberg: Timber Schedules. We desire you to get out 20 schedules as per the list you recently furnished us, at the rate, if possible, of 4 schedules per month. Mr. Haynen will see you in Mobile within the next few days.

"Yours very truly, R. E. Wood, General Purchasing Officer."

It is alleged that, in pursuance of this agreement, plaintiff expended "large sums of money in securing and providing additional necessary machinery, materials and labor for performing said contract," and that defendant, on the 21st day of August, 1917, without any just cause, canceled in writing said contract, to plaintiff's damage in the sum of $117,786.27.

Defendant pleaded (1) that the Fleet Corporation is a governmental agency, and its acts were the acts of the United States; and (2) that

"defendant did not promise as alleged." Plaintiff demurred to the first plea, which demurrer was sustained by the court. Under leave of court, two efforts were made to amend this plea; but in each instance the court, upon demurrer of plaintiff, ruled out the amended plea. Whereupon defendant elected to proceed with the cause upon the pleadings as they stood. The court then made the following order:

"Upon consideration of the motion of plaintiff filed herein by his attorneys, it is ordered that this cause be and the same is hereby referred to the auditor of this court, to audit and state the accounts and dealings between the parties herein."

No objection was interposed by defendant to the order of reference. The case was heard by the auditor upon the testimony of witnesses produced on behalf of both plaintiff and defendant. In a full and complete report, he found for plaintiff in the sum of $116,346.13, with $11,138.10 interest. On filing the report, exceptions thereto were filed by defendant on the following grounds:

(1) That the Shipping Board is an agency of the United States, and this is, in effect, a suit against the United States.

(2) That, under the act of Congress and the order of the President, the Shipping Board is an agent of the United States, and plaintiff contracted with it, knowing that the United States was the principal, and alone liable upon the contract.

(3) "(a) Because the alleged schedules of damage are wholly computed of speculative, prospective, and uncertain profits, not flowing from any labor or investment of capital, as in the said report and schedules appears, but from mere estimates of the difference between cost and sale price, without evidence or assumption of the ownership or availability of material.

"(b) Because the said schedules of expectant profits and damages take no account of materials on hand or available, or the value thereof at the time of the alleged breach of contract, and without inclusion of reductions of alleged damages, or proof of any efforts to reduce the same.

"(c) Because the defendant was wholly dependent upon the floating of logs through unnavigable streams, particularly the Escambia river, which frequently, particularly during the periods covered by the contract, was so low in water flow as to provide at intervals less water than 18 inches above the sand bars therein, of all of which exceptant is informed by the independent evidence of witnesses, who it expects to testify thereto, and by the specific admissions of the plaintiff.

"(d) Because the plaintiff's stock of timber was wholly inadequate to produce the requisite timber, whereby he was dependent upon two small sawmills near Bluff Springs and McDavid, Fla., and not to exceed six hewers of timber, which the defendant expects to prove by documentary evidence in its possession and by the evidence of circumstances, and the independent evidence of witnesses, as well as the admissions of the plaintiff, by which evidence of the character set forth the defendant expects to establish that the losses of the plaintiff do not exceed the sum of six thousand ($6,000) dollars.

* * * * * * * * * *

"(f) Because the plaintiff's evidence wholly fails to establish any binding or definite subcontracts, or any responsibility or liability or loss on account of same."

Exception (e) relates to the defective character of the timber at plaintiff's source of supply, and sets forth the rejection of certain timber under inspection. Exception (g) is in effect that the contract was conditional upon plaintiff's securing the approval of the American Bureau of Shipping for the substitution of water oak for white oak, which, it is alleged, plaintiff represented could safely and practically

be done; that the contract was made relying wholly upon this statement and representation; and that plaintiff failed to secure the approval as agreed, and as a result defendant, on August 22, 1917, canceled the contract.

When the exceptions were filed, counsel for plaintiff moved the court to confirm the report of the auditor and enter judgment thereon "for want of proper and sufficient exceptions in law to said report." This motion was denied, and the court struck out exception No. 1, and ordered exceptions Nos. 2 and 3 calendared for trial by jury. Objections were made by plaintiff to the submission of the case to a jury, which were overruled. When the jury was impaneled and sworn, certain stipulations of fact made at the hearing before the auditor were introduced by counsel for plaintiff, the chief of which was that the contract was made and canceled by duly authorized agents of the Fleet Corporation.

Counsel for plaintiff then introduced the letters between the parties, above set out, and read the auditor's report, after which they moved the court for a directed verdict for plaintiff for the full amount found by the auditor. Counsel for defendant moved the court to direct a verdict for defendant, setting forth the grounds of exception to the report, whereupon the following colloquy occurred between the court and counsel for plaintiff:

"The Court: Do you care to reopen this case, and call any witnesses, and take testimony?

"Mr. Roberts: No, sir, we do not.

"The Court: All right, then; I will deny the motion of the plaintiff and grant the motion of the defendant, and grant you the right of appeal."

A verdict was accordingly directed, and from the judgment thereon this appeal was taken.

[1, 2] The propriety of the reference to the auditor need not be considered, since no objection to the reference was made by defendant. The power of a court, with consent of the parties, to refer a case pending before it "is incident to all judicial administration, where the right exists to ascertain the facts as well as to pronounce the law. 'Conventio facit legem.' In such an agreement there is nothing contrary to law or public policy." Newcomb v. Wood, 97 U. S. 581, 583 (24 L. Ed. 1085). Reference by consent may be made either by written stipulation of the parties or by order agreed to in open court. The reference here was without objection, which may be treated as equivalent to consent.

[3] Section 254, D. C. Code, providing for the reference to an auditor of actions at common law grounded upon account or involving open accounts between the parties, came into the Code in substantially the form of a prior existing rule of court, which was based upon a statute of Maryland of 1785. The authority for compulsory reference under the rule and judgment upon the report of the auditor in the absence of proper exceptions was upheld by this court in Simmons v. Morrison, 13 App. D. C. 161.

[4] The statute, however, applies only to actions at law wherein a mutual accounting between the parties is involved. This is not such a

case. Hence, if the reference is to be upheld, it must be done independently of the statute. In the federal courts inherent power resides to make references in actions at law to the same extent as in equity. In the Matter of Walter Peterson, 253 U. S. 300, 40 Sup. Ct. 543, 64 L. Ed. 919, present term, which was decided after the trial of this case in the court below, the court said:

"A compulsory reference with power to determine issues is impossible in the federal courts because of the Seventh Amendment. United States v. Rathbone, 2 Paine, 578, Fed. Cas. No. 16,121. But no reason exists why a compulsory reference to an auditor to simplify and clarify the issues and to make tentative findings may not be made at law, when occasion arises, as freely as compulsory references to special masters are made in equity. Reference of complicated questions of fact to a person specially appointed to hear the evidence and make findings thereon has long been recognized as an appropriate proceeding in an action at law. Heckers v. Fowler, 2 Wall. 123, 17 L. Ed. 759. The inherent power of a federal court to invoke such aid is the same whether the court sits in equity or at law."

[5, 6] Nor can the statute be construed as excluding references in actions at law other than those involving accounting. Nothing in the language of the statute appears to place a limitation upon the inherent power of the court to so refer a case, in order that the actual issues of fact may be defined and simplified. It may be stated, before entering into a consideration of the exceptions made by the defendant to the auditor's report, that, in the absence of exceptions under a general submission, the auditor's report, when admitted on trial before a jury, is prima facie evidence both of the facts and conclusions of fact therein contained. In the Peterson Case, the prima facie character of an auditor's report in a common-law case is established in the federal courts. On this point the court said:

"It may be assumed that, if accepted by the court, the report would be admitted at the trial before the jury as prima facie evidence both of the evidentiary facts and of the conclusions of fact therein set forth. The report, being evidence sufficient to satisfy the burden of proof (Wyman v. Whicher, 179 Mass. 276, 60 N. E. 612), would tend to dispense with the introduction at the trial before the jury of evidence on any matter not actually in dispute."

[7] The admission of the report in evidence in the present case amounted to an acceptance of the report by the court.

[8, 9] The exceptions, to be sufficient to avoid judgment on the report, must respond to the original issues made by the pleadings, as further defined and limited by the approved findings of the auditor. If proper exceptions are filed, in so far as they dispute the findings of fact by the auditor, they create issues to be submitted to the jury, and, upon the issues so defined, the trial will proceed in all respects as if no reference or report had been made. This in no respect deprives either party of any right granted by the Seventh Amendment to the Constitution. As was said in the Peterson Case:

"In so far as the task of the auditor is to define and simplify the issues, his function is, in essence, the same as that of pleading. The object of each is to concentrate the controversy upon the questions which should control the result. United States v. Gilmore, 7 Wall. 491, 494, 19 L. Ed. 282; Tucker v. United States, 151 U. S. 164, 168, 14 Sup. Ct. 299, 38 L. Ed. 112. No one is entitled in a civil case to trial by jury, unless and except so far as there are issues of fact to be determined. It does not infringe the constitutional right

to a trial by jury to require, with a view to formulating the issues, an oath by each party to the facts relied upon. Fidelity & Deposit Co. v. United States, 187 U. S. 315, 23 Sup. Ct. 120, 47 L. Ed. 194. Nor does the requirement of a preliminary hearing infringe the constitutional right, either because it involves delay in reaching the jury trial, or because it affords opportunity for exploring in advance the evidence which the adversary purposes to introduce before the jury. Capital Traction Co. v. Hof, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. Ed. 873. In view of these decisions, it cannot be deemed an undue obstruction of the right to a jury trial to require a preliminary hearing before an auditor. Nor can the order be held unconstitutional, as unduly interfering with the jury's determination of issues of fact, because it directs the auditor to form and express an opinion upon facts and items in dispute. The report will, unless rejected by the court, be admitted at the jury trial as evidence of facts and findings embodied therein; but it will be treated, at most, as prima facie evidence thereof. The parties will remain as free to call, examine, and cross-examine witnesses as if the report had not been made. No incident of the jury trial is modified or taken away either by the preliminary, tentative hearing before the auditor or by the use to which his report may be put. An order of a court, like a statute, is not unconstitutional because it endows an official act or finding with a presumption of regularity or of verity."

[10] The demurrer to the first of defendant's pleas was properly sustained. The Emergency Fleet Corporation is not such an agency of the government as to render it immune from suit. United States v. Strang, 254 U. S. 491, 41 Sup. Ct. 165, 65 L. Ed. ——, present term. Exception No. 1 was therefore properly stricken out.

In exception No. 2, portions of the Act of Congress of September 7, 1916, c. 451, 39 Stat. 728, creating the United States Shipping Board, are set out as authority for the incorporation of defendant company. It then recites certain facts as to the amount of capital stock and the number of shares issued, all of which were stipulated before the auditor and incorporated in his report.

An executive order delegating power conferred upon the President by the Act of Congress of June 15, 1917, c. 29, 40 Stat. 182, to the Shipping Board and the Emergency Fleet Corporation is set out for the purpose, as alleged, of showing that the Fleet Corporation was the agent of the United States, and that plaintiff contracted for the sale of the timber and materials in this cause mentioned knowing that the United States was the principal of the defendant, and, as such, alone liable upon the contract. It may be suggested, however, that the Fleet Corporation was authorized under its charter to enter into such a contract as the one in question and the presumption is that in the absence of evidence to the contrary, it was acting under its charter powers, and not under any special power given it by the President, and therefore it would be liable for a breach of its contract to the same extent as any other corporation.

[11] We think, however, that the delegation of the authority conferred upon the President in no way affects the right of action in this case. In Haines v. Lone Star Shipbuilding Co., 268 Pa. 92, 110 Atl. 788, where the court refused to quash a writ of foreign attachment against the Fleet Corporation, it is said:

"The Shipping Act provided for the formation of a corporation, with other minor provisions relative thereto, to carry out the purposes of the act. There is not a single line before us which has a tendency to show that the board con-

ferred on the Fleet Corporation any of its many administrative or governmental duties; but when we turn to the articles of association of this company we find the limit of this 'carrying out the purposes of the act' to be the 'purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States, and in general to do and to perform every lawful act and thing necessary or expedient to be done or performed for the efficient and profitable conducting of said business' That the President, under the emergency fund provision of the Urgent Deficiencies Act, designated this corporation to perform certain duties similar to those embodied in its certificate of incorporation, does not alter the real status of this concern, to wit, that it was an arm of the Shipping Board, functioning as a great industrial business corporation, with power to enact by-laws, vote its stock, deposit its money and securities, and declare dividends from the surplus and profits."

This is but in line with an analogous holding of the Supreme Court in Krichman v. United States, 255 U. S. ——, 41 Sup. Ct. 514, 65 L. Ed. ——, present term, decided May 16, 1921, in which the Fleet Corporation was held to be a separate entity from the government, notwithstanding the delegation of authority by the President "to exercise a portion of the power granted to him under the act of June 15, 1917."

The court erred in sustaining this exception, since it was but another way of raising the question of governmental agency, which had been properly ruled out by the court in sustaining plaintiff's demurrer to the first plea. This exception has no standing either in law or in fact.

[12] Since the case must go back for retrial, it is not necessary to consider in detail the objections under exception 3. Exception 3 (g) is, perhaps, good in form, and other exceptions may be well taken under defendant's theory of a conditional contract. Without stopping, therefore, to analyze the exceptions under No. 3, it may be stated that they are general, and in many instances, not responsive to either the pleadings or the auditor's report. No rule is better established than that exceptions to the report of an auditor must be specific, and point out with the utmost care the particular point to which exception is made. This court has repeatedly held that general allegations of error, without specifying the particular points to which the exceptions are directed, are clearly insufficient. Nowhere is the rule better stated than by the Chief Justice, in the recent case of Lincoln v. Portland Cement Co., 49 App. D. C. 33, 258 Fed. 505, as follows:

"Chapter 4 of the Code is a valid exercise of legislative power. Simmons v. Morrison, 13 App. D. C. 161, 169. It does not deprive a party, in a proper case, of a trial by the common-law triers of fact, but provides a simple and workable method by which he may secure it. If the facts upon which the auditor finds against him are specifically denied by him, he may have them tried by a jury; but, if he refuses to deny them specifically, and thus fails to raise an issue of fact, he has no just cause for complaint if the court holds as matter of law he has not made out a defense. To sustain exceptions so vague and general as those before us, when preciseness was easy, if the facts warranted it, would be to fritter away by construction the chapter of the Code we are examining. The act must be read 'according to the natural and obvious import of the language, without resorting to subtle and forced construction.' United States v Temple, 105 U. S. 97, 99 (26 L. Ed. 967); Moore v. United States, 249 U. S. 487, 39 Sup. Ct. 322, 63 L. Ed. 721, decided April 14, 1919."

[13] Some point is made as to the sufficiency of the correspondence of August 2 and 3, 1917, to establish a contract. We are of opinion that they constitute an offer and acceptance. The mere request in the letter of acceptance that, if possible, four schedules be furnished monthly, instead of two, constituted neither a counter offer nor a condition. Kelley, Maus & Co. v. Sibley, 137 Fed. 586, 69 C. C. A. 674. If there was anything in the conversation referred to in the telegram that affected the contract, it was incumbent upon defendant to show it by competent proof.

[14] Defendant has injected a point into the case not raised before the auditor nor made the basis of an exception, which, in view of a retrial, perhaps should be noticed. The contract is assailed upon the alleged lack of authority in the purchasing agent Wood to bind the corporation. It was not incumbent upon plaintiff to establish this officer's authority, nor is defendant in position now to deny liability on this ground. There was nothing to put plaintiff upon notice that the purchasing agent lacked authority to represent the corporation.

"Where a party deals with a corporation in good faith, the transaction is not ultra vires, and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them. * * * The principle has become axiomatic in the law of corporations, and by no tribunal has it been applied with more firmness and vigor than by the court. * * * Corporations are liable for the acts of their servants while engaged in the business of their employment in the same manner and to the same extent that individuals are liable under like circumstances." Merchants' Bank v. State Bank, 10 Wall. 604, 645 (19 L. Ed. 1008).

There is no theory upon which the judgment can be sustained. The admission in exception No. 3 of a liability of not to exceed $6,000 forbade a general verdict and judgment for defendant.

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

Reversed and remanded.

Mr. Justice BAILEY, 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.

SMYTH, Chief Justice (dissenting in part). I concur in the judgment, but not in all that is said in the opinion. If it were not for the stipulation which appears in the record to the effect that the letter of August 2 from the appellant and the telegram and letter of August 3 from the appellee constitute an offer and an acceptance, I would be of the opinion that the appellant had failed to establish the contract sued upon.

From the conclusion that the auditor's report in a law case is prima facie evidence of the truth of his findings I must dissent, for these reasons:

Chapter 4 of the Code, providing for the appointment of an auditor in law cases and defining his authority, is, as the opinion states, substantially the same as a prior rule of the Supreme Court of the District which was based on the Maryland statute of 1785. Construing that rule, the Supreme Court of the District, sitting in general term, said in McCullough v. Groff, 2 Mackey (13 D. C.) 361, 365:

"When, therefore, the proceedings before the auditors under the Act of 1785, c. 80, were to be such 'as in cases of actions of account,' the right of hearing before the court as to all questions of law, and of trial by a jury upon all matters of fact, was intended to be preserved to the contestants. And where, in point of fact, the auditors have undertaken to decide all questions of fact incorporated into their report, without a reference to a jury, although such trial had been insisted upon by one of the parties, it seems to be clearly against the intent and spirit of the statute to admit the report before the jury even as prima facie evidence of the truth of its assertions or conclusions."

This decision was rendered in 1883. On the same day on which it was handed down the rule referred to was amended, to cure certain infirmities which had been developed during the trial of the case (Simmons v. Morrison, 13 App. D. C. 161, 166), but was not amended so as to make the auditor's report prima facie evidence. This is significant. As thus amended, the rule continued without change until it was incorporated into chapter 4 of the Code—a period of nearly 20 years.

Now, it is a well-established principle that when a Legislature adopts an act, the meaning of which has been settled, it enacts it with that meaning. Allen v. St. Louis Bank, 120 U. S. 20, 34, 7 Sup. Ct. 460, 30 L. Ed. 573; 25 R. C. L. 1069. The commission which framed the Code and the Congress which adopted it must be presumed to have had knowledge of the interpretation which had been given to the rule. If it was desired to change that interpretation, it would have been easy to do so by saying that the report of the auditor should be considered as prima facie evidence. I am warranted, therefore, in saying that Congress approved that interpretation, and that, in consequence, it is the proper interpretation of the chapter. The court ignores the decision in the McCullough Case, ignores the well-established rule of interpretation to which I have just called attention, and gives to the chapter a different meaning from that which it has had for nearly 40 years. This, I submit, is not judicial interpretation, but judicial legislation.

Even if we consider the chapter as a matter of first impression, unaided by the rules which I have invoked, there is no warrant for the interpretation given to it by the court. According to the chapter, a party who desires to frame an issue of fact for trial by the jury must file exceptions to the auditor's report, and then, says the chapter:

"Exceptions shall be tried and determined in the same manner as other issues of * * * fact made by the pleadings in an action at common law. * * *"

An issue of fact at common law is made by an assertion on the one hand and a denial thereof on the other, and the burden of proof is on him who makes the assertion. By a finding of fact the auditor affirms

a proposition. When an exception thereto is taken, the proposition is denied, and, by the words of the chapter, an issue of fact is thereby formed. He who seeks to establish the proposition has the burden of proof. But the court says the burden is on the exceptant, which is equivalent to holding that he must prove a negative.

The opinion says the case was submitted to the auditor, not under the Code, but in pursuance of a rule of the common law to the effect that a court has the inherent power to refer any matter to an auditor for consideration and report. The record shows that there was no intention on the part of either of the parties, or of the court, to submit the case to any auditor but the one provided for by the Code. The order is that the case be referred "to the auditor of this court"—not to an auditor to be appointed, but to "the auditor of this court." The fact that it may not have been a proper case to submit to him can make no difference, because no objection was made to its submission, and neither of the parties raises any objection now on that score. I must conclude, therefore, that the submission was a valid one and was under the Code.

In this connection it is worthy of note that, while the court says the submission to the auditor was under the common law, it tests the sufficiency of the exceptions to his report by chapter 4. Is not this somewhat inconsistent?

I deny that a trial court in this District has any inherent common-law power to refer a law case to an auditor. Reference is made in the opinion to the decision of the Supreme Court of the United States in the Peterson Case, wherein it was held that federal courts generally have such power; but there was no statute controlling the situation in that case, and that makes the distinction between it and this case. Conceding that at one time the common law in this District was as stated in the Peterson Case, the court or Congress could change that law. It was changed first by the adoption of the rule to which I have referred, and then by the enactment of chapter 4 of the Code. If Congress was satisfied with the common law on the subject, why any legislation at all? The fact that it thought it necessary to legislate is conclusive that it desired to change the common law. By enacting chapter 4 it dealt fully with the subject, and the rule "expressio unius est exclusio alterius" applies.

If the common-law rule prevails, then chapter 4 is a useless thing, and Congress has accomplished nothing by enacting it. "There is a presumption against the construction which would render a statute ineffective or inefficient. * * *" Bird v. United States, 187 U. S. 118, 124, 23 Sup. Ct. 42, 44 (47 L. Ed. 100). Chapter 4 has often been interpreted. Its scope has been demarcated and its intent defined. By the decision just handed down a rule of practice of nearly 40 years' standing has been upset, uncertainty substituted for certainty, and an act of Congress rendered nugatory, all of which is done, as I view it, without any warrant of law.

GENERAL ELECTRIC CO. v. PHILADELPHIA ELECTRIC & MFG. CO.

(Circuit Court of Appeals, Third Circuit. June 24, 1921.)

No. 2669.

Patents ⇐328—Reissue 14,341, for incandescent lamp socket, not infringed.
The Jones reissue patent, No. 14,341 (original No. 818,253), for an incandescent lamp socket is limited to the specific structure described, and, as so limited, *held* not infringed.

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

Suit in equity by the General Electric Company against the Philadelphia Electric & Manufacturing Company. Decree for defendant, and complainant appeals. Affirmed.

See, also, 226 Fed. 488; 232 Fed. 722, 146 C. C. A. 648.

Samuel Owen Edmonds, of New York City, for appellant.

Charles Howson and Charles H. Howson, both of Philadelphia, Pa., for appellee.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

WOOLLEY, Circuit Judge. The invention of the Jones patent No. 818,253, related to sockets for incandescent lamps, and especially for those used in series incandescent lighting. It consisted of three parts, which, in the language of claim 1, were as follows:

(1) "A receptacle having automatic line-closing contacts,
(2) a lamp-socket adapted to receive
(3) an ordinary incandescent lamp therein and (2) carrying co-operating contacts normally separated by insulation of low dielectric value."

We have held that this claim of the Jones patent, covering essentially a three-part device, was too broad as against Wirt (No. 465,508) and was, therefore, invalid. 232 Fed. 722, 146 C. C. A. 648.

The complainant, assignee of the inventor, thereupon surrendered the Jones patent and obtained a reissued patent (No. 14,341) on the same specifications, omitting the invalid claim and substituting two new claims drawn to conform to our adverse ruling and to disclose what it believed, in view of our decision, to be Jones' actual improvement. Disclaiming any right to recover from the defendant for what it had done before the reissue, the complainant filed the present bill, presenting for adjudication an invention based, not on the three parts which, being found in Wirt, invalidated the original Jones patent, but on a device consisting of the same three parts particularly described as to their structure by the two new claims of the Jones reissue. These claims, although expressed in different language, may for present purposes be regarded as the same. The language of the first claim (italicized to distinguish the new matter in the reissue from the old matter in the original) is as follows:

"1. In series incandescent lighting, a receptacle *comprising an insulating block* provided with automatic line-closing contacts, an *insulating* socket

closed at one end and open at the other and provided, adjacent to the latter, with contacts encompassed by said insulation and adapted for coaction with the base of an ordinary lamp and, *adjacent to the closed end,* with cooperating contacts normally separated by insulation of low dielectric value, *and means for detachably connecting said socket and receptacle and thereby opening said line-closing contacts, the insulating outer surface of said socket forming a hand-hold free from conductive parts or dangerous proximity thereto and adapted to be grasped to detach said socket from said receptacle.*"

Mainly on the evidence of the case on the original patent, the District Court, speaking in an opinion by Judge Dickinson, held that claims 1 and 2 of the reissue, here in suit, limit the invention to its specific structural features, and, accordingly, dismissed the bill. The opinion so accurately reflects our views that we shall, on this appeal, avail ourselves of it for a statement of the case and a statement of the reasons for our decision. It is as follows:

"Passing the question which the defendant raises of the right of the plaintiff to a re-issue, in order to present the other questions involved, these observations may be made in order to clarify the atmosphere in which the rights of the parties must be viewed. In the first place, the question is not whether in view of what Jones did the plaintiff is not entitled to a patent for something in spite of the Wirt patent, but whether it is entitled to what is set forth in the claims of the re-issued patent. We say this because as the defendant itself holds a patent upon the infringing device covering the features of its special construction, the right of the plaintiff to a like patent cannot be deemed to be in controversy.

"The task of the plaintiff, as it frankly avows, was not to secure such a patent, but one which, while it escaped conflict with the Wirt patent, would, at the same time, read upon the defendant's device. Nothing short of this will answer its purposes. That the disclosures of the Wirt patent exclude all its features from any patent issued upon the strength of the Jones invention is res adjudicata. These opposing devices concern an appliance used in the 'series' system of incandescent electrical lighting. The obvious practical necessity is that the construction must consist of at least two parts. When it does so consist, the terminology of the art permits of one of these parts being called a lamp and the other a socket or receptacle. A further necessity, although not such an obvious one, has been found to be the presence of what is called a line closer and also what is called a film cut-out. Without going into any detailed statement of the development of the art, we now know that it is of advantage to have the contrivance made in three parts instead of two. This thought of having three parts was the contribution of Wirt which Jones must be considered to have adopted and thus borrowed from the prior art.

"To appreciate what Jones did, we must go back to the Thomson device. This, as we would expect from the genius of its author, possessed valuable features. It had, however, shortcomings which led to its disuse. The defects were so soon apparent that it would perhaps be more accurate to speak of its non-use. The Thomson device showed a method of locating line closer and film cut-out. As the device was an impracticable one, those who had to do with the art, assumed that the error which Thomson committed was in wrongly locating these features.

"Out of this assumption grew ten or more years of vain effort to meet the difficulty by changing the location of these features as Thomson located them. Jones solved the vexing problem by returning to the discarded idea of Thomson, but instead of putting the cut-out in the lamp he put it in the socket, and changed Thomson's socket into what Jones called a receptacle, which was made to bear the whole burden of the line closer, Jones introduced a third part, which he called the receptacle. The problem was thus solved. The proof of this is the practical and commercial success of the Jones device and its appropriation by the defendant.

"If the foregoing were a full recital of all which had been accomplished in the art before Jones, his right to what, in the happy phrase of Judge McPherson, was called 'the commanding place' which he first claimed, could not be successfully denied to him. It is not, however, a full recital, for it omits the vital part that the idea of the introduction of this third part for the very purpose for which Jones introduced it and for the very use which Jones made of it had occurred to Wirt, and had been disclosed by his patent application before Jones came upon the scene. Why then was not the Wirt device as much of a success as that of Jones at once proved itself to be? The fact, for it is a fact, that no commercial use was made of the Wirt device would be entitled to great weight, were it not for the other fact that the Wirt and Jones devices were in the same 'strong hands,' and that by submerging Wirt and bringing Jones to the surface the plaintiff would have been able to have greatly prolonged the life of its monopoly. The plaintiff is admittedly concluded by the finding that no patent issued to reward Jones for what he did can cover in its claims the three-part features of his device.

"The touchstone of the case now before us is to be found in the following question: Given the like right to make use of the Wirt disclosure to the maker of the Jones device and to the maker of that of the defendant, does the latter infringe any of the inventive features of the former? If the claims of the reissued patent are limited to the specific features of construction, a finding of the validity of the claims would give so little promise of a finding of infringement and would have so little of practical value that a finding of infringement is not even asked.

"Because of this, without multiplying words the finding is made that the claims now before us should be so read as to limit them to the specific structural features of the Jones device, and that when so read the defendant's device does not infringe.

"We can applaud the persistency of counsel for plaintiff in upholding what he believes to be the right of his client to have the claims given such meaning as that they may be read upon the defendant's machine; we are compelled to admire the ingenuity and ability displayed in creating and defending the position selected from which to assert this claim of right, and we can commend the earnestness with which the argument is pressed, but we cannot escape the impression that back of the confidence of counsel is the subconscious, perhaps the unconscious, thought that the ruling made in the former case was wrong and should be corrected. Of course, the present proceeding before this Court cannot be used to serve any such appellate purpose. In no event would a trial Court be asked to make a ruling in the present case, which would be in conflict with the decree before made by an appellate court. What the plaintiff was before asking was for a decree giving to it a 'commanding place' in the art. A consequence would have been that no other person could make use of the Wirt disclosure. This claim of right was denied. There was no finding that plaintiff did not have the right to a subordinate place. Indeed, as counsel for plaintiff reads the opinion, there was a plain intimation that plaintiff did have this right. The inference, therefore, is that as in the view of counsel the Court was of opinion that the claim could be read and followed so as to read upon defendant's device, this reading might have been given to it. In fact, counsel now thinks this is what the Court should have done, and frankly says so. This makes not for the plaintiff's present contention but against it. This is because the Court did not uphold the validity of the claim to even a limited extent, but dimissed the bill. We do not see how the inference can be escaped that the effect of the ruling was the expression of the opinion of the Court that the claim could not be so read as to make of the defendant's device an infringement. This is now the very thing which the plaintiff is seeking to have done. We are, in consequence, asked to do what the Circuit Court of Appeals refused to do in the former case. This request at least approaches an encroachment upon the res adjudicata doctrine, because the granting of it would deny to the defendant (until the Court of Appeals indicates that the inference is not justified) the benefit of what logically results from what has been taken to be the view of the Court.

"The bill of complaint should, in consequence, be dismissed, with costs, for want of equity."

As the limitations in the claims of the reissued patent, carefully made to conform to our decision on the original patent, preclude a finding of invention in the three-part characteristic of the device, invention in the device of the reissue, if any, must reside in its several parts. Thus our attention is addressed to their structure.

It is quite evident that Jones, in making his socket, shopped around in the prior art, freely selecting things of value and discarding things without value. Practically all features of the new device can be found in company with other features in some old device. Of course, if in assembling and rearranging old things Jones produced a new entity, having new behavior and new capabilities, it might, none the less, amount to invention. But the invention would be confined to the new thing made of old parts and would, in view of our decision denying Jones invention based on a three-part device, be restricted, in all likelihood, to the structure into which it entered. And this we find to be so. We are of opinion that in the device as claimed in the reissue there is invention in some degree, but the invention Jones made is limited to the things he did and those things are measured in terms of structure. His invention is, therefore, limited to the particular structure disclosed, and, being so limited, it does not embrace the device of the defendant.

Passing by the question of validity of the reissued patent, we direct that the decree below be

Affirmed.

FARIS et al. v. PATSY FROK & ROMPER CO.

(Circuit Court of Appeals, Ninth Circuit. June 6, 1921.)

No. 3630.

1. **Patents ⟸15—Under present statute, design patent cannot be issued for mere outline.**

Under Rev. St. § 4929, as amended by Act May 9, 1902 (Comp. St. § 9475), authorizing design patent for any new, original and ornamental design, which omits the provision, found in earlier statutes, authorizing a patent for any new, useful, and original shape or configuration, no patent can be issued for a mere shape or outline of the design or pattern, unless such shape or outline is, in and of itself, an ornamental design.

2. **Patents ⟸28—Originality and beauty are essential to valid design patent.**

Patents for design were intended to encourage the decorative arts, and no patent can be issued for a design, unless it possesses both originality and beauty.

3. **Patents ⟸328—Design patent 54,809, for child's romper, held not to disclose invention.**

The Zidell patent, No. 54,809, for design for child's romper, *held* not to disclose invention, in view of the earlier patent issued to the same inventor for a design which embodied all the features of the patented design.

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

4. Patents ⇐28—Outline of figure previously patented, with ornamentations, does not disclose invention.
A design for a child's romper, consisting merely of an outline drawing, does not disclose invention over a previous design having the same outline, but embodying also additional ornamental features.

5. Patents ⇐28—Different appearance of outline on filled-in figure does not show patentability of design.
The rule that the test of the validity of a design patent is whether the design presents to the eye the same general appearance as the prior design does not apply where the latter design embodies the same outline as the earlier, but lacks ornamental features embodied in the earlier.

6. Patents ⇐121—Cannot be issued for feature of previous design not claimed in specification.
A patentee of a design cannot obtain a subsequent new patent for a design embodying features which were embodied in the original design, though not claimed therein; his remedy being by application for reissue of the original patent.

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

Suit for infringement of patent by the Patsy Frok & Romper Company against W. A. Faris and another, individually and as copartners trading under the firm name of the Fifth Street Store. Decree for plaintiff, and defendants appeal. Reversed, with directions to dismiss the bill.

See, also, Zidell v. Dexter, 262 Fed. 145.

This suit was brought for infringement of plaintiff's design letters patent No. 54,809, granted March 23, 1920, to William I. Zidell, pursuant to an application filed by him on July 14, 1919, assigned to plaintiff, Patsy Frok & Romper Company. The design is for a child's romper. The defendants in four other suits brought in the District Court of the United States for the Northern District of California by William I. Zidell, for infringement of the same patent, have petitioned this court for permission to be heard upon this appeal amici curiæ. Permission granted.

William R. Litzenberg and Lissner, Lewinsohn & Barnhill, all of Los Angeles, Cal., for appellants.

Frederick S. Lyon and Leonard S. Lyon, both of Los Angeles, Cal., for appellee.

Chas. E. Townsend, of San Francisco, Cal., for petitioners, as amicus curiæ.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). This appeal is before us upon the following stipulations, entered into by the parties:

"This appeal is taken by the defendants from said decree holding said design letters patent No. 54,809 valid, and it is hereby stipulated that the sole issue to be presented and determined upon this appeal is whether or not said design letters patent No. 54,809 are valid, in view of said design letters patent No. 52,720. For the purposes of appeal it is stipulated that said William I. Zidell produced and made a child's romper in accordance

with the drawing of patent No. 54,809, as distinguished from a child's romper conforming to the drawing of said patent No. 52,720, prior to the filing of his application for said patent No. 52,720."

The design of letters patent No. 54,809 is as follows:

Fig. 1. Fig. 2.

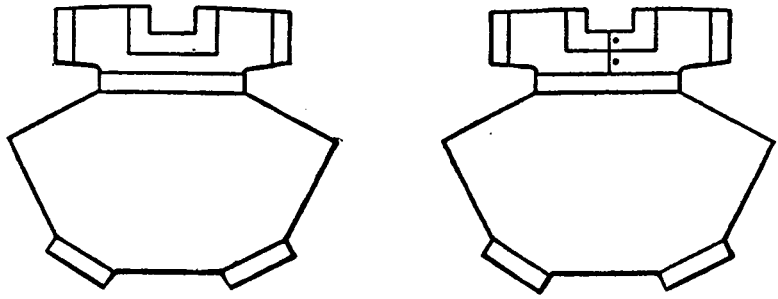

Figure 1 is a front view of the child's romper. Figure 2 is a rear view of the same. In his application for patent No. 54,809, Zidell declared that he had "invented a new, original, and ornamental design for children's rompers, of which the following is a specification; reference being had to the accompanying drawing, forming part thereof." In the specification he claimed "the ornamental design for children's rompers as shown."

The design for letters patent No. 52,720 is as follows:

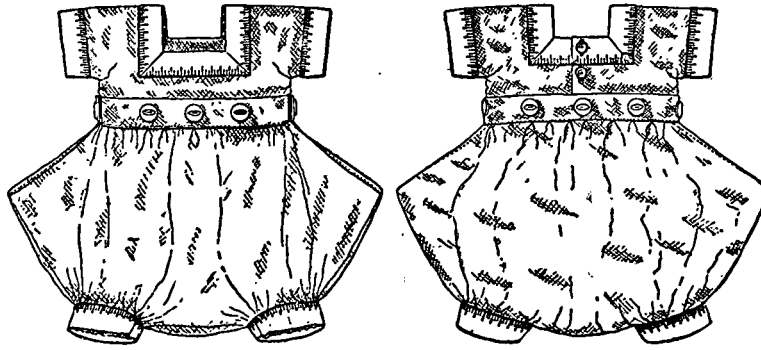

Fig. 1. Fig. 2.

Figure 1 is a front view and Figure 2 is a rear view of the same. In his application for patent No. 52,720, Zidell declared that he had "invented a new, original, and ornamental design for children's rompers, of which the following is a specification; reference being had to

the accompanying drawing forming part thereof." In the specification he claimed "the ornamental design for children's rompers as shown."

It will be observed that the declarations and specifications for the two applications are identical, except in the drawings, to which references are made. The plaintiff contends that the only question to be determined is whether the design in patent No. 54,809 presented to the eye the same general appearance as the design in patent No. 52,720. If it does, it is conceded that patent No. 54,809 is invalid; but if, on the other hand, patent No. 54,809 does not present to the eye the same general appearance as patent No. 52,720, then it is contended that patent No. 54,809 is valid, and defendant has infringed.

The plaintiff finds support for this doctrine in the case of Gorham v. White, 14 Wall. 511, 20 L. Ed. 731. In that case Gorham & Co. had obtained a patent in July, 1861, for a new design in configuration and ornamentation for the handles of table spoons and forks under the name of the "Cottage Pattern." Defendant White had obtained two patents for designs, one in 1867, and another in 1868. These designs were also for the configurations and ornamentations on handles of forks and spoons. The statute under which these patents were obtained was section 11, Act of March 2, 1861 (12 Stat. 246–248). This statute was substantially a re-enactment of section 3 of the Act of August 29, 1842 (5 Stat. 543), the first statute of the United States on the subject. The Act of March 2, 1861, provides, among other things, that the Commissioner of Patents might grant a patent for any new and original design for a manufacture, or for any new and original impression or ornament to be placed on any article of manufacture, or for any new and useful pattern or print or picture to be either worked into or worked on or printed or painted or cast, or otherwise fixed on any article of manufacture, or for any new and original shape or configuration or any article of manufacture not owned or used by others before his, her, or their invention or production thereof, and prior to the time of his, her, or their application for a patent. It appears that the "Cottage" pattern of the Gorham & Co. design and the patterns of the White designs were all alike, the result of peculiarities of outline or configuration on the handles of the forks and spoons and of ornamentation thereon. The court, in discussing the provisions of the acts of Congress, said:

"The acts of Congress which authorize the grant of patents for designs were plainly intended to give encouragement to the decorative arts. They contemplate not so much utility as appearance, and that, not an abstract impression, or picture, but an aspect given to those objects mentioned in the acts. * * * And the thing invented or produced, for which a patent is given, is that which gives a peculiar or distinctive appearance to the manufacture, or article to which it may be applied, or to which it gives form."

The court proceeds:

"It is the appearance itself, therefore, no matter by what agency caused, that constitutes mainly, if not entirely, the contribution to the public which the law deems worthy of recompense. The appearance may be the result of peculiarity of configuration, or of ornament alone, or of both cojointly; but, in whatever way produced, it is the new thing, or product, which the patent law regards."

The court concludes with this statement:

"We hold, therefore, that if, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other."

It will be observed that the court held that:

"The appearance may be the result of peculiarity of configuration, or of ornament alone, or of both cojointly."

This was clearly within the scope of the statute of March 2, 1861, providing, as it did, that the invention might be "any new and original design for a manufacture" or "any new and original impression or ornament * * * to be placed on any article of manufacture, * * * or any new and useful pattern * * * to be either worked into or worked on * * * any article of manufacture, or any new and original shape or configuration of any article of manufacture." The designs of both the plaintiff and defendant were for the "configurations" of the spoon and fork handles and the "ornaments" placed thereon.

[1] The Act of March 2, 1861, was repealed by the Act of July 8, 1870 (16 Stat. 198–216), and in lieu of section 11 of the former act section 71 (page 209) of the later act was enacted. The word "useful" was introduced into this section of the statute by this act of 1870 to qualify "shape or configuration of any article of manufacture," and as thus amended resulted in section 4929 of the Revised Statutes of 1874; and this section, as amended by the Act of May 9, 1902 (32 Stat. pt. 1, p. 193), is the present statute under which this case is to be determined. It provides:

"Any person who has invented any new, original, and ornamental design for any article of manufacture * * * may * * * obtain a patent therefor."

In this statute no provision is made for the granting of a patent for "any new, useful, and original shape or configuration of any article of manufacture," or for any new and "original pattern," and we must conclude that no patent can now be issued for a mere shape, configuration, or outline of a design or pattern, unless such shape, configuration, or outline or pattern is in and of itself an ornamental design.

[2] We are dealing with the decorative art. As said by the Supreme Court in Gorham v. White, supra:

"The acts of Congress which authorize the grant of patents for designs were plainly intended to give encouragement to the decorative arts."

In Smith v. Whitman Saddle Co., 148 U. S. 674, 13 Sup. Ct. 768, 37 L. Ed. 606, the patent was dated September 24, 1878, and was for an improved design for saddles, issued under section 4929 of the Revised Statutes, as amended by the Act of July 8, 1870, providing protection for "any new, useful and original shape or configuration of any article of manufacture." The court refers to the fact that the word "useful" was not contained in the act under which the patent to Gorham & Co. was granted, and draws the conclusion that under section 4929, as so

amended, "where a new and original shape or configuration of any article of manufacture is claimed, its utility may be also an element for consideration." But, without stating what consideration was to be given to the word "useful" in a design patent, the court approved the language of Mr. Justice Brown, then District Judge for the Eastern District of Michigan, in Northrup v. Adams, 2 Ban. & A. 567, 568, Fed. Cas. No. 10,328, as follows:

"To entitle a party to the benefit of the act, in either case [mechanical inventions or designs], there must be originality and the exercise of the inventive faculty. In the one, there must be novelty and utility; in the other, originality and beauty."

In Rowe v. Blodgett & Clapp Co., 112 Fed. 61, 50 C. C. A. 120, the Circuit Court of Appeals for the Second Circuit, affirming the decision of the Circuit Court in the design patent for a horseshoe calk, also under the Act of July 8, 1870, adopted the language of the Circuit Judge in denying the patentability of the design. The court said:

"I decide this case upon the broader ground that patents for designs are intended to apply to matters of ornament, in which the utility depends upon the pleasing effect imparted to the eye, and not upon any new function. * * * Design patents refer to appearance, not utility. Their object is to encourage works of art and decoration which appeal to the eye, to the æsthetic emotions, to the beautiful. * * * The term 'useful,' in relation to designs, means adaptation to producing pleasant emotions. There must be 'originality and beauty. Mere mechanical skill is not sufficient.'"

We understand now the scope and purpose of the present statute. It is limited to the promotion of the decorative arts. In the production of a design within its scope "there must be originality and the exercise of the inventive faculty. * * * There must be originality and beauty. Mere mechanical skill is not sufficient." And these elements must be found in an invention of a "new, original, and ornamental design for an article of manufacture."

[3] Does the design shown in patent No. 54,809 come within the scope and purpose of this statute? What contribution has the patentee made to the decorative arts in its production? He has admittedly made nothing since he made the application for the original patent, No. 52,720, on August 12, 1918. The stipulation provides:

"That said William I. Zidell produced and made a child's romper in accordance with the drawing of patent No. 54,809, as distinguished from a child's romper conforming to the drawing of said patent No. 52,720, prior to the filing of his application for said patent No. 52,720."

The stipulation might have gone further and provided:

"That the design in patent No. 54,809 is shown as the outline or configuration of the design shown in patent No. 52,720," as it there plainly appears.

How, then, can the plaintiff obtain a patent for a design already shown in the patent previously granted to him? The earlier patent embraces and distinctly shows everything shown in the later patent. When design patent No. 54,809 was issued, design patent No. 52,720 had been issued and published to the world, and all its elements had become part of the prior art 8 months before the second application was filed, and more than 16 months before the second design patent

was issued. The second design patent is for the bare pattern or single outline form or configuration of the design, exactly as shown in the first patent, with the shaded lines and hatchings eliminated, and without the ornamental stitching around the neck, sleeve, and leg bands. The first patent was issued for a term of 7 years; the second patent was issued for a term of 14 years. When the first patent expires, November 19, 1925, the original ornamental design for the garment there described should become public property under the statute. But will this be so if the second patent is held valid for the outline design of the first patent?

Had Zidell obtained a reissue of his first patent with the outline of that design a dominant feature, a different question would have been presented. The expiration of that patent would then have released all its elements from monopoly at the same time; but under the terms of the second patent, if valid, it will still have more than 8 years to run. Can the public then make use of the design of the expired patent without infringing the design of the second patent? Will it be possible to make use of the ornamental design of the first patent when it expires, without at the same time making use of the essential single outline element of the second unexpired patent?

Patent No. 52,720 was before this court in Zidell v. Dexter, 262 Fed. 145, where the patent was held valid. Judge Gilbert, speaking for the court, said:

"The patent was obtained without specifications or description, other than drawings of the design, and it gives to the public no notice that any particular element or group of elements of the design is predominant. On the face of the design the more prominent distinguishing features would appear to be: (1) A square Dutch collar; (2) the ornamentation of collar, wrist bands, and knee bands; (3) a belt with large buttons; and (4) the flaring or peg shape of the trousers."

In other words, it was an indivisible design. Comparing these elements of the design with the prior art, the court found that there was nothing new in any of the features of the design. Elements had been brought together which were old and well-known. "Single piece child's rompers with belts were old. Square Dutch collars were old. Ornamental stitching was old. Peg-shaped trousers were old." But the court held that the fact that the elements were old did not prove want of invention in assembling them into a single design; that—

"the differences in designs, which under the patent law will avoid infringement, are differences which will attract the attention of the ordinary observer, giving such attention as the purchaser usually gives in buying articles of the kind in question and for the purposes for which they are intended."

Patent No. 54,809, like patent No. 52,720, "was patented without specifications or description, other than drawing of the design, and it gives to the public no notice that any particular element or group of elements of the design is predominant." If we look now at the design for the purpose of ascertaining its distinguishing features, we find that it is essentially an outline or configuration of the same features we find in patent No. 52,720, namely: (1) A square Dutch collar; (2) wrist bands and knee bands; (3) a belt with buttons; (4) the flare or peg

shape of the trousers. If we give to this outline or configuration the substance of form in the ornamental shape of a garment for a child's romper, as called for by the patent and required by the statute, we plainly have the same garment design we have in patent No. 52,720. In other words, we cannot take the mere outline or configuration of a garment drawn on paper, and eliminate the cloth body distinguishing it in design from the garment, and call the outline an invention over the prior design for the garment with identically the same outline.

[4] The inspection of the original design reveals the further fact that there is in our opinion no originality or invention in the design of the second patent, when compared with the design of the first patent. It requires no inventive faculty to draw the outline of a figure already produced in interstitial form.

[5] It follows that we cannot take the appearance of a design, as shown by an outline drawing on paper, and make it the controlling test in a controversy such as we have in this case. The outline drawing of the second patent was the configuration or outline of the first patent. It was determined by this court in Zidell v. Dexter, supra, that the invention of the first patent was the "ornamental stitching around the neck, sleeve, and leg bands" worked on or into the configuration of the romper. The outline or configuration was either not claimed as invention in that case, or, if claimed, was denied by the court.

[6] But plaintiff claims that the outline design of the first patent was not dedicated to the public, but has been claimed by Zidell in the second patent; and as the application for that patent was made within two years of the first use or sale of a garment of that design, the patent is valid. But rule 92 of the Rules of Practice of the United States Patent Office provides as follows:

"Matters shown and described in an unexpired patent, which is an indivisible part of the invention claimed therein, but which was not claimed by reason of a defect or insufficiency in the specification arising from inadvertence, accident, or mistake, and without fraud or deceptive intent, cannot be subsequently claimed by the patentee in a separate patent, but only in a reissue of the original patent."

This rule is in accordance with the long-established law of patents. In James v. Campbell, 104 U. S. 356, 382 (26 L. Ed. 786), the Supreme Court said:

"It is hardly necessary to remark that the patentee could not include in a subsequent patent any invention embraced or described in a prior one granted to himself"—cited in Miller v. Eagle Manufacturing Co., 151 U. S. 186, 197, 14 Sup. Ct. 310, 38 L. Ed. 121.

In Ashley v. Tatum Co., 186 Fed. 339, 108 C. C. A. 539, the plaintiff's patent was for a design for a glass inkstand. The patent contained no written description, because the Patent Office at that time refused to allow any description to be filed. The drawing showed an inkstand with a low, square base, surmounted by a low dome, of a diameter somewhat less than the side of the base; the entire surface being plain, and without any applied ornamentation. The absence of such ornamentation was considered by the court as an essential ele-

ment of the design, and was not infringed by the defendant's design, which showed such surface ornamentation. After this decision an application was made to the Patent Office for a reissue, which was granted.

In Ashley v. Tatum Co. (D. C.) 240 Fed. 979, the suit was for an infringement of the same design as reissued. In the reissue the specifications set forth that the essential feature of the design consisted in the general outline of the stand, which comprised a low, broad, flat base, surmounted by a low dome, in which a funnel-shape dip cut was located. This design was claimed as ornamental. The defendant's design used plaintiff's outline design as a basis upon which ornamentation was superimposed, and of such a different appearance as to be readily distinguishable by a casual observer from plaintiff's design. It was held that the plaintiff's patent was valid and infringed, but that the suit could not be maintained against the defendant because of its intervening rights, and the bill was accordingly dismissed.

The plaintiff in the present case claims that this decision is authority supporting the validity of the second patent in this case; but it is clearly not applicable, unless we say that it is authority for the contrary view. It may be that Zidell could have obtained a reissue of the patent covering the outline of the design for the unexpired term of the original patent, as was done in Ashley v. Tatum Co., supra, upon a showing that Zidell's failure to claim the outline of the design in the original application for a patent was by reason of mistake or inadvertence; but that was not done, and we are not called upon to determine that question.

We are of the opinion that patent No. 54,809 is invalid. The decree of the District Court is reversed, with directions to dismiss the bill of complaint.

ROSS, Circuit Judge (concurring). I concur in the result. It seems to me that the second patent, numbered 54,809, was issued for precisely the same combination of old elements for which the first patent, numbered 52,720, was issued, and which first patent was sustained by this court when presented in the case of Zidell v. Dexter et al., 262 Fed. 145. It is true that the design disclosed in the first patent is much more elaborate in configuration than that of the second, but the prominent distinguishing lines are identical, and to ordinary observers would, I think, clearly present to the eye the same picture and to the mind the same idea. As a matter of course, two patents for the same invention are unauthorized.

SILVERMAN v. SUNRISE PICTURES CORPORATION.

(Circuit Court of Appeals, Second Circuit. May 11, 1921.)

No. 245.

1. **Copyrights ⇐33—Renewal is in effect a new grant.**
Copyright Act March 4, 1909, § 24 (Comp. St. § 9545), providing for renewal of a copyright on application made within one year prior to expiration by the author, if living, and, if not, by the widow, widower, or children of the author, or if none of them are living, by the author's executor, or, in the absence of a will, by the next of kin, provides for what is in effect a new grant, since the right of renewal is not given to the original proprietor, as such, but only to the persons designated in the statute in the order named.

2. **Copyrights ⇐33—Right of renewal not transferable before it accrues.**
Under Copyright Act March 4, 1909, § 24 (Comp. St. § 9545), providing for renewal of a copyright, the right does not arise until one year prior to expiration of the original copyright, when it vests in the person or persons then living given priority by the statute; hence an author dying before that time has no right of renewal, which can be bequeathed by will.

3. **Copyrights ⇐33—Renewal may be taken by one of next of kin of author for benefit of all.**
Where the author of a copyrighted book died leaving neither husband nor children and his estate was settled and executors discharged more than a year before expiration of the copyright, the right of renewal *held* to have vested at the beginning of that year in the next of kin, as tenants in common, and the exercise of the right by two out of a number of such next of kin *held* to have vested the legal title to the renewal in them in trust for the benefit of all.

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

Suit in Equity by Isaac Silverman against the Sunrise Pictures Corporation. From an order denying a preliminary injunction, plaintiff appeals. Reversed.

Augusta Evans Wilson was the author of numerous books, and particularly one entitled "At the Mercy of Tiberius." This novel was copyrighted by her publisher, Dillingham, as "proprietor," and such copyright expired October 12, 1915. Mrs. Wilson died a resident of Mobile, Ala., and testate, in May, 1909, leaving her surviving neither husband, children, nor any descendants of childen deceased. Her will was duly admitted to probate in the county of her residence on May 25, 1909. By it she devised and bequeathed her residuary estate, "including copyright on my books," to three sisters, to the children of deceased brothers, and to the surviving widow of one brother in the same parts or shares as the same persons would have taken as next of kin under the laws of Alabama had the testatrix died intestate.

On August 7, 1911, Mrs. Wilson's executors rendered their final accounts, and the probate court, having ascertained and declared that the debts of the testatrix were fully discharged and all specific legacies paid, distributed the residuary estate to the legatees above referred to or those entitled in succession to such as had died pending estate settlement. Thereupon the executors were fully and finally discharged. April 7, 1915, two of the sisters of Mrs. Wilson filed an application "in accordance with the provisions of section 24 of the act of March 4, 1909," for the renewal of said copyright on the book entitled "At the Mercy of Tiberius." The application stated that this "renewal copy-

right is claimed by us as next of kin Virginia E. Bragg, and Mary E. Tarleton (sisters)." At this time Mrs. Wilson's third sister was dead, leaving children her surviving. It does not appear whether, when the surviving sisters applied for renewal of copyright, any consultation was had with, or the consent obtained of, their nieces and nephews, who were similarly related to Mrs. Wilson.

In or prior to 1920 plaintiff wished to obtain the copyright of "At the Mercy of Tiberius" in order to make a "movie" out of it, and to that end obtained assignment, not only from Mrs. Tarleton, the still surviving sister of Mrs. Wilson, but from all other persons who in 1920 could be comprehended under the description "next of kin" of Mrs. Wilson. An administration d.b.n.c.t.a. was also raised of the Wilson estate, and the administrator assigned to plaintiff whatever rights he had. Defendant openly threatened to produce a photoplay based upon the novel "At the Mercy of Tiberius." Plaintiff applied for the injunction above referred to. No objection was apparently offered below, and none has been presented here, except lack of title in plaintiff. The District Court refused the injunction, and plaintiff appealed.

Ross & Kaufman, of New York City (Walter C. Noyes, Arthur Leonard Ross, and Joseph B. Kaufman, all of New York City, of counsel), for appellant.

Kahn & Zorn, of New York City (J. Joseph Lilly, Clinton T. Roe, and Charles P. Kramer, all of New York City, of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). The single question argued at bar is whether any rights, under the copyright statute (Comp. St. § 9517 et seq.) or otherwise, resulted from the action of a part only of the deceased author's next of kin.

Mere statement of the scope of discussion eliminates, however, everything but inquiry as to how, when, by whom, and for whom what is called "renewal" of statutory copyright may be obtained; for, whatever is the proper historic view, it is authoritatively settled that in the United States there is no copyright, except that both created and secured by act of Congress. Holmes v. Hurst, 174 U. S. 82, 19 Sup. Ct. 606, 43 L. Ed. 904. To dwell on the right of literary property does not advance the matter; for that exists without copyright, is not increased by it, and means neither more nor less, after publication, than it did before, viz. the right of disseminating by every lawful means the author's expression of thought. But the statute and that alone prevents others from doing the same thing; wherefore copyright may be described, though not defined, as the only practical method of uniting publication with profit.

But though plaintiff's rights, if they exist, are derived solely from that section of the act (No. 24 [Comp. St. § 9545]) dealing with renewals, as distinct from original grants or registrations, aid is derived from considering the nature of copyright as property. The exclusive right of multiplying and distributing written, pictured, or otherwise recorded thought is an incorporeal hereditament, having in origin and nature much resemblance to a patent for invention. There are many and important differences in the extent and incidents of the protection given an inventor, as compared with that afforded an author (Bobbs-

Merrill Co. v. Straus, 210 U. S. 345, 28 Sup. Ct. 722, 52 L. Ed. 1086), but they are alike as estates, in that both are statutory only, both give nothing but the power of denying to others what author or inventor had without and before the statutes, and both are incorporeal and heritable. Nor can any difference in respect of estate nature be found between original and renewed copyrights, when both are in existence and are compared.

[1] But there is a marked difference in respect of the persons to whom the rights accrue. No one but the author, or his quasi assignee, the proprietor, can obtain the original copyright (Societe v. Vitagraph Co., 251 Fed. 258, 163 C. C. A. 414), while as was said in White, etc., Co. v. Goff, 187 Fed. 247, 109 C. C. A. 187, the statute does not really give to the author a true extension or renewal, but authorizes "a new grant to the author, or the others enumerated" in section 24. See the same ruling as to an earlier act. Pierpont v. Fowle, 2 Woodb. & M. 23, Fed. Cas. No. 11,152.

The words of the Twenty-Fourth section are given below (Comp. St. § 9545). They relate only to copyrights in force when the act was passed in 1909; but, as section 23 (section 9544) confers in the same words the same privileges as to copyrights under the act, their construction is important.[1]

We cannot discover that what may be called the renewal provisions of the present act have received judicial consideration other than that of White, etc., Co. v. Goff, supra, affirming the opinion of Brown, District Judge, in (D. C.) 180 Fed. 256. These cases very closely follow the reasoning and conclusion of Assistant Attorney General Fowler (28 Op. Attys. Gen. 162) rendered shortly before the judgment of the appellate court.

On this authority, as well as, the reason of the matter, we regard it as settled: (1) That the proprietor of an existing copyright as such has no right to a renewal. (2) There is nothing in Paige v. Banks, 13 Wall. 608, 20 L. Ed. 709, opposed to this ruling. (3) The statute confers no right of renewal upon administrators. (4) The purpose of the statutory renewal provisions is to give to the persons enumerated in the order of their enumeration a new right or estate, not growing legally out of the original copyright property, but a new creation for the benefit (if the author be dead) of those naturally dependent upon or properly expectant of the author's bounty.

[2] Thus far authority may be cited, but hitherto no court has been required to consider such a state of facts as that at bar. When Mrs.

[1] "That the copyright subsisting in any work at the time when this act goes into effect may, at the expiration of the term provided for under existing law, be renewed and extended by the author of such work if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then by the author's executors, or in the absence of a will, his next of kin, for a further period such that the entire term shall be equal to that secured by this act including the renewal period: * * * Provided, that application for such renewal and extension shall be made to the Copyright Office and to the register therein within one year prior to the expiration of the existing term."

Wilson died, there was no right of renewal in existence, for that right only arises one year before expiration of the current and original copyright. Again, her estate was distributed and her executors ceased to function before that statutory year began; and when an administrator d. b. n. c. t. a. (who in point of fact was the surviving executor) attempted to sell that which he had never applied for, the year within which such applications are permitted had long passed.

It is, we think, plain that the Legislature intended to keep the original and renewal copyrights continuous; there is no provision for the saving of any rights, if the statutory year be permitted to pass without action by someone. It would seem to follow that, if an author unfortunately dies on the day of expiry of his copyright without having himself acted in the premises, all possibility of a renewal in, by, or for any one is gone forever. It follows that, no matter who had the right to renew, there are no present rights, except such as directly flow from the action of Mrs. Bragg and Mrs. Tarleton, who assumed to do what they did as next of kin. It also follows that the conveyance from the administrator d. b. n. c. t. a. is a nullity, and whether such result flows from the fact of his being an administrator, or from his lack of action when he was executor, is a matter of no present moment.

In the White Case, supra, 187 Fed. 253, 109 C. C. A. 193, it is pointed out that the congressional intent, as evidenced by the report of committee, was "to permit an author who had no wife or children to bequeath by will the right to apply for the renewal." It may be noted here, as the real reason for this litigation, that until after the estate was closed no one thought the copyright worth renewing. Value has been given to this and many other old copyrights, and rights thereto, by the growth of the moving picture and photo play industry.

Defendant's claim to use Mrs. Wilson's novel without recompense to any one, may be thus summarized: (1) Legatees as such never have any renewal rights, because they are not named in the statute. (2) In the absence of immediate family, and because Mrs. Wilson made a will duly probated, the executors, as the next class enumerated, were the only persons capable of applying, and were therefore bound to remain in active office in order so to apply. Their failure so to do worked a forfeiture of the privilege of next of kin. (3) But, if the last point be not well taken, then the right of next of kin is unitary; application must be by all; the effort of a fraction is of no avail.

With the first proposition we agree; legatees as such must get whatever they are entitled to through the executors. How they would or could proceed, if through negligence, malice, or dishonesty executors did not act, is a question not before us. But resolution of the second point depends upon the query: How far has the statute, in sections 23 and 24, given a childless and widowed author the power to bequeathing by will the right to apply for renewal?

It is plain from the language of the act, and from the design and purpose thereof as expressed by congressional committee and recognized by courts, that the author cannot take away the rights of widow, children, etc., before the opening of the last year of original copyright. It

is not until then that any estate or chose in action arises or exists; and when such right arises it is—as above stated—a new estate, not a true extension of the existing copyright. If it were otherwise, the author could grant to his first publisher the renewal right eo nomine, which is exactly what the statute was designed to prevent.

But what may be assigned can ordinarily be devised, and it results that before the statutory year the author cannot devise the renewal right; consequently in this case Mrs. Wilson's legatees took no such right, so far as this novel in concerned, because shortly the testatrix had as yet nothing to leave. If, however, the author lives to within the statutory year, he may certainly exercise his right, assign it, or bequeath it; and if he dies in the year, but before registration, it is for his executors to function. They would receive the renewal, as do the executors of an inventor dying after application and before issue of patent, who "in the absence of context to the contrary" take "in trust for the next of kin." De La Vergne, etc., Co. v. Featherstone, 147 U. S. 222, 13 Sup. Ct. 285, 37 L. Ed. 138. In this case, had Mrs. Wilson died within the year, her executors would have found "context to the contrary," and would have acquired copyright for the residuary legatees as such.

Result is that we construe the section as vesting the right in or imposing the duty on, executors only when the power or privilege of obtaining renewal was existing in the testator author at the moment of decease. This avoids the anomaly of requiring executors, as such, to do something in respect of a property right not passing by the will appointing them, or capable of so passing. It is consequently held here that, since this renewal right did not exist, it was not affected by the will or the appointment of executors; in short, there was a necessary absence of a will in respect of this right, which only came into existence some five years after the testatrix died.

This holding also renders unnecessary any consideration of the question as to how far an executor is or can be discharged of his office, by anything short of death or revocation of letters—a matter of state regulation, and capable of greatly complicating questions arising under national statutes.

Defendant's last contention requires investigation of the attributes and incidents of the incorporeal property called copyright. The privilege of application may be likened to that "inchoate right" in an invention, which the proper party "may perfect and make absolute by proceeding in the manner which the law requires." Gayler v. Wilder, 10 How. 477, 13 L. Ed. 504. When that right arose in October, 1914, it vested in the next of kin, as follows from our findings hitherto. Furthermore, it so vested in them as owners in common; there being no material difference in estate nature on this point between the right to apply and the copyright as and when granted or registered. As to the nature of tenancy, see Carter v. Bailey, 64 Me. 458, 18 Am. Rep. 273; Powell v. Head, 12 Ch. Div. 686; Lauri v. Renad, [1892] 3 Ch. 403; Maurel v. Smith (C. C. A. 2d, Jan. 12, 1921), 271 Fed. 211, affirming (D. C.) 220 Fed. 198.

There is nothing in the nature of copyright forbidding a separation between the legal and equitable titles; one may hold in trust for others (Harms v. Stern, 229 Fed. 42, 145 C. C. A. 2, and Maurel v. Smith, supra), and ownership in common may and does arise from joint authorship (Levi v. Rutley, L. D. 6 C. P. 523; Maurel v. Smith [D. C.] 220 Fed. 198) as well as from creation of right in a plurality, wherein again it resembles a patent (Blackledge v. Weir, 108 Fed. 71, 47 C. C. A. 212.

One of the most characteristic marks of tenancy in common, absence of right to an accounting inter sese, has been recognized in respect of copyright (Carter v. Bailey, supra), as well as in patent law (Blackledge v. Weir, supra); while the right of each part or common owner to license is acknowledged, though with differences of opinion as to the effects on nonlicensing co-owners (Powell v. Head, supra; Nillson v. Lawrence, 148 App. Div. 678, 133 N. Y. Supp. 293), of which the last is more in consonance with corresponding patent law (Walk. Pat. [5th Ed.] § 305).

[3] Assuming tenancy or ownership in common in the next of kin, there is no reason why other and well-known incidents of such title should not control the interpretation of a statute creating common ownership. Thus it is "a settled rule of law" that the possession of one tenant in common is the possession of all (Mining Co. v. Taylor, 100 U. S. 40, 25 L. Ed. 541); so, too, the entry of one is the entry of all; seisin of one is for the use of all, any act of one is presumed to be for the common benefit; in short the relation between such owners is ordinarily or presumably that of trust (Clymer v. Dawkins, 3 How. 674, 11 L. Ed. 778, Rapalje's notes). Especially is the purchase or acquisition of an outstanding title for the common benefit. Rothwell v. Dewees, 2 Black, 613, 17 L. Ed. 309; Courtner v. Etheredge, 149 Ala. 78, 43 South. 368.

Reasoning ab inconvenienti is not legally cogent; but remembering that we must construe this statute "with a view to effecting the purposes intended by Congress," and not so "narrowly * * * as to deprive those entitled to their benefit of the rights Congress intended to grant" (Bobbs-Merrill v. Straus, supra, 210 U. S. at page 346, 28 Sup. Ct. at page 724 [52 L. Ed. 1086]), we may point out that only by treating the act of a fraction of the next of kin as a class act can injustice be prevented. Next of kin are often numerous, as here; widely separated geographically, as here; some may be in parts unknown; yet defendant's argument, pressed to its logical result, means that, if one owner of a microscopic fraction of right cannot be found or can be bought, so that he cannot or will not sign the renewal application, the rest of the family are helpless. The same result would flow from the malicious or purchased act of one child in a numerous family. Assuredly the Legislature never intended such injustice.

It is therefore held that the two sisters, who as next of kin registered the renewal, were lawfully authorized so to do for themselves and their fellow owners in common, their act was in law the act of all, and

plaintiff, having derived title from all, is the owner of a lawful renewal copyright.

Order reversed, with costs, and cause remitted, with directions to grant injunction as prayed for.

UNITED STATES ex rel. BRYANT v. HOUSTON, Secretary of the Treasury, et al.

(Circuit Court of Appeals, Second Circuit. May 18, 1921.)

No. 260.

1. **Habeas corpus ⇐54—Complaint by next friend not warranted without explanation.**
   Under Rev. St. § 754 (Comp. St. § 1282), providing that application for writ of habeas corpus shall be made by complaint, "signed by the person for whose relief it is intended," and verified by the oath of the person making the application, a complaint made by one as "next friend" must set forth some reason or explanation, satisfactory to the court, showing why it is not signed and verified by the person detained, and what relation the next friend bears to such person.
2. **War ⇐4—Order of president, retransferring the Coast Guard to the Treasury Department, valid.**
   The order of the President of August 28, 1919, retransfering the Coast Guard from the Navy to the Treasury Department, made under Overman Act May 20, 1918, § 1 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 283a), *held* within the authority given by such act and effective.

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

Petition of Mildred Bryant, on behalf of Harry Harris, against D. F. Houston, Secretary of the Treasury, and others, for writ of habeas corpus. Writ denied, and petitioner appeals. Affirmed.

Emery C. Weller, for appellant.

Francis G. Caffey, U. S. Atty. (Earl B. Barnes, Asst. U. S. Atty., of counsel), for appellees.

Before WARD and ROGERS, Circuit Judges, and MAYER, District Judge.

MAYER, District Judge. [1] 1. This is an appeal from an order of the District Court for the Southern District of New York, dismissing a writ of habeas corpus. The writ was allowed on the application of "your petitioner, Mildred Bryant (a friend of Harry Harris), of Woodhaven, Long Island." The petitioner fails to disclose anywhere in her petition who she is, or what relationship, if any, she bears to Harry Harris, or whether Harry Harris for any reason was unable to sign and verify the petition, or whether the father of Harris, who according to the petition resides at No. 2128 North Twenty-First street, in Philadelphia, Pa., or Harry Harris himself, desired this application to be made. The petitioner, it is true, alleges that she is advised that

Harris is "troubled with aphasia"; but this allegation is set forth as an excuse for his desertion, and not as explaining why Harris did not sign and verify the petition or complaint (as it should more aptly be called), in accordance with U. S. Compiled Statutes, § 1282 (R. S. § 754), which reads as follows:

"Sec. 1282. *Application for*—Application for writ of habeas corpus shall be made to the court, or justice, or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application."

The provisions of the section quoted, supra, indicate that it was not intended that a writ of habeas corpus should be allowed on the application of any person whomsoever without explanation as to why the complaint was not signed "by the person for whose relief" the writ "is intended."

The practice of a next friend applying for a writ is ancient and fully accepted. There are many instances and circumstances under which it may not be possible nor feasible that the detained person shall sign and verify the complaint. Inability to understand the English language or the situation, particularly in the case of aliens, impossibility of access to the person, or mental incapacity are all illustrations of a proper use of the "next friend" application. In re Ferrens, Fed. Cas. No. 4,746, Judge Blatchford, entertained an application made by the wife of an enlisted soldier and briefly summed up the practice as follows:

"It is claimed on the part of the United States that the writ must be dismissed, because it is not prosecuted by the recruit himself; that no one can prosecute it but himself, unless it be shown that he is debarred the opportunity of preferring a petition himself; and that such fact is not shown in this case. It has never been understood that, at common law, authority from a person unlawfully imprisoned or deprived of his liberty was necessary to warrant the issuing of a habeas corpus, to inquire into the cause of his detention. In the case of People v. Mercein, 3 Hill, 399, 407, the Supreme Court of New York intimate that such authority from the person detained is not ordinarily necessary. In case of Ashby, 14 How. St. Tr. 814, the House of Lords, in England, in 1704, resolved 'that every Englishman, who is imprisoned by any authority whatsoever, has an undoubted right, by his agents or friends, to apply for and obtain a writ of habeas corpus, in order to procure his liberty by due course of law.' This resolution was assented to by the house of commons. Id. 826. In the present case, the petitioner states, in her petition, that she is the wife of the recruit, and is dependent upon him for support. This is, I think, sufficient to authorize her to prosecute the writ."

But the complaint must set forth some reason or explanation satisfactory to the court showing why the detained person does not sign and verify the complaint and who "the next friend" is. It was not intended that the writ of habeas corpus should be availed of, as matter of course, by intruders or uninvited meddlers, styling themselves next friends. Gusman v. Marrero, 180 U. S. 81, 21 Sup. Ct. 293, 45 L. Ed. 436.

The case at bar well illustrates the desirability of making clear that applications of this character should not be entertained. There is noth-

ing to show that either Harris or his father authorized or desired this application to be made, or that it is a matter of the slightest concern to either of them whether Harris shall be tried by a Navy court-martial or by a Coast Guard court-martial.

There is nothing in the record to show that the point here considered was called to the attention of the District Court, but the District Court would have been justified in disallowing or dismissing the writ for failure on the part of the petitioner to show why she, and not Harris, signed and verified the complaint, and for failure to show what relationship, if any, existed between Harris and herself, or what was her concern, if any, in the detention of Harris.

We are not to be understood as holding that an outsider may not make the application for a writ of habeas corpus, but the application must set forth facts, which will satisfy the court that the interest of the next friend is appropriate, and that there is good reason why the detained person does not himself sign and verify the complaint, as provided in section 1282, supra.

[2] 2. At the time when the writ was allowed, Harris, it is alleged, was under arrest confined in the brig at the Barge Office of the New York Division of the United States Coast Guard, awaiting trial by a General Coast Guard Court upon charges of desertion, and of violating lawful regulations issued by the Secretary of the Treasury.

In time of peace, the United States Coast Guard is under the jurisdiction of the Treasury Department; but, in time of war, it is subject to the orders of the Secretary of the Navy. The act of January 28, 1915 (38 Stat. L. 800, 2 Fed. Stat. Ann. [2d Ed.] p. 262, Comp. St. §§ 8459½a[1]), provides in part:

"The Coast Guard, which shall constitute a part of the military forces of the United States and which shall operate under the Treasury Department in time of peace and operate as a part of the Navy, subject to the orders of the Secretary of the Navy, in time of war or when the President shall so direct."

At the date of the entry of the United States into the war with the German Empire, the Coast Guard automatically passed under the control of the Navy Department and so remained until August 28, 1919, when the President signed an order turning it back to the Treasury Department, under whose direction since said date it has been operated and is now operated.

The order directing the trial of Harris on the charges preferred against him was signed by the Assistant Secretary of the Treasury on February 21, 1921, and it is to be presumed that the General Coast Guard Court was duly convened by the same authority pursuant to the provisions of the statute. Act May 26, 1906, 34 Stat. L. 200 (2 Fed. Stat. Ann. [2d Ed.] 304).

The President's order of August 28, 1919, was as follows:

"By virtue of the authority conferred by 'An act authorizing the President to coordinate or consolidate executive bureaus, agencies, and offices, and for other purposes, in the interest of economy and the more efficient concentration of the government,' approved May 20, 1918, I do hereby make and publish the following order:

"The important purposes for which the operation of the Coast Guard was temporarily transferred to the Navy under the Act approved January 28, 1915, entitled 'An act to create the Coast Guard by combining therein the existing Life Saving Service and Revenue Cutter Service,' having been accomplished, and, it being for the best interest of the government and for the efficient service of the Coast Guard in connection with the collection of the revenue that the Coast Guard be under the supervision of the Treasury Department, it is hereby directed that the Coast Guard shall on and after this date operate under the Treasury Department."

The act of May 20, 1918, known as the Overman Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, 283a, 283b, 283f), so far as here applicable reads as follows:

"That for the national security and defense, for the successful prosecution of the war, for the support and maintenance of the Army and Navy, for the better utilization of resources and industries, and for the more effective exercise and more efficient administration by the President of his powers as Commander in Chief of the land and naval forces the President is hereby authorized to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the purposes of this act, and to this end is authorized to make such regulations and to issue such orders as he may deem necessary, which regulations and orders shall be in writing and shall be filed with the head of the department affected and constitute a public record; Provided, that this act shall remain in force during the continuance of the present war and for six months after the termination of the war by proclamation of the treaty of peace, or at such earlier time as the President may designate: Provided further, that the termination of this act shall not affect any act done or any right or obligation accruing or accrued pursuant to this act and during the time that this act is in force: Provided further, that the authority by this act granted shall be exercised only in matters relating to the conduct of the present war.

"Sec. 2. That in carrying out the purposes of this act the President is authorized to utilize, coordinate, or consolidate any executive or administrative commissions, bureaus, agencies, offices, or officers now existing by law, to transfer any duties or powers from one existing department, commission, bureau, agency, office, or officer to another, to transfer the personnel thereof or any part of it either by detail or assignment, together with the whole or any part of the records and public property belonging thereto. * * *

"Sec. 6. That all laws or parts of laws conflicting with the provisions of this act are to the extent of such conflict suspended while this act is in force.

"Upon the termination of this act all executive or administrative agencies, departments, commissions, bureaus, offices, or officers shall exercise the same functions, duties, and powers as heretofore or as hereafter by law may be provided, any authorization of the President under this act to the contrary notwithstanding."

A mere reading of the act shows that the President was clothed with the widest measure of discretion, so far as concerned "matters relating to the conduct of the present war." "Upon the termination" of this act means, of course, upon the termination of "the present war." When the "present" war shall have been terminated, then (but not until then) "all executive * * * agencies * * * shall exercise the same functions * * * as heretofore or hereafter may be provided, any authorization of the President under this act to the contrary notwithstanding."

The President, by his order of August 28, 1919, exercised his discretion in respect of subject-matter over which, by the act of May 20, 1918, he had full power and authority, and the discretion, so exercised, is not reviewable.

The order dismissing the writ is affirmed.

BARBOT v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. May 5, 1921.)

No. 1838.

Poisons ⟸4—Defrauding revenue not essential to conviction for violation of Narcotic Act.

In the prosecution of a physician for prescribing or dispensing drugs in violation of Harrison Narcotic Act § 2 (Comp. St. § 6287h), it is not a defense that his acts were not intended, and did not tend, to violate or defeat the revenue provisions of the act but the only issue is whether he acted in good faith in prescribing drugs to patients for maladies requiring administration of the drug, or whether he dispensed or prescribed them generally to persons seeking his professional aid merely to procure the drugs.

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

Criminal prosecution by the United States against Louis D. Barbot. Judgment of conviction, and defendant brings error. Affirmed.

John P. Grace, of Charleston, S. C., for plaintiff in error.

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

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

WADDILL, District Judge. Louis D. Barbot, the plaintiff in error, hereinafter called the defendant, is and was a physician, and prior to the commission of the offense of which he stands indicted had long practiced his profession in the city of Charleston. He was for some years professor of anatomy at the South Carolina Medical College, of high standing in the community, a member of the leading medical societies, accomplished in his profession, and enjoyed a large practice. On the 2d of December, 1919, he was indicted by the grand jury of the United States District Court at Columbia, charged with the violation of the Harrison Anti-Narcotic Drug Act of the 17th of December, 1914 (38 Stat. 786; Comp. St. §§ 6287g–6287q). The indictment contained 16 counts. The first 2 related to failure to keep proper records as a licensed physician under that act, and the remaining 14 covered sales of morphine and cocaine to divers persons named in the several counts, not in the course of his professional practice. Upon his trial, the jury

returned a verdict of not guilty as to the first 2 counts, and guilty on the remaining 14 counts. Judgment was entered, and the defendant fined and imprisoned under the said 14 counts on which he was convicted, from which action of the court this writ of error was sued out.

Three assignments of error were made—the first relating to the admission of testimony on the trial; the second, to the charge of the court interpreting the Harrison Act; and the third, to the portion of the court's charge relating to the same subject. At the hearing, and in the defendant's briefs, the second assignment alone was relied upon as ground for reversal of the lower court's action. Defendant excepted to the refusal to charge that—

"The jury are instructed that the primary object of this law is not a police one; it is a revenue law; it is only secondarily a police measure; it could not be maintained as constitutional, if it were regarded as primarily a police measure. The jury are instructed that they must find that the defendant had an intention to violate, or that his conduct reasonably would lead to the violation of the revenue object of the law, in order to find him guilty."

The facts in the case—that is to say, that the defendant prescribed, sold, and distributed drugs and narcotics as charged in the indictment, in large quantities—are not in dispute. Indeed, the defendant insists upon his right, as a licensed physician, so to do, and that he was acting from a humanitarian standpoint, and that, in so far as it inhibited him from so doing, the act was in contravention of his constitutional rights. The extent of the defendant's business is worthy of mention. It appears from his own records that from July 1, 1918, to October 16, 1919, he purchased 92,950 one-quarter grain tablets of morphine, 200 one-half grain morphine tablets, 329 drachms of powdered morphine, and 10 drachms of cocaine; and further that for a considerable time the defendant was the chief source from which narcotic drugs were obtained in Charleston, and his own record disclosed that most of the habitual users of drugs were in almost daily attendance upon him, and that the dosages furnished them, if, indeed, that feature is at all material, were not given in decreasing quantities, but frequently in larger and sometimes steadily increasing doses; and by his own handwriting it was shown that he was accustomed to give some addicts as much as a drachm of cocaine or morphine at one time, and to others he furnished 500 and 600 quarter grain morphine tablets at one time.

A number of local physicians were called, who testified as to the method of treatment of drug addicts, and physicians from Charleston, Columbia, and New York, called as experts, were in accord that the defendant's manner of furnishing morphine and cocaine did not constitute treatment of a drug addict, such as would cure him. The government's testimony established that the defendant's method of treatment was not a bona fide attempt to cure patients afflicted by the drug habit, but merely a way of selling and dispensing to them such drugs as they wanted. It seems quite manifest from the testimony that the defendant, in what he did, proceeded in plain violation of the Harrison Act; and he cannot for a moment set up the defense of his conduct that, from his viewpoint, what he had done, though in

the teeth of the law, was in the interest of humanity. An excuse for violating every law would be readily found, if such a defense could be interposed. The meaning and purpose of the act, as respects physicians, is manifest, namely, not that they may not in a proper case, in good faith, prescribe drugs for a patient whose malady is such that in their professional judgment the drug is necessary, but only that they may so prescribe in good faith to their patients in the course of their professional practice; and, of course, this does not contemplate prescribing drugs for persons who merely desire the same to gratify their appetites or desires, or because of their unfortunate habit of the use of the same.

The defendant's instruction in effect involves the constitutionality of the act, in that it insists that in order to legally convict under the same it is necessary to establish, not only improper prescribing of the drug, but that in so doing the government was defrauded of its revenue. The constitutionality of the act has been settled, and is no longer open to discussion. United States v. Doremus, 249 U. S. 86, 39 Sup. Ct. 214, 63 L. Ed. 493; Webb v. United States, 249 U. S. 96, 39 Sup. Ct. 217, 63 L. Ed. 497. Under these decisions, and the cases therein cited, it is clear that, while it is necessary for the constitutionality of the act of Congress that the same should come within the scope of the taxing power of Congress, yet that the reason and purpose of Congress, and the real effect of the act, may properly be for a moral end, wholly different from the mere collection of revenue. The Circuit Court of Appeals of this circuit, speaking through Judge Woods, aptly answered this suggestion as follows:

"The Supreme Court has answered such objections by holding that in a revenue statute the Congress may make any rule or regulation which is not in itself unreasonable, although its effect on the revenue be only remote or incidental, and its effect on the public health or morals direct and obvious." Foreman v. United States, 255 Fed. 621, 166 C. C. A. 655.

A careful review of the decisions as they exist at the present time make clear the fact that, when a physician is charged with unlawfully selling or prescribing drugs under the Harrison Act, the case turns largely upon his good faith in prescribing drugs to his regular patients, for maladies requiring the administration of the drug, or whether he prescribed for persons seeking his professional aid merely to procure the drug. In the latter case the physician might, perhaps, in a single instance afford temporary relief for one whose condition demanded immediate treatment. To go further than this would enable every doctor to do just what the defendant did here—furnish the drug to addicts, or afford opportunity to them to procure all the narcotics they desired; as, unrestrained, they would go from one physician to another, and quickly destroy the whole purpose of the act in question.

The case of Thompson v. United States, 258 Fed. 196, 169 C. C. A. 264, a decision of the Circuit Court of Appeals for the Eighth Circuit, thus refers to this subject:

"The good faith of the defendant treating these persons as a physician, for the purpose of curing them from the narcotic habit, is the main and only issue involved in this case. The object of the act although enacted under the taxing power of Congress, was no doubt intended to prevent the

growing use of these narcotics, deemed a menace to the nation by Congress. * * * If physicians and the others mentioned in the exceptions can sell and dispense these narcotics, regardless of the fact whether it is done in good faith for the relief of a patient, then the moral object of the act is entirely defeated. It certainly cannot be claimed that a physician selling these narcotics, not in good faith, for the purpose of securing a cure of one suffering from an illness, or to cure him from the morphine habit, is doing so 'in the course of his professional practice only,' as prescribed by the express language of the act."

In the Trader Case, 260 Fed. 923, a decision of the Circuit Court of Appeals for the Third Circuit, the subject is likewise considered; the court using the following language:

"It is next urged that the trial judge was not justified in stating as he did in his charge, that, while the Harrison Act is a revenue measure, 'its clear purpose * * * is to restrict the distribution and use of opium and its derivatives to medicinal purposes only.' It is assuredly within the discretion of a trial judge, in charging a jury, to state the purpose, as he conceives it, that Congress had in passing any given act. If an erroneous statement of such a purpose may be considered reversible error in any case, we are entirely clear that, although the Harrison Act was passed pursuant to the taxing power of Congress and is clothed in the garb of a revenue act, the learned trial judge did not misconceive or misstate the broad underlying purpose which Congress had in passing it (United States v. Jin Fuey Moy, 241 U. S. 394–402, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854), and therefore that no harm was done the defendant by the statement in question."

From this decision a writ of certiorari was taken to the Supreme Court, and there denied. 251 U. S. 555, 40 Sup. Ct. 119, 64 L. Ed. 412. This would seem to be conclusive of the subject.

Since the last-named decision, the Supreme Court at the October term, 1920 (December 6, 1920), in the case of Jin Fuey Moy v. United States, 254 U. S. 189, 41 Sup. Ct. 98, 65 L. Ed. —— (a second decision under that name), rendered a far-reaching and most important opinion as respects the subject of this class of case, namely, as to what constitutes a sale under the Harrison Act, on the part of a physician, and the court held that the unlawful issue of a prescription by a doctor, was a selling of the prescribed drug, and an aiding and abetting therein, within the meaning of section 2 of the Harrison Act, and the provisions of section 332 of the Criminal Code (Comp. St. § 10506). In this decision, Mr. Justice Pitney, citing Webb v. United States, 249 U. S. 96, 39 Sup. Ct. 217, 63 L. Ed. 497, supra, speaking for the Supreme Court, said:

"Manifestly the phrases 'to a patient' and 'in the course of his professional practice only' are intended to confine the immunity of a registered physician, in dispensing the narcotic drugs mentioned in the act, strictly within the appropriate bounds of a physician's professional practice, and not to extend it to include a sale to a dealer or a distribution intended to cater to the appetite or satisfy the craving of one addicted to the use of the drug. A 'prescription' issued for either of the latter purposes protects neither the physician who issues it nor the dealer who knowingly accepts and fills it."

The assignments of error in this case are without merit, and the decision of the lower court will be affirmed.

CLARKE v. BOYSEN et al.

(Circuit Court of Appeals, Eighth Circuit. June 13, 1921.)

No. 5356.

Appeal and error ⇐1222—Appellate court has inherent power to correct mandate.

Every court has inherent power, on motion of a party or on its own motion, to make certain that its orders and decrees are confined to its jurisdictional powers in the instance involved, and that such orders and decrees carry out the expressed determinations on which they are based, and to that end an appellate court may recall a mandate before its execution and amend its opinion and orders to make them conform to the issues involved.

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

On motion of appellant to recall mandate and rectify decree. Granted.

For prior opinion, see 264 Fed. 492, 268 Fed. 535.

Bruce W. Sanborn, of St. Paul, Minn., for appellant.
D. Avery Haggard, of Cheyenne, Wyo., for appellees.

Before CARLAND and STONE, Circuit Judges.

STONE, Circuit Judge. This is a motion filed by appellant, John T. Clarke, for recall of the mandate issued by this court and to rectify the decree granted by this court on appeal. 264 Fed. 492. While the mandate has been issued, it has not, as yet, been executed. On the first appeal of this case (Broatch v. Boysen, 175 Fed. 702, 99 C. C. A. 278), this court held that appellants were owners, as cestuis que trust, of certain undivided fractional interests to a tract of land, subject to the payment of their proportional shares of certain expenditures made by the trustee. The second appeal (236 Fed. 516, 149 C. C. A. 568) determined the amounts of such payments. Thereafter the proceedings set out in the opinion on the present appeal (264 Fed. 492) occurred. Decree and mandate were issued on this appeal in accordance with the last paragraph of the opinion (264 Fed. 496). On motion to modify this opinion and decree (before issue of mandate) the opinion was modified to permit filing of the second supplemental petition.

We are asked by this motion to "rectify" the decree issued and to recall the mandate. We cannot treat this motion as of the nature of a petition for rehearing, for it is filed out of time, and appellants have already filed, and we have ruled upon, one such motion. Nor can it be considered as a bill of review. Omaha Elec. L. & P. Co. v. City of Omaha, 216 Fed. 848, 133 C. C. A. 52. But every court has an inherent power, even of its own motion, to make certain that its orders and decrees are confined to its jurisdictional powers in the instance involved, and that such orders and decrees carry out the expressed determinations upon which they are based. Clark v. Arizona Mutual S. &

L. Ass'n (D. C.) 217 Fed. 640, and affirmance in Farmers' & Merchants' Bank v. Ariz. Mut. Sav. & Loan Ass'n, 220 Fed. 1, 135 C. C. A. 577, with citations in those opinions.

To understand whether the decree and mandate were, in all things, within the jurisdiction of this court on this appeal, and whether they carry out the expressed intentions of this court, it is necessary to bear in mind the previous history of this litigation, to understand the issues involved in this appeal, and to study the scope of the opinion upon which this decree and mandate issued. The previous history of the litigation can be learned in detail from the three opinions. The issues on this appeal were from a decree of June 18, 1918, dismissing complaint as to Clarke and others, who had not paid into court amounts adjudged for their interests in the land, and who therefore had not accepted master's deeds.

The errors alleged were: (1) Order of June 4, 1918, requiring payments into court and master's deeds. (2) Order of June 18, 1918, to clerk to pay money, paid into court by certain claimants, to the attorney of the Asmus Boysen Mining Company. (3) Denial of filing second supplemental petition.

The points argued were: (1) Order of June 4 and decree of June 18 erroneous, because mining company had not offered deed, and could not offer clear deed to 88 acres (the only valuable part of land) and to part granted Burlington for right of way. (2) To require payments in full would give mining company full value for clear title, while appellants would get only lawsuit as to the most valuable portion.

The opinion (264 Fed. 492) clearly shows that there was no intention in this court to affect the title as declared in the first decision of this court (175 Fed. 702, 99 C. C. A. 278). The opinion, taken with the modification entered on appellant's motion to modify, shows clearly that what this court intended was to reverse the four orders then appealed from, and to remand the case for proceedings in accordance therewith. This would have reinstated the case, which would have been then pending on the first and second supplemental petitions. In the directory portion of the opinion (last paragraph) this court sought to work out some of the steps by which its judgment could be rendered effective in the trial court. One of the complications so presented, and which the court endeavored to work out in its directions, was that a portion of the land had been transferred by the Asmus Boysen Mining Company and would involve litigation (as set forth in the first supplemental petition) before any benefits could be derived therefrom. It was claimed by appellant, and not seriously disputed, that this portion conveyed was practically all of the entire tract that had any value. A correlative feature, in this complication, related to the payment required, by former appeals, to be made by appellants as a condition of obtaining title. That payment was due the mining company—the company which had wrongfully transferred the above portions of land, and thus put the burden and uncertainty of litigation upon appellants. The payments adjudged, in the second appeal, as due from appellants to this mining company, were based upon the idea of a clear title.

To require, under the circumstances of this litigation, such full payment for this clouded and uncertain title, would be inequitable for two reasons: First, it would be overpayment, because appellants might not be able to recover the land involved, and would certainly be burdened by prolonged and expensive litigation therefor; second, the mining company, a wrongdoer, would receive double full payment, in that it would have gotten one full payment from its grantees under the transfers which have caused all this trouble, and would get payment a second time from the appellants. The plan in the mind of the court to solve this complication was to require deeds to appellants covering their respective interests in the entire tract; to require them to pay the amounts justly due the mining company therefor. These amounts would be those adjudged on the second appeal, as affected by the situation that the mining company had already received and was accountable for the value of the lands in litigation. So far as these amounts of payment by appellants were concerned, this would mean ascertaining the value of the lands conveyed by the mining company at the time of such conveyance, and balancing between appellants and the mining company such value against the amounts decreed on second appeal to be paid by appellants. There would be a debit or credit according to whether appellants' proportion of the value of the litigated lands was less or more than the amounts they were to have paid under the decree on the second appeal.

Upon determination of these balances, payment of such as were against appellants, if any, and the passing of the deeds for appellants' interests in the entire tract, the situation would be as follows: The appellants would have title to their proportionate parts of the lands, free to litigate for possession under the first supplemental petition, and free to litigate the mining company for their proportion of the damage, because of retention and use, as set forth in the second supplemental petition. If the above balance was determined to be in favor of the appellants, they would get their deeds without payment, and also a judgment against the mining company for that balance. In the wording of the directory portion of the decree the inadvertent error was made in requiring (in line 6 from the bottom of page 496 of 264 Fed.) that the deeds be "for such lands as may be conveyed free of such litigation." This should have been, as patent from the opinion "for such portions of the entire tract as appellants have been heretofore adjudged entitled," or words to the same effect. This mistake is evident on the face of the record, particularly as shown by the opinion of which this paragraph was the directing and enforcing part.

On this third appeal it was entirely without the power and jurisdiction of this court to adjudicate as to the title of appellants in this land. That was no issue in the orders appealed from, nor presented on this appeal, and no attempt was made to disturb the title. Besides, this title had become finally established on the first appeal, which determined the law of the case, and this court in the present appeal was endeavoring to make effective that title so declared. We have no doubt of our power, in the interest of justice, after the term and before execution

of the mandate, to recall the mandate and to amend the opinion, and the orders thereunder of this court, to make them conform to the issues involved, and to the determination clearly expressed on the face of the record.

The mandate should be recalled. The opinion and decree should be amended, by inserting in each the words, "and also for deeds for such portions of the entire tract as appellants have been heretofore adjudged entitled," in lieu of the words, "and also for deeds for such lands as may be conveyed free of such litigation."

A new mandate should issue, in consonance with the decree as thus amended.

HENRY v. CRAIGIE & CO., Limited.

(Circuit Court of Appeals, Third Circuit. June 4, 1921.)

No. 2690.

Brokers ⇐43(3)—Contract held not to entitle brokers to a commission from the seller of merchandise.

Where defendant wrote to plaintiff's brokers concerning a powder, "We make you a price of six (6) cents per pound, net without commission," and later, on receiving a letter from plaintiff apprising them he had a buyer, and containing seller's contract, defendant returned the letter, marked "Accepted," the letter reading, "It is understood that you are to protect us for the difference as between your price of 6 cents per pound net and the final selling price which our buyers are paying for the material. You will understand that we will have to divide the above overage with two other brokers," plaintiffs had no claim for commission.

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

Action by Craigie & Co., Limited, against Leon Henry. Judgment for plaintiff, and defendant brings error. Reversed.

Frederick K. Hopkins, of Hoboken, N. J., and Wall, Haight, Carey & Hartpence, of Jersey City, N. J. (Thomas G. Haight and John A. Hartpence, both of Jersey City, N. J., of counsel), for plaintiff in error.

Moses J. De Witt, of Newark, N. J. (Millard F. Tompkins, of New York City, of counsel), for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below Craigie & Co., on the ground of diversity of citizenship, brought suit against Leon Henry to recover some $13,000 for commissions for procuring a purchaser for 150 tons of cocoa compound. The case was sent to a jury, and at the conclusion of the proofs the court denied defendant's request for binding instructions in its favor. The jury having found for plaintiff, and a judgment being entered thereon in its favor, this writ of error was sued out by defendant. The underlying question involved is whether the trial judge should have held that, by the papers which evidenced the contract between the parties, the plaintiff was not en-

titled to commissions, and therefore granted the defendant's request for binding instructions.

The proofs in the case tended to show that on June 18, 1919, Henry, hereinafter called the defendant, wrote Craigie & Co., hereafter styled plaintiff, as follows:

"Confirming our telephone conversation of this a. m., beg to say that the sample of powder handed to you is made of cocoa shells and hulls finely ground. We never had any analysis made of that powder, but believe that the crude fiber must run up to about 17 per cent. and the fat between 5 to 8 per cent. We can turn out about 50 tons of this product per month, and make you a price of six (6) cents per pound, net without commission, goods packed in cases f. a. s. New York, cash against documents."

In pursuance of this authorization, plaintiff procured a buyer, and on June 26 wrote defendant a letter, accompanied by the seller's contract. This letter the defendant received and marked "Accepted," and it was returned by him the same day. It reads:

"We hereby confirm sale made to-day for your account to Messrs. J. A. Kirsch & Co., of this city, of 150 tons of cocoa compound as per sample submitted, packed in cases f. a. s. New York, to be delivered by August 31, 1919, or sooner, as per contract inclosed. It is understood that you are to protect us for the difference as between your price of 6 cents per pound net and the final selling price which our buyers are paying for the material. You will understand that we will have to divide the above overage with two other brokers. Kindly sign duplicate copy of this letter and oblige.

"Accepted 6/26/19. C. Leon Henry."

Under date of June 27th, the plaintiff wrote defendant in reference to the seller's contract, as follows:

"I am inclosing original seller's contract for 150 tons cocoa compound, sold for your account yesterday to J. A. Hirsch & Co., of this city. We are very glad to have been able to negotiate the second contract for your account, and trust that we may be as successful in the future. I want you to understand that we had to divide the overage with two other concerns, who were between ourselves and J. A. Kirsch & Co. I hope that on the next contract for you we can sell direct to the buyer, and save both you and ourselves the major part of the profit."

These papers constitute the contemporaneous writings, and, taken together, they evidence the whole transaction. Considered as a whole, we are clear the rulings not only fail to show a situation where an agreement to pay commissions could be implied, but they expressly show that the understanding and agreement of both parties was that no commissions were to be paid. This is clear from a study of the papers. Thus, in his letter of June 18th to Craigie, a letter which is the foundation of the whole matter, and whose terms are not modified or changed by any subsequent writing, Henry says he can "make a price of six (6) cents per pound, net without commission," etc.

After obtaining a buyer pursuant to such understanding, viz. "net without commission," and transmitting to Henry for approval and acceptance the seller's contract, Craigie, the plaintiff, not only made no mention of commissions, but, in confirmation of the fact that the sale was to be "net without commission," expressly stated and claimed the source from which he was to obtain his pay, using these words:

"It is understood that you are to protect us for the difference as between your price of 6 cents per pound net and the final selling price which our buyers are paying for the material. You will understand that we will have to divide the above overage with two other brokers."

From this definition of overage as the difference between 6 cents Henry was to have, and 10 cents, "the final selling price which our buyers are paying for the material," and insisting on protection from that source by Henry it will be seen that no ground existed for a claim of commission. Indeed, the papers show that this was in the nature of a joint venture, where both parties were to participate in an expected resultant profit namely, Henry to the extent, to use the terms of his letter, of "your price of 6 cents per pound net," and Craigie in the terms of their letter the excess over "a price of six (6) cents per pound, net without commission." And this participating in the result of a joint venture as a profit is evidenced by Craigie's letter of June 27th to Henry. He speaks of his overage, creating the profit, in these words, as quoted above:

"I hope that on the next contract for you we can sell direct to the buyer, and save both you and ourselves the major part of the profit."

Indeed, upon the writings as a whole—and, as we have said, they evidence the dealings between the parties—we are clear that the singularly large prospective overage of the joint venture, and not the relatively small customary commission of a broker, was the profit to which Craigie was looking, and that the trial judge should have affirmed the defendant's point for binding instructions. By doing otherwise, the court failed to enforce the written contract the parties had made for overage, and permitted the jury to enforce a supposed contract for commissions, which the parties had not only never made, but expressly stipulated was not made.

The judgment below is reversed, and the cause remanded for further proceedings.

HOLLAND et al. v. DIRECTOR GENERAL OF RAILROADS.

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

No. 2638.

1. **Trial ⇐141—When evidence on vital issue is undisputed or legally conclusive, court should direct verdict.**

In an action against a carrier for injury to a passenger, where evidence on the issue of defendant's negligence is such that fair-minded men might draw different conclusions therefrom, the case should be submitted to the jury; but, if evidence that it exercised the high degree of care required by law is undisputed, or of such conclusive character that the court, in the exercise of a sound judicial discretion, would set aside a verdict in opposition to it, it is the duty of the trial judge to direct a verdict.

2. **Carriers ⇐301—Railroad company held not liable for injury to passenger caused by derailment.**

Affirmative and undisputed evidence that derailment of a train by which a passenger was injured was due to the breaking of a rail, caused

by an internal transverse fissure not discoverable by inspection, that the track was inspected daily, and that the rail was made by a reputable manufacturer, *held* to exonerate the railroad company from liability for the injury.

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

Action at law by Hazel Holland, by her next friend, Thomas Holland, and Thomas Holland, against the Director General of Railroads. Judgment for defendant, and plaintiffs bring error. Affirmed.

Charles J. Stamler, of Elizabeth, N. J., for plaintiffs in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

DAVIS, Circuit Judge. This is an action to recover for personal injuries to Hazel Holland received October 4, 1919, while riding on one of the trains operated by defendant between Rahway and Newark, N. J. The train, composed of a locomotive and four cars, was derailed at South Elizabeth station, and the plaintiff Hazel Holland was thrown against a window of the car in which she was riding, and received the injuries of which she complains. At the conclusion of the case, the learned trial judge directed a verdict against the plaintiffs on the ground that the evidence did not establish any negligence on the part of the defendant.

[1] If the evidence showed that the defendant was guilty of any negligence contributing proximately to the accident, or facts, whether in dispute or not, from which fair-minded men might honestly differ as to the conclusions to be drawn from them, the case should have been submitted to the jury, and the question of negligence not decided by the judge as a matter of law, provided there was no evidence showing that the plaintiff was guilty of contributory negligence. Pennsylvania Railroad Co. v. Matthews, 36 N. J. Law, 531; John Nolan v. Bridgeton & Millville Traction Co., 74 N. J. Law, 559, 65 Atl. 992; Bower v. Bower, 78 N. J. Law, 387, 74 Atl. 522; Bennett v. Busch, 75 N. J. Law, 240, 67 Atl. 188; More-Jonas Glass Co. v. West Jersey & Seashore Railroad Co., 76 N. J. Law, 708, 72 Atl. 65. If, on the other hand, the defendant had used that high degree of care for the safety of the plaintiff Hazel Holland, which it owed her under the law, and the evidence showing such care was undisputed, or if disputed or conflicting, was nevertheless of so conclusive a character that the court in the exercise of a sound judicial discretion would set aside a verdict in opposition to it, it was the duty of the trial judge to direct a verdict, for he stands primarily charged with the full responsibility for the just outcome of the trial. Randall v. Baltimore & Ohio Railroad, 109 U. S. 478–482, 3 Sup. Ct. 322, 27 L. Ed. 1003; Patton v. Texas & Pacific Railway Co., 179 U. S. 658–660, 21 Sup. Ct. 275, 45 L. Ed. 361; Woodward et al. v. Chicago, M. & St. P. Ry. Co., 145 Fed. 577, 578, 75 C. C. A. 591 (C. C. A. 8th Circuit). In an accident such as this, which raises a presumption of negligence, the case must go to the jury, unless the evidence introduced by the defendant conclusively exculpates it from

negligence. Dusenbury v. North Hudson County Railway Co., 66 N. J. Law, 44, 48 Atl. 520.

[2] The undisputed evidence shows that the derailment of the train in which the plaintiff Hazel Holland was riding was due to the breaking of a rail, caused by a lateral or "internal transverse fissure," which was concealed and could not have been detected by the naked eye, and that no other test than the actual breaking of the rail would have revealed this defect. The rail was made by the Maryland Steel Company, a reputable manufacturer of standard rails used by the Pennsylvania Railroad Company, the New York Central, and many other railroads throughout the United States. The rail had been in use about five years, which is only about one-third of the normal life of a rail, used as this one was. This particular piece of track, including this rail, was inspected daily by both the superintendent of maintenance and a trackwalker, the latter of whom had examined the track at the place of the accident about 15 minutes before it occurred. It has been held by the Court of Errors and Appeals of New Jersey, and also by this court that a defendant is not liable for injuries resulting from a latent defect of which it was ignorant, and which could not be discovered by reasonable care and diligence. Stassett v. Taylor Iron & Steel Co., 82 N. J. Law, 631, 83 Atl. 881; Pennsylvania Railroad Co. v. Buckley, 210 Fed. 268, 127 C. C. A. 86.

These cases are readily distinguished from the case of Gleeson v. Virginia Midland Railroad Co., 140 U. S. 435, 11 Sup. Ct. 859, 35 L. Ed. 458, relied upon by plaintiffs. In that case the train was derailed by a landslide, which raised a presumption of negligence, which defendant did not overcome by showing that rain caused the landslide and consequent derailment. This landslide was not unavoidable, and could not be classed as an act of God, for the road could have been so constructed as to avoid the landslide. Whether or not due care in the construction of the railroad would have taken into account possible landslides and provided against them were questions for the jury.

We think the undisputed evidence shows in the case before us that the defendant discharged its full duty to the plaintiffs and exculpated itself from the presumption of negligence raised by the accident. It was therefore the duty of the learned trial judge to direct a verdict, and the judgment is affirmed.

RADCLIFFE v. BALTIMORE & O. R. CO.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1921.)

No. 1822.

Master and servant ⟸112(3)—Injuries to brakeman, slipping on gravel, held not actionable.

A railroad company *held* not chargeable with negligence because it did not keep the top of a retaining wall alongside its track on a private siding free from gravel or other substances, which rendered it liable for injury to a brakeman, who slipped on such substances and fell, when walking on the wall in moving cars on the track.

In Error to the District Court of the United States for the Northern District of West Virginia, at Wheeling; Alston G. Dayton, Judge.

Action at law by Frank Radcliffe against the Baltimore & Ohio Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

C. W. Dille, of Cleveland, Ohio (Thomas Ray Dille, of Morgantown, W. Va., on the brief), for plaintiff in error.

Frank W. Nesbitt, of Wheeling, W. Va., for defendant in error.

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

WADDILL, District Judge. This is a writ of error to the judgment of the District Court for the Northern District of West Virginia, rendered on the 30th of October, 1919, sustaining the demurrer to the plaintiff's declaration, and dismissing his suit.

The plaintiff's case briefly is that, while he was in the employ of the defendant as a brakeman on one of its freight trains, engaged in transportation of freight in interstate commerce, he sustained the injury complained of; the defendant being at the time engaged in the operation of its train on a private siding of the Stafford Coal Company, near to its main track at or near Baxter, county of Marion, West Virginia—the specific charge being that, while the plaintiff, as such brakeman, was so engaged, the defendant allowed a certain platform upon said private siding, which was part of the platform in front of the store or storage buildings of said coal company, and constructed by having a retaining wall of about 8 or 10 inches in width and 4½ feet high, along the said private siding, which said platform was filled, back of said wall, with cinders or slack, leaving not more than 12 inches of clearance space between the wall and the freight cars running beside said wall; that the top of said retaining wall was smooth, when it should have been notched, grooved, or roughened; that there had been allowed to accumulate thereon certain gravel or other round or uneven substances, which rendered said wall, or that part of said platform, unsafe and dangerous to walk upon; and that the plaintiff, while in the performance of his duty as such brakeman, was in the act of stepping hurriedly from a freight car on defendant's train to said platform, he

stepped upon certain gravel or other substance which had been allowed to accumulate on said wall, and which was invisible and unknown to plaintiff, which substance, rolling or sliding beneath his feet on said wall, caused him to slip, with such suddenness and force that it threw him down, resulting in the injury sued for.

The negligence alleged is the failure of the railroad company to sweep off or remove this gravel or other substance from the wall, before allowing its use by the plaintiff, and in not having the surface of the wall notched, grooved, or made rough, so that the plaintiff, in using the same, would not slip and fall therefrom.

Two questions are presented for the consideration of the court: First, whether the defendant is liable for the injuries sustained from the alleged defective construction of the retaining wall on the coal company's premises; and, second, whether a cause of action is set forth by the plaintiff against the defendant.

The first question, upon the averments of the declaration, may be said to be of the gravest doubt, since there is no allegation that the premises of the coal company, on which the plaintiff sustained the injury, were either owned, used, or controlled by the defendant company. But this need not be passed upon, as the same becomes unimportant in view of the conclusion we have reached upon the second question, namely, whether a cause of action is charged against the defendant. The correct determination of the latter is readily reached, when considered in the light of principles properly applicable.

The plaintiff's right of recovery is based entirely upon the defendant's negligence, and, unless this is averred and proved, no recovery can be had. The plaintiff was an employé of the defendant, and upon entering its service the latter assumed certain obligations for his protection, namely, that it would exercise proper care to provide a reasonably safe place for the plaintiff to work, in the discharge of his duties. This obligation on the part of the defendant was not to insure plaintiff's safety, or freedom from danger, but only to exercise ordinary care; that is, such care as an employer of prudence, engaged in like service, would and should undertake on behalf of his employés engaged in similar service, under like circumstances. It will readily be seen that to impose on an employer the duty to see that gravel or other substances, so delicate as to be invisible to an employé, did not gather upon top of the retaining wall used by the latter, or to require him to notch, groove, or make rough the ordinary siding and walkways upon and over which employés would pass in the discharge of their duties, would be to place upon him an intolerable burden and expense, and in effect make him an insurer against danger, and charge him with a higher degree of care than is afforded a citizen in the ordinary use of the streets and highways of the community.

The lower court's action in sustaining the demurrer to the plaintiff's declaration was plainly right, and the same will be affirmed.

LEDERER, Collector of Internal Revenue, v. REAL ESTATE TITLE INS. & TRUST CO. OF PHILADELPHIA.

(Circuit Court of Appeals, Third Circuit. June 16, 1921.)

No. 2648.

1. **Appeal and error ⇐1097(1)—Questions once decided become law of case.**
Matters once considered and decided by an appellate court constitute the law of the case and on review of a second judgment the only question to be considered is whether the previous opinion and mandate were followed.

2. **Appeal and error ⇐232(2)—Ruling admitting evidence reviewable only on ground of objection stated.**
Objection to the admission of evidence must be specific, and in a proceeding in error the party objecting is confined to the ground of objection stated at the trial.

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

Action by the Real Estate Title Insurance & Trust Company of Philadelphia against Ephraim Lederer, Collector of Internal Revenue. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also (C. C. A.) 263 Fed. 667.

Gordon Auchincloss, of New York City, for plaintiff in error.

Maurice Bower Saul, of Philadelphia, Pa., for defendant in error.

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

MORRIS, District Judge. This is the same case that was before us at the October term, 1919. Real Estate Title Insurance & Trust Co. v. Lederer, 263 Fed. 667. Judgment against the Trust Company, the plaintiff below, following a compulsory nonsuit, was then reversed. A new trial has been had resulting in a verdict and judgment in favor of the Trust Company. The defendant, Lederer, is plaintiff in this writ.

[1] The questions decided upon the first writ of error are no longer open, for it is well settled that matters once considered and decided by an appellate court constitute the law of the case and will not be re-examined upon a subsequent writ of error. Consequently we have now to consider only whether the present judgment was had in due pursuance of the previous opinion and mandate of this court. United States v. Camou, 184 U. S. 572, 22 Sup. Ct. 515, 46 L. Ed. 694; Supervisors v. Kennicott, 94 U. S. 498, 24 L. Ed. 260; Roberts v. Cooper, 20 How. 467, 481, 15 L. Ed. 969. Minerals Separation v. Miami Copper Co. (C. C. A.) 269 Fed. 265, 269. The evidence produced at the second trial was substantially the same as that offered at the first. An examination of the record discloses that the trial judge carefully followed the course pointed out in our former opinion, both in his rulings during the trial and in the charge to the jury. Numerous errors in the court's charge and in the admission of evidence are alleged, but,

save one, the assignments supported by proper exceptions merely present anew matters heretofore decided by us.

[2] The assignment presenting the question not heretofore examined is based upon the admission, over the objection of the defendant, of the testimony given at the first trial by a witness absent from the second by reason of paralysis. The evidence so received was objected to at the trial upon the sole ground "that there is better evidence available." That objection is not here pressed, but, in its stead, the defendant now urges that the testimony was incompetent by reason of section 861 of the Revised Statutes of the United States (Comp. St. § 1468). This objection comes too late here, and will not be considered, for it is an established rule of law that when a party objects to the admission of testimony the objection must be specific, and not general, and in a proceeding in error the party objecting is confined to the objection stated at the trial. The rule that the objection must be specific and not general obtains, in order that the attention of the trial judge may be directed to the precise point of law intended to be raised by the objection, for it cannot be expected that a particular objection in the mind of counsel, thoroughly conversant with the case through previous study, will occur to the judge in the intricacy of the trial, although, if stated, he would readily perceive its force. The party objecting is, upon proceedings in error, confined to the objection stated at the trial, for the reason that the question of law raised by the specific objection made is the only one ruled upon by the trial court, and it cannot be said that the court erred in respect to a matter not brought to its attention, and upon which it neither ruled nor was asked to rule. It is not within the province of this court to retry common-law cases de novo. Burton v. Driggs, 20 Wall. 125, 22 L. Ed. 299; Stebbins v. Duncan, 108 U. S. 32, 2 Sup. Ct. 313, 27 L. Ed. 641; Wood v. Weimar, 104 U. S. 786, 795, 26 L. Ed. 779; Noonan v. Caledonia Mining Co., 121 U. S. 393, 400, 7 Sup. Ct. 911, 30 L. Ed. 1061; Robinson & Co. v. Belt, 187 U. S. 41, 50, 23 Sup. Ct. 16, 47 L. Ed. 65; Rem. Mach. Co. v. Wil. Candy Co., 6 Pennewill (Del.) 288, 306, 66 Atl. 465.

The judgment below must be affirmed.

UNITED STATES v. ONE COLE AERO EIGHT AUTOMOBILE et al.

(District Court, D. Montana. June 28, 1921.)

No. 882.

Internal revenue ⇐2—Provisions of internal revenue laws not repealed by National Prohibition Act.

Rev. St. § 3450 (Comp. St. § 6352), providing for the forfeiture of vehicles used for removing or concealing articles subject to internal revenue tax with intent to defraud the United States of such tax is not inconsistent with the provisions of National Prohibition Act, tit. 2, § 26, for forfeiture of vehicles seized when in use for the illegal transportation of liquor, and under title 2, § 35, of the act, is not repealed thereby.

Libel by the United States against one Cole Aero Eight Automobile and others. On demurrer to libel. Overruled.

John L. Slattery, U. S. Atty., of Helena, Mont.

Fletcher Maddox and I. W. Church, both of Great Falls, Mont., for libelees.

BOURQUIN, District Judge. Defendants' demurrer to this libel to forfeit the auto, for that it was used to remove whisky with intent to defraud plaintiff of the tax thereon, involves one aspect of the controversy that divides the courts in respect to the extent that the old revenue laws are repealed by the Eighteenth Amendment and the Volstead Act. 41 Stat. 305. That the repeal extends to all of the old laws that apply solely to liquors for beverage purposes, save to the extent taxing features are preserved by title 2, § 35, of the act, seems clear from the nature of things. That it also extends to all that are inconsistent, in the usual acceptance of the term, with amendment and act, is clear from the express declaration of said section 35. The conflict arises from differences of opinion in respect to what of the old revenue laws are inconsistent with the act. Section 35 expressly declares:

"All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency, and the regulations herein provided * * * shall be construed as in addition to existing laws, * * * nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws."

This express declaration is so far of the nature of express repeals that in the face of it the rules of implied repeal—new revision, complete system, change in policy, only rule, etc.—have no application. See Suth. Stats. § 147; 36 Cyc. 1081, and cases cited. Congress plainly says that only inconsistent features of the old laws are repealed, and that all other features are unimpaired; that the only rule of implied repeal that shall apply is that of inconsistency. Despite it, some courts incline to go beyond the legislative declaration, and appeal to all rules of implied repeal, including a new definition of inconsistency in purpose. And they overlook the rules that negative implied repeal—legislative language, variance in subject and object, consistency between the old laws and the new, inconclusiveness of partial repugnancy in spirit, different elements in offenses, cumulation, special or particular and general laws.

As always, legislative intent is to be found in legislative language, and rules are resorted to only when the language otherwise fails to disclose the intent. In respect to R. S. § 3450 (Comp. St. § 6352), by virtue of which this libel is prosecuted, U. S. v. One Haynes Auto (D. C.) 268 Fed. 1003, holds it is repealed by the act, and U. S. v. One Essex Auto (D. C.) 266 Fed. 138, holds it is not. The learned judge in the latter case, whose views and reasoning commend themselves to the writer, leaves little to be added to demonstrate that in the usual acceptation there is no inconsistency between section 3450 and the act.

The latter is general, and creates the offense of unlawful transportation, composed of various elements and committed by various acts,

the purpose of which is to conserve public health and morals, and to that end to keep watch and ward over all movement of liquors from start to finish. Sections 6, 10, 15, tit. 2. The former is particular, and creates the offense of defrauding the United States of taxes by not only removal, but also by deposit or concealment of liquors with intent to so defraud, of elements and acts different from those of the act, the purpose of which is to conserve revenue, with some supervision to that end.

Section 26 applies only to conveyances taken in the act of unlawful transportation; section 3450, to those used not only to remove, but also to those used to deposit or conceal, whether by transportation or otherwise, whether or not taken in the act. With these distinctions in mind, and that the offenses created by the act do not include the offense of section 3450, that either is capable of commission while the law in respect to the other is strictly pursued, that transportation of the act is not synonymous with removal, deposit, or concealment of section 3450, that there is no inconsistency between them, and keeping in view the language and intent of section 35, it is believed section 26 applies only to the offense of unlawful transportation by the act created. Hence section 26 does not repeal section 3450, no more than did a previous general statute (R. S. § 3296 [Comp. St. § 6038]), which was also enacted subsequent to section 3450 and is also broad enough to include the latter's elements, and the conclusion is that section 3450 is "existing law" within the language and intent of section 35 of the act.

It is at least interesting to note that section 26 applies to conveyances taken in the act of transportation only. If this includes removal, prescribed by section 3450, it leaves removal not taken in the act, and deposit and concealment in or by an auto, in violation of section 3450, either to the application of the latter section or nothing. For clearly enough section 26 has no application to these latter offenses or contingencies.

Yuginovich's Case, 255 U. S. —, 41 Sup. Ct. 551, 65 L. Ed. —, is not like this at bar. It proceeds upon a peculiar construction of an indictment, and determines that, for the offense charged of manufacture of liquor for beverage purposes, the tax features of the old revenue laws in part apply, but the penalties of only the act. It further determines, however, that, whatever the purpose of the liquor, plaintiff is entitled to taxes, and so is capable of being defrauded of them by removal in violation of section 3450.

The demurrer is overruled.

PACIFIC GAS & ELECTRIC CO. v. CITY AND COUNTY OF SAN FRANCISCO et al.

(District Court, N. D. California, S. D. June 3, 1921.)

Nos. 27, 97, 190.

1. Gas ⇐14(1)—**Cutting and replacing paving over mains not part of cost of reproduction of plant.**
   In valuing the property of a gas company for rate purposes, the cost of cutting and replacing pavement over mains *held* properly excluded in estimating the cost of reproduction.

2. Gas ⇐14(1)—**Franchise not included in property valued for rate purposes.**
   The franchise of a gas company to use the streets of a city, which was not exclusive, and for which nothing was paid, and where the company was subject to municipal regulation of its rates, *held* properly excluded in the valuation of its property in a rate suit.

3. Gas ⇐14(1)—**Going concern value allowed in valuation of property of gas company.**
   In the valuation of the property of a gas company for rate purposes, the addition of 12 per cent. to the value of the physical property for going concern value approved.

4. Gas ⇐14(1)—**Value of patent rights not allowable in valuation of property of company.**
   Patent rights owned by a gas company, by the use of which cost of manufacture is lessened, not included in property valued for rate purposes.

5. Gas ⇐14(1)—**Reserve allowed company to cover insurance risk held reasonable.**
   In determining reasonableness of rates of a gas company, which carried no insurance, an allowance of a reserve to cover fire risk of a sum largely in excess of its losses through a series of years *held* reasonable.

6. Gas ⇐14(1)—**Company not entitled to allowance for efficient management in fixing reasonable rates.**
   In determining reasonable rates which a gas company is entitled to earn, it is not entitled to an annual allowance for efficient management.

7. Gas ⇐14(1)—**Rates not invalid because nonremunerative in case of small consumers.**
   That gas rates fixed by municipal ordinance require a company to supply small consumers at a loss does not render them invalid, if as a whole they produce a fair return.

8. Gas ⇐14(2)—**Rates fixed by municipality set aside by courts only when clearly confiscatory.**
   In determining what are fair and reasonable rates to be charged by a gas company, a city council exercises a discretionary power, and since there are necessarily many elements of uncertainty in the valuation of property and in respect to other items to be taken into consideration, a court is authorized to substitute its judgment and declare such rates invalid only when they are clearly confiscatory, taking into consideration the fact that what is a fair rate of return on the investment differs with time and locality.

Suit in Equity by the Pacific Gas & Electric Company against the City and County of San Francisco and others. On exceptions by complainant to report of master. Exceptions overruled, and decree for defendants.

W. B. Bosley, of San Francisco, Cal., for plaintiff.
George Lull, Robert M. Searls, and John J. Dailey, all of San Francisco, Cal., for defendants.

RUDKIN, District Judge. The plaintiff is a corporation engaged in the business of manufacturing and supplying gas to consumers in the city and county of San Francisco. Pursuant to the requirements of the state Constitution the board of supervisors of the city and county, in the month of June, 1913, adopted an ordinance fixing rates to be charged for gas furnished to consumers for lighting and heating purposes during the year commencing July 1, 1913, and ending June 30, 1914. The ordinance fixed a maximum rate of 75 cents per thousand cubic feet of gas, but prescribed no minimum. Soon after the ordinance took effect, the gas company commenced a suit in this court to restrain the municipal authorities from enforcing the ordinance, on the ground that it violated the due process clause of the Fourteenth Amendment to the Constitution of the United States, which declares that no state shall deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. Similar ordinances were adopted in the two succeeding years, and their adoption was followed by similar suits. By consent of parties the three suits were consolidated for trial and referred to a special master to take testimony and report to the court. The cases are now before the court on exceptions to the master's report. The exceptions were argued at length before me on the last day of May and the 1st day of June of last year, but months elapsed before the filing of briefs and final submission. Since then I have carefully examined the master's report, the briefs submitted, the voluminous testimony offered at the trial, and the arguments of counsel, and am now prepared to announce my conclusions. But inasmuch as a final decision has already been too long delayed I must content myself with a reference to, and brief discussion of, the more important questions presented by the exceptions.

Generally speaking, the properties of the plaintiff used and useful, and reasonably necessary to the manufacture and distribution of gas may be described as follows: Lands; manufacturing and distributing plants, consisting of structures, machinery, apparatus, equipment, and appliances; working capital; patent rights; going concern or established value; and the franchise of using the public streets of the city as a right of way for laying, maintaining, and operating gas mains and service pipes with the necessary connections for supplying the city and county of San Francisco and its inhabitants with gas. The master found that the reasonable value of these properties and rights for the year 1913–1914, including working capital, was the sum of $13,976,435; that the reasonable cost of operation was $2,031,926.11; that $348,853 was a reasonable allowance for depreciation, $10,000 as a reserve for fire insurance, and $15,000 for casualty insurance; and that $978,350.45, or 7 per cent., was a reasonable return on the capital invested, making a total of $3,384,129.56. The total revenue at the ordinance

rate was $3,405,532.51, or $21,402.95 in excess of the 7 per cent. return on the capital invested. A slightly increased value was found for 1914–1915 and 1915–1916, and the net return for these respective years at the ordinance rates was $89,446.12 and $171,464.48 in excess of the 7 per cent. return which the master found to be the lowest rate or return that would not result in confiscation. The master concluded, therefore, that the ordinance rates were not confiscatory, and recommended that the several bills be dismissed and that proper decrees be entered to carry out the previous orders of the court. Many items go to make up the values thus returned, and the allowances for operating expenses and depreciation, and many of these items have been excepted to by the respective parties. But any attempt to review each separate exception would extend the opinion to an inordinate length and to little purpose, especially in view of the fact that the allowance or disallowance of many of the smaller items would have no effect upon the final result. For this reason I will confine myself to the more important items in controversy.

[1] *Paving Over Mains.*—The plaintiff contends that reproduction of the plant would necessitate the cutting and replacing of the pavement laid over the mains by the city, and the cost of this is estimated at approximately $600,000. The master disallowed the item, and this ruling is the basis of one of the exceptions. In answer to a similar claim in Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 171, 35 Sup. Ct. 811, 817 (59 L. Ed. 1244), the court said:

"As to the item of $140,000, which, it is contended, should be added to the valuation, because of the fact that the master valued the property on the basis of the cost of reproduction new, less depreciation, and it would be necessary in such reproduction to take up and replace pavements on streets which were unpaved when the gas mains were laid, in order to replace the mains, we are of opinion that the court below correctly disposed of this question. These pavements were already in place. It may be conceded that they would require removal at the time when it became necessary to reproduce the plant in this respect. The master reached the conclusion that the life of the mains would not be enhanced by the necessity of removing the pavements, and that the company had no right of property in the pavements thus dealt with, and that there was neither justice nor equity in requiring the people who had been at the expense of paving the streets to pay an additional sum for gas because the plant, when put in, would have to be at the expense of taking up and replacing the pavements in building the same. He held that such added value was wholly theoretical, when no benefit was derived therefrom. We find no error in this disposition of the question."

So here I find neither justice nor equity in the present claim, and the same is accordingly disallowed.

[2] *Franchises.*—The plaintiff further contends that there should be added to the value fixed by the master the sum of $1,476,000 for the franchise of using the public streets of the city as a right of way, for laying, maintaining, and operating the gas mains and service pipes. This item is based on the cost of procuring a private right of way through the city for the like purposes, less the difference between the cost of constructing the system over such private right of way and the cost of constructing the same in the city streets. The item was disallowed by the master, and his ruling forms the basis of another excep-

tion to the report. That a franchise of this kind is property, and has value for some purposes, does not admit of question; but such value depends entirely upon circumstances. If, as in the case of Willcox v. Consolidated Gas Co., 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034, the company has a practical monopoly is not subject to public regulation and is permitted to pay enormous dividends on the invested capital, the franchise or franchises are naturally and necessarily of very considerable value. But, on the other hand, where the rates are subject to public regulation and only fair and reasonable rates are permissible, a different situation is presented, and whether in such case the franchise has value or not depends largely upon the views of the rate-making body and the decisions of the courts. If the court should here find that the franchise in question has a value of approximately $1,500,000, as claimed, and that the plaintiff is entitled to a reasonable return on that value, the value of the franchise is thus fixed as firmly as the value of any of the tangible property of the company. But why should the court make such addition or allowance? Nothing was paid for the franchise in the first instance; it is not exclusive, has no peculiar value, and when the plaintiff is allowed a fair return on the full value of its tangible property, including going concern value, it has no just ground for complaint.

Such, it seems to me, was the view of the Supreme Court in the Willcox Case. There the value of the franchises had been fixed upon consolidation in 1884 under legislative authority. The court below found the value of the franchises in 1884 as thus fixed, and further found that their value increased thereafter in the same ratio as the value of the other tangible property of the company. The Supreme Court approved the valuation as fixed in 1884 under legislative authority, because that valuation had been fixed by authority of law, the agreement regarding it had always been recognized as valid, and the stock had been largely dealt in for more than 20 years past on the basis of the validity of the valuation of the stock issued by the company. But the court refused to allow any increase in that valuation, concluding that branch of the case by saying:

"What has been said herein regarding the value of the franchises in this case has been necessarily founded upon its own peculiar facts, and the decision thereon can form no precedent in regard to the valuation of franchises generally, where the facts are not similar to those in the case before us. We simply accept the sum named as the value under the circumstances stated."

The inference from this language is that under normal conditions, such as here presented, no franchise value should be taken into consideration or allowed.

[3] *Going Concern Value.*—In fixing the value of the property and plant, the master added for this element the sum of $1,500,000 to the value of the physical property. To this finding both parties have excepted. Little can be gained from a discussion of a subject so intangible and speculative as this. The question has been referred to or discussed by the courts in the following, among the many cases that

might be cited: National Waterworks Co. v. Kansas City, 62 Fed. 853, 864, 10 C. C. A. 653, 27 L. R. A. 827; Knoxville v. Water Co., 212 U. S. 1, 9, 29 Sup. Ct. 148, 53 L. Ed. 371; Des Moines Gas Co. v. Des Moines (D. C.) 199 Fed. 204, Id., 238 U. S. 153, 162, 35 Sup. Ct. 811, 59 L. Ed. 1244; Denver v. Denver Union Water Co., 246 U. S. 178, 38 Sup. Ct. 278, 62 L. Ed. 649; Lincoln Gas. Co. v. Lincoln, 250 U. S. 256, 267, 39 Sup. Ct. 454, 63 L. Ed. 968; Spring Valley Water Co. v. City & County of San Francisco (D. C.) 252 Fed. 979. In the Knoxville Case the court refused to approve or disapprove an allowance of approximately 10 per cent. of the value of the physical property. In the Des Moines Case no separate allowance for going concern value was made, but both courts concluded that the element was taken into consideration and sufficiently provided for in the general findings of the master. In the Denver and Spring Valley Water Company Cases the allowance was considerably less than here. In this case the master added approximately 12 per cent. to the value of the physical property to cover this element, and under the circumstances disclosed by the record I think the allowance thus made was fair and just, if not liberal. The exception on the part of the plaintiff is therefore overruled.

[4] *Patent Rights.*—The plaintiff acquired from its chief engineer and his assistant the exclusive right to use certain patented devices and processes in the city and county of San Francisco and other counties of Northern California, by the use of which the cost of manufacturing gas was materially lessened, and it claims an allowance of $4,000,000 because of these acquisitions. A disallowance of the claim is the subject of another exception. The gas consumers of San Francisco have no concern with the exclusive rights thus acquired, even in the city and county, much less in other counties of the state. They are only chargeable with the reasonable cost or value of the right to use the devices and processes in the manufacture of gas in the city and county of San Francisco. In the Spring Valley Case, supra, the water company for many years pumped water for its system from the gravel underlying a considerable acreage of agricultural land. These pumping operations lowered the water table to such an extent that the company was threatened with litigation, and to avoid injunction suits and actions at law for damages it purchased the lands outright, and the value of these lands was added to the value of its other property for the purpose of ascertaining the rating base by the master. In discussing this question the court said:

"However desirable the acquisition of these lands may have been from a business standpoint, the fact remains that they are not necessary to the maintenance of the system, and not used or useful in connection therewith. It seems to me that the correct basis would be to ascertain as nearly as possible the value of the right or interest in these lands which is actually used for public purposes, and base the rate of return on that valuation."

So here the rate of return should be based on the reasonable cost or value of the rights acquired for the purpose of manufacturing gas in the city of San Francisco and not elsewhere. The record affords no basis for such a finding, and under these circumstances the claim as made was properly rejected.

[5] *Insurance.*—In each of the years in controversy the master allowed as a reserve for fire insurance $10,000 and for casualty insurance $15,000. The plaintiff claimed a much larger allowance, and to the refusal of the master to make the same an exception has been taken. The claim of the plaintiff to the additional allowance is based on the cost of procuring or obtaining insurance from the standard companies. I see no basis for this claim. As stated by the master, a little less than half of the premiums received by insurance companies in general go to pay the expense of obtaining insurance, and why should the plaintiff, who took out no insurance, be entitled to these profits. It is unquestionably entitled to set aside a reasonable reserve to cover losses of this kind, but the record fails to show that such a reserve was not allowed. The allowance of the master greatly exceeded the average losses of the company during the eight preceding years, and this is persuasive at least that the allowance as made was fair and reasonable to the plaintiff. The exception is overruled.

[6] *Compensation for Management.*—The plaintiff claims a considerable allowance for efficient management of the affairs of the company during each year. I assume the company was managed through its officers and agents and that they have been paid just compensation for their services. If they have not, that fact affords no sufficient reason for making a donation to stockholders at this time. This, as well as other claims, were doubtless taken into consideration by the master in fixing the rating base and a reasonable return on the invested capital.

Much has been said in the course of the argument and in the briefs concerning original cost, book value, and reserves for depreciation resulting from different causes, but I will not attempt to review the testimony bearing upon these questions. Suffice it to say that the findings of the master are amply supported by the testimony, and beyond this I am not required or permitted to go.

[7] Another contention is that the ordinances compel the plaintiff to furnish gas to small consumers at less than cost and that such a requirement is violative of its constitutional rights. This question has been fully answered by the Supreme court. Thus in the Willcox Case the court said:

> "So long as the total is enough to furnish such return, it is not important that with relation to some customers the price is not enough."

In support of this ruling the court cited Minneapolis, etc., Co. v. Minnesota ex rel. Railroad & W. Commission, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. Ed. 1151, and Atlantic Coast Line v. North Carolina Commission, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933, 11 Ann. Cas. 398. It is a noteworthy fact that, when the plaintiff was left free to act, it established a maximum rate of only 85 cents, or less than the actual cost to small consumers. It is urged that the plaintiff was at liberty to give its property away if it chose, but it is not an eleemosynary corporation, and in fixing rates was no doubt prompted by business considerations, and not by charity.

[8] The concluding finding of the master is that 7 per cent. is a reasonable return on the capital invested, and that any less rate of return would be confiscatory. To this finding both parties have excepted. I can add but little to what was said upon this subject in the Spring Valley Case, supra, nor do I feel called upon to modify my views or answer the criticisms of the master. But a word on this subject may not be out of place. It is said in the report that when the court conceded that 7 per cent. was a fair rate of return the case was ended, and that the court was controlled too largely by precedent. In other words, his view is that, when the court found the value of the property and the fair rate of return, it thereby established a procrustean standard to which all else must yield. Applying that rule to these cases, had the returns fallen short each year by the sum of $25,000, the ordinance for the first year would be void, and the remaining two ordinances valid, notwithstanding the fact that all three ordinances were enacted under identical circumstances and prescribed the same maximum rate.

Such a conclusion is, to my mind, absurd and ridiculous. The reason for this is obvious. The subject-matter with which the board of supervisors had to deal was full of doubt and intricacy at best. The valuation of the property was a mere matter of approximation and the operating expenses and income were unknown. The last two elements might be made certain by future developments but the uncertainty as to value would still remain. The valuation of a plant of this kind is largely a matter of guess work. Unlike cotton, wheat, and other commodities, that are bought and sold daily on the market and have an established value, gas plants are seldom sold, and if one should be sold the selling price offers a poor criterion by which to fix the value of another where the surrounding circumstances may be entirely different. Noted engineers will differ, and differ widely, as to the value of such plants. The difference between the engineers who come before this court so highly commended by the master and by counsel is measured by millions and not by thousands. No two courts and no two juries would reach the same conclusion upon the same testimony. A difference of 10 per cent. in the appraisement or valuation would be accepted as a matter of course rather than as a matter of surprise. The courts have no monopoly on the privilege of appraising or guessing. They must accord the same rights and the same privileges to the board of supervisors, and the mere fact that they may differ from the board in their conclusions does not necessarily establish the charge of confiscating private property or denying to the citizen the equal protection of the laws. In other words, the court must not only differ with the board, but it must differ so widely that it is able to say in the language of the Supreme Court:

"In a case like this we do not feel bound to reexamine and weigh all the evidence, although we have done so, or to proceed according to our independent opinion as to what were proper rates. *It is enough if we cannot say that it was impossible for a fair-minded board to come to the result which was reached.*" (Italics supplied). San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 441, 23 Sup. Ct. 571, 47 L. Ed. 892, Approved in Knoxville v. Water Co., 212 U. S. 1, 17, 29 Sup. Ct. 148, 53 L. Ed. 371.

Does, therefore, the mere finding of the court establish the fact that no fair-minded board in the exercise of an honest judgment could reach a different conclusion? To some it may, but, speaking for myself alone, I can only say that I assume no such arrogance and make no such claim to superiority, omniscience, or infallibility.

These views find ample support in the authorities. Thus, in Spring Valley Waterworks v. San Francisco (C. C.) 124 Fed. 574, 598, Judge Morrow found from the weight of the expert evidence before him that 6 per cent. per annum was the smallest income that could be considered reasonable on the investment under consideration, and that 5 per cent. was the smallest income which the court could, under all the circumstances of the inquiry, consider reasonable and just. This case was followed by Judge Gilbert in Contra Costa Water Co. v. City of Oakland (C. C.) 165 Fed. 518, 532, and Spring Valley Water Co. v. San Francisco (C. C.) 165 Fed. 657, 665, and by Judge Farrington in Spring Valley Waterworks v. San Francisco (C. C.) 192 Fed. 137, 192. In the Knoxville Case the Supreme Court said:

"It cannot be doubted that in a clear case of confiscation it is the right and duty of the court to annul the law. Thus in Reagan v. Farmers' Loan & Trust Company, 154 U. S. 362, where the property was worth more than its capitalization, and upon the admitted facts the rates prescribed would not pay one-half the interest on the bonded debt; in Covington, etc., Turnpike Co. v. Sandford, 164 U. S. 578, where the rates prescribed would not even pay operating expenses; in Smyth v. Ames, 169 U. S. 466, where the rates prescribed left substantially nothing over operating expenses and cost of service; and in Ex parte Young, supra, where, on the aspect of the case which was before the court, it was not disputed that the rates prescribed were in fact confiscatory—injunctions were severally sustained. But the case before us is not a case of this kind. Upon any aspect of the evidence the company is certain to obtain a substantial net revenue under the operation of the ordinance. The net income, in any event, would be substantially 6 per cent., or 4 per cent. after an allowance of 2 per cent. for depreciation. See Stanislaus County v. San Joaquin Company, 192 U. S. 201. We cannot know clearly that the revenue would not much exceed that return. We do not feel called upon to determine whether a demonstrated reduction of income to that point would or would not amount to confiscation."

In the Des Moines Case, supra, the court held that there was no error in refusing an injunction upon the conclusion reached that a return of 6 per cent. per annum on the valuation would not be confiscatory in the face of the report of the master that the company ought to earn 8 per cent. In the Willcox Case, and in the case of Cedar Rapids Gaslight Co. v. Cedar Rapids, 223 U. S. 655, 32 Sup. Ct. 389, 56 L. Ed. 594, a finding of 6 per cent. was approved. In the Denver Case the court held that a return of 4.2812 per cent. of the value of the plant was confiscatory, but found it unnecessary to determine whether a considerable sum claimed for water rights should be added to the value. Should the value of the water rights be included, the return would be further reduced. So far as I am advised this is the highest rate of return that the Supreme Court has ever declared to be confiscatory. True, in the more recent case of Lincoln Gas Co. v. Lincoln, supra, the court disapproved a finding that 6 per cent. upon the invested capital could not be regarded as confiscatory, in view of the

undisputed evidence accepted by the master that 8 per cent. was the lowest rate sought and generally obtained as a return upon capital invested in banking, merchandising, and other business in the vicinity; 7 per cent. being the legal rate of interest in Nebraska. The bill of complaint, however, in that case, was dismissed, so that the question as to what constitutes a confiscatory rate was not determined by the court.

If it be claimed that the court there held that any discrepancy between the finding of the court and the established rate which is prejudicial to the public utility is confiscatory, it will be difficult indeed to reconcile the decision with many prior decisions of the same court. Under such a view the courts will in effect review the decisions of rate-making bodies, notwithstanding their repeated disclaimer of their right and authority so to do. Furthermore, if any such hard and fast rule is adopted, Public Service Commissions cannot safely establish what they themselves deem fair and reasonable rates. They must, in addition, allow a considerable margin of safety to cover possible deficiencies in revenue, increases in operating expenses, and differences of opinion as to values. If they do not, the courts will be constantly appealed to, and the benefits of regulation will be more than offset by the burdens of litigation. The very fact that in the years in question here the rate of return differed more than 1 per cent. on the total value of the property under substantially identical conditions all but demonstrates the utter fallacy and futility of such a course. I have not overlooked the fact that in many, if not all, the foregoing cases the returns in controversy had not been tested by time, so that the exact rate of return was ascertainable, and this fact was in a measure controlling; but, for reasons already stated, this is not the only element of uncertainty with which courts and rate-making bodies are confronted in this class of suits.

It may be true that the court did not consider the customary rate of interest on local investments as absolutely controlling, for, as said in the opinion:

"But it is a matter of common knowledge that interest rates vary almost as much in the same locality at different times as they do in different localities at the same time, and in an enterprise of this magnitude the question of locality, while entitled to consideration, is not controlling."

In the Willcox Case the court said:

"Such compensation must depend greatly upon circumstances and locality; among other things, the amount of risk in the business is a most important factor, as well as the locality where the business is conducted and the rate expected and usually realized there upon investments of a somewhat similar nature with regard to the risk attending them."

As there stated, the risk of the business is the most important factor. Capital has no home, and always seeks employment where it can gain the best returns with the least risk. In Stanislaus County v. San Joaquin K. & I. Co., 192 U. S. 201, 24 Sup. Ct. 241, 48 L. Ed. 406, the court declared that a statute reducing the compensation for supplying water to 6 per cent. upon the present value of the property used for the purpose was not unconstitutional, and that there was nothing in

the nature of confiscation about it. The court made no reference to local conditions. Its language was as broad as the domain over which its jurisdiction extends, was as applicable to Maine as to California, and was evidently so intended. In the recent case of Simpson v. United States, 252 U. S. 547, 40 Sup. Ct. 367, 64 L. Ed. 709, the court said that it would take judicial notice of the fact that 4 per cent. was very generally assumed to be the fair value or earning power of money safely invested, and it is but a very short step to take judicial notice of the earning power of money invested in a public utility of this magnitude, when subject to public regulation. In many of the cases to which I have referred, little or no reference was made to local interest rates or to local conditions, and for these reasons I feel that my conclusions were fully justified, on both principle and authority.

Without further comment, I will only add that in no aspect of the record can the court say that the plaintiff has been deprived of or denied the full protection of the Constitution. The exceptions to the report of the master are therefore overruled, and a decree will be entered in accordance therewith.

Supplemental Memorandum.

Counsel seem unable to agree upon the disposition to be made of the exceptions reserved by the defendants, in view of the statement in the opinion that the exceptions to the report are overruled. As soon as the court reached the conclusion that the exceptions on the part of the plaintiff were not well taken, it became unnecessary to discuss or consider the exceptions reserved by the prevailing party, and for that reason no reference to such exceptions was made, unless an exception to the same ruling was reserved by both parties. In the latter event the court considered the question from the standpoint of the plaintiff only, and deemed it unnecessary to consider or view the report in any other aspect.

As was originally intended, the exceptions on the part of the plaintiff are therefore overruled, the report of the master is confirmed, and the final decree will so declare.

GULF, C. & S. F. RY. CO. et al. v. CITIES SERVICE CO. et al.

(District Court, D. Delaware. May 31, 1921.)

No. 1.

1. **Parties ⇐76(7)—Demurrer for incapacity to sue raises question of personal capacity of plaintiff only.**

A demurrer to a declaration on the ground that it fails to show that plaintiff has any legal capacity to sue goes only to his personal capacity, and does not present the question whether the declaration shows a right of action in him.

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2. **Railroads ⊂=5½, New, vol. 6A Key-No. Series—Director General held entitled to sue for interference with contract to furnish fuel oil to railroad company.**
The Director General of Railroads, during his administration, *held* to have a legal interest in an existing contract for the supplying of fuel oil to a railroad company, which entitled him to maintain an action to recover damages from one alleged to have maliciously interfered with such contract by causing the seller to refuse performance.

3. **Torts ⊂=25—Only joint tort-feasors may be joined as defendants.**
Two defendants cannot be joined in an action of tort on allegations in the declaration that "they and each of them" caused a complete breach of a contract to supply fuel oil to a railroad company, where it is not alleged that they acted in concert and it is inferable that the failure to deliver a part of the oil due under the contract was caused by acts of one defendant, and the remainder to acts of the other.

4. **Pleading ⊂=8(3)—Declaration held insufficient, as too general in its allegations.**
The declaration in an action of tort, alleging that defendants maliciously "caused, required, procured, influenced, persuaded, induced, and compelled" the breach of a contract by a party thereto, *held* insufficient in failing to set out more particularly the acts of defendants.

At Law. Action by the Gulf, Colorado & Santa Fé Railway Company and Walker D. Hines, Director General of Railroads, against the Cities Service Company and the Empire Refining Company. On demurrer to declaration. Demurrer sustained.

See, also, 270 Fed. 994.

John Biggs and Percy Warren Green, both of Wilmington, Del., for plaintiffs.

George N. Davis and Robert Penington, both of Wilmington, Del., for defendants.

MORRIS, District Judge. This is a demurrer to each of the two counts of a declaration filed in a suit instituted by Gulf, Colorado & Santa Fé Railway Company, a Texas corporation, and Walker D. Hines, Director General of Railroads of the United States, against Cities Service Company and Empire Refining Company, Delaware corporations, to recover damages from the defendants for inducing, as is alleged, a breach by Producers Refining Company, a Missouri corporation, of a contract made by and between the latter company and the plaintiff Railway Company, on the 1st day of June, 1915, for the sale and delivery by the Producers Company to the Railway Company of fuel oil in specified quantities and at specified prices during a period of five years beginning October 1, 1915.

The first count alleges, in substance, the making of the contract; the assignment thereof on November 15, 1915, by the Railway Company to Coline Oil Company, an Oklahoma corporation, and "a subsidiary company of" the Railway Company; the issuance of the proclamation of the President of the United States on December 26, 1917, appointing a Director General of Railroads, and through him taking possession and control as of December 28, 1917, of the railroads of the United States, including the railroads owned and leased by the plaintiff Rail-

way Company, its appurtenances, and the contract in question, as evidenced by an agreement of November 22, 1918, between the Director General, the Railway Company, and others; the breach of the oil contract on June 14, 1918, by the Producers Refining Company; that the defendants, for the purpose of appropriating the property, assets, business, operations, and profits of the Producers Refining Company to them and each of their own use and benefit, willfully, maliciously, deliberately, and with wanton disregard of the plaintiff, and with knowledge of the facts and circumstances alleged, "caused, required, procured influenced, persuaded, induced, and compelled the said Producers Refining Company to commit a total breach of said contract"; that the Coline Oil Company, by an agreement of July 1, 1919, transferred and assigned to the Railway Company the contract of June 1, 1915, together with all rights thereunder arising since January 1, 1918, on account of the failure or refusal of the Producers Refining Company to deliver oil under the terms of said contract, and all causes of action against any person theretofore or thereafter causing, inducing, or procuring the Producers Refining Company to fail or refuse to deliver oil under the agreement of June 1, 1915; "that the said assignment was made to the plaintiff Railway Company for its own use and the use and benefit of the United States of America (the United States Railroad Administration) as their respective interests shall appear, depending upon the time of the beginning and ending of said federal control over said plaintiff Railway Company." The plaintiffs claim damages in the sum of $10,000,000.

Each of the defendants filed separate, but identical, demurrers. The causes of demurrer assigned are:

"(1) For that it nowhere appears in said first and second counts of the said amended declaration that Walker D. Hines, Director General of Railroads of the United States, has, or at the time of filing the said amended declaration had, any legal capacity to sue.

"(2) For that it nowhere appears in the said first and second counts of the said amended declaration that there was any concerted action on the part of the defendants named therein in the commission of the alleged tort.

"(3) For that it nowhere appears in the said first and second counts of the said amended declaration in what respect or manner this defendant 'willfully, maliciously, deliberately, and with wanton disregard of the rights of the said plaintiff * * * caused, required, procured, influenced, persuaded, induced, and compelled the said Producers Refining Company to commit a total breach of the agreement.'"

[1] The first cause of demurrer assigned, being directed solely to the legal capacity of the Director General to sue, raises the single question whether the declaration discloses that the Director General is under some personal disability or incapacity, such as infancy, insanity, or the like, and does not present the question of the existence or nonexistence under the allegations of a right of action in him. The two questions are essentially different. Meeks v. Vassault, Fed. Cas. No. 9,393; Pence v. Aughe, 101 Ind. 317, 319; Ward v. Petrie, 157 N. Y. 301, 311, 51 N. E. 1002, 68 Am. St. Rep. 790. The first question was not argued; the second was. Inasmuch as a demurrer, though special, includes a general demurrer (Silver v. Rhodes, 2 Har. [Del.] 369, 375),

and inasmuch as the failure of a declaration to show a right of action in a plaintiff is a matter of substance and may be taken advantage of by a general demurrer (Lytle v. Lytle, 2 Metc. [Ky.] 127; Weidner v. Rankin, 26 Ohio St. 522), and as the question whether the declaration shows any right of action in the Director General was discussed in argument and in the briefs of the respective parties, it will be here considered.

[2] This is an action in tort. Elliott on Contracts, vol. 3, § 2685. "The action for a tort must in general be brought in the name of the party whose legal right has been affected, and who was legally interested in the property at the time the injury thereto was committed." Chitty's Pleading (5th Am. Ed.) *48. A contract for the delivery of goods or chattels is a chose in action (Bushnell v. Kennedy, 9 Wall. 387, 19 L. Ed. 736), and a chose in action is property (Cincinnati v. Hafer, 49 Ohio St. 60, 30 N. E. 197). Hence it is necessary first to ascertain who was legally interested in or had the legal title to the contract at the time its breach was induced and the contract broken, as alleged, on June 14, 1918. The parties to the contract were Producers Refining Company, seller, and the plaintiff Railway Company, purchaser. Before the breach the plaintiff made an assignment thereof to Coline Oil Company. Though the beneficial interest passed thereby to the Coline Oil Company, the legal interest in the contract remained in the plaintiff Railway Company, notwithstanding the assignment. Hayward v. Andrews, 106 U. S. 672, 1 Sup. Ct. 544, 27 L. Ed. 271; New York, etc., Co. v. Memphis Water Co., 107 U. S. 205, 2 Sup. Ct. 279, 27 L. Ed. 484; Woolley's Del. Prac. 145; Dicey on Parties to Actions, p. 43. Likewise, before the time of the breach, the President of the United States, by a proclamation (40 Stat. 1733) made under an act of Congress of August 29, 1916 (39 Stat. 645), took possession and assumed control "of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States," including that of the plaintiff Railway Company, and thereby directed "that the possession, control, operation and utilization of such transportation systems" should be exercised by and through a person thereby appointed and designated Director General of Railroads. At the time of the breach the Director General by governmental authority and warrant had for the time being the complete "possession, control, operation and utilization" of the railway system of the Gulf, Colorado & Santa Fé Railway Company to the exclusion of that company. Northern Pacific Ry. Co. v. North Dakota, 250 U. S. 135, 148, 39 Sup. Ct. 502, 63 L. Ed. 897. Under the allegations he then had like possession and control of the rights, property, of that company in, to, and under the contract in question.

The immediate and crucial question, as I see it, is whether the Director General thereby became vested with a legal interest in the contract. Upon first impression this appears to be a new question, but upon reflection it seems to differ in principle not at all from the rights of a sheriff in property seized by him under a writ of attachment or execution. The Director General took control by governmental au-

thority. A sheriff, acting under a valid writ, takes possession and control of property by like authority. I discern no distinguishing difference in the fact that the former acts under executive and the latter under judicial warrant, for both executive and judiciary are but coordinate branches of one government. Rights arising out of contract are, of course, intangible and incapable of manual seizure; but as the acts of Congress and the presidential proclamation contemplated "one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership theretofore existing" (Northern Pac. Ry. Co. v. North Dakota, 250 U. S. 135, 148, 39 Sup. Ct. 502, 63 L. Ed. 897), such rights were included among those over which the Director General was authorized to exercise exclusive control. The control over such rights may be as effectually interfered with as if they were tangible. Consequently the intangible nature of the property in question likewise fails to afford a distinguishing difference. The rights of a sheriff in property seized by him have been long settled. He has in such property a legal interest, described and defined as "a special property," sufficient to enable him to maintain an action against anyone interfering with his possession or control. 24 R. C. L. 1001. For the foregoing reasons I am of the opinion that, under the allegations and without regard to the assignment of the Coline Oil Company of July 1, 1919, the Director General had a legal interest or special property in the contract at the time of its alleged breach, and that he may maintain an action to recover damages for malicious interference therewith.

[3] The second cause of demurrer, charging that the declaration fails to show any concerted action on the part of the defendants in the commission of the alleged tort, seems indirectly to assert that there is a misjoinder of parties defendant. The allegations of the declaration touching this matter are that—

> "The said defendants and each of them, * * * for the purpose of devoting the property * * * of said Producers Refining Company to them and each of their own use and benefit, * * * caused * * * the said Producers Refining Company to commit a total breach of said agreement."

The general rule of law is that to maintain an action in tort against several codefendants it is essential that the wrong complained of be joint. Dicey on Parties to Actions, 431. Several persons, acting, not in concert, but separately and independently, may not ordinarily be joined as defendants in actions ex delicto. 26 R. C. L. 764. The rule is the same, even though the injury to the plaintiff arise out of the simultaneous acts of such persons. Sadler v. Great Western R. Co., [1895] 2 Q. B. 688. This is not an arbitrary rule of law, but is one founded upon reason and justice. One person should not be made liable in damages for the distinct and independent wrongs of another. Yet this result would follow if tort-feasors, acting independently and not in concert, be joined as defendants, for the writ of execution must follow the judgment, and each defendant in such writ is liable for the whole debt. 17 R. C. L. 202. Where, however, the tortious acts of sev-

eral supplement one another and directly contribute in producing a single indivisible injury, such persons are in legal contemplation joint tort-feasors by reason of the indivisibility of the resulting injury to which each contributed, although there was no concerted action. Cooley on Torts (3d Ed.) 247; Graves v. City & Suburban Telegraph Ass'n et al. (C. C.) 132 Fed. 387; 26 R. C. L. 763. A concise and accurate statement of the law, as I understand it, is found in Allison v. Hobbs, 96 Me. 26, 29, 51 Atl. 245, 246. It is there said:

"Again, while it is true that persons who act separately and independently, each causing a separate and distinct injury, cannot be sued jointly, even though the injuries may have been precisely similar in character and inflicted at the same moment, yet if such persons, acting independently, by their several acts directly contribute to produce a single injury, each being sufficient to have caused the whole, and it is impossible to distinguish the portions of injury caused by each, they are then joint tort feasors within the rule, and may be sued either jointly or severally at the election of the plaintiff, and in such an action against one or more the whole damage may be recovered."

Applying these principles of law to the declaration in the case at bar, I find no sufficient allegations therein showing any joint or concerted action on the part of the defendants in committing the tort alleged, nor do I find that the injury resulting from the acts of the defendants was single and indivisible. True, it is alleged that there was a total breach of the contract; but the total breach of a contract for the sale of a commodity such as oil may be single, or it may result from each of two or more persons separately inducing the seller to deliver to him a specified quantity, less than the whole, of the oil bargained and sold by the contract, the aggregate of the several lesser quantities amounting to the whole.

[4] The question raised by the third cause of demurrer is one touching the form, and not the substance, of the declaration. That the declaration is sufficient in substance is not questioned. That it sets forth the acts of the defendants with sufficient particularity and certainty is denied. The plaintiffs rely upon Walker v. Cronin, 107 Mass. 555, and O'Reiley v. Bevington, 155 Mass. 72, 29 N. E. 54; but, as I understand those cases, all questions therein considered pertained only to matters of substance. The degree of particularity and certainty required in declarations has been considered numerous times by the courts of the state of Delaware. Campbell v. Walker, 1 Boyce (Del.) 580, 76 Atl. 475; Valerii v. Breakwater Co., 3 Boyce (Del.) 196, 84 Atl. 222; Jones' Adm'r v. People's Ry., 4 Pennewill (Del.) 201, 53 Atl. 1065; Newton v. People's Ry., 4 Pennewill (Del.) 350, 55 Atl. 2. Tested by the rule of those cases, the declaration of the present case is defective, in that it fails to set out in what respect or manner the defendants "caused, required, procured, influenced, persuaded, induced, and compelled" the Producers Refining Company to breach its contract.

The second count does not require separate consideration. What has been said as to the first count applies equally to the second.

The demurrer to each count must be sustained.

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

(District Court, D. Delaware. March 12, 1921.)

No. 370.

1. **Trade-marks and trade-names ⇐34—Contract held not void as transfer in gross, but as transfer of right to use in connection with sale of toilet preparations.**
A contract whereby an institute, which had been engaged in the treatment of skin diseases and the sale of preparations incidental thereto, transferred to a company the right to use its trade-mark and trade-name in the latter's business, which under its charter included the sale of the preparations, as well as the treatment, from which transfer were excepted rights theretofore granted to other corporations, the only one shown being a grant to complainant of the right to use the trade-mark in connection with the sale of specified articles, and also excepted the right of the institute to use the mark so long as it continued in the business, granted the right to use the mark in connection with the sale of the preparations, as well as in the treatment of diseases, so that the transfer of the trade-mark was not void as a transfer in gross.

2. **Contracts ⇐153—Construction which renders exception meaningless should be avoided.**
A construction of a contract which renders meaningless an exception expressed therein should be avoided.

3. **Trade-marks and trade-names ⇐34—Sale of list of patients who bought marked preparations sufficient to support transfer of trade-mark.**
A sale by an institute, which was engaged in the treatment of skin diseases and the sale of preparations in connection therewith, of its list of patients of the institute, who were also the customers of the preparations, was a sale of the good will of the institute, so that the transfer of the trade-mark in connection therewith was not void as a transfer in gross.

4. **Trade-marks and trade-names ⇐35—Contract held an assignment of trade-mark, not a license.**
A contract by a trade-mark owner, giving to a corporation, in consideration of all of the stock of the company, the exclusive license to use the trade-mark, with certain exceptions, which otherwise disclosed a purpose to transfer the rights in the trade-mark, subject only to those exceptions, was not a mere license, personal to the company, to use the mark, but was in legal contemplation an assignment, notwithstanding the use of the word "license."

5. **Trade-marks and trade-names ⇐35—Assignment of trade-mark held to include owner's name used in connection therewith.**
An assignment of a common-law trade-mark, identified by reference to a certificate of registration of the mark as applied to a facial soap, included in the assignment the name of the original maker, which had accompanied the trade-mark as previously used, and also the last name of the maker, by which abbreviated name the commodities had become known to the purchasing public in connection with the trade-mark.

6. **Trade-marks and trade-names ⇐32—Abandonment is matter of intention.**
The abandonment of a trade-mark is a matter of intention.

7. **Trade-marks and trade-names ⇐32—Facts held not to show intention to abandon.**
The fact that an institute, which owned a trade-mark and had been engaged in the treatment of skin diseases, which was not authorized by its charter, thereafter transferred its trade-mark rights to a corporation, of which it owned all the stock, and which was authorized to treat diseases,

as well as to sell the preparations, negatives an intention to abandon, so that the rights to the trade-mark were not lost by temporary nonuser.

8. **Trade-marks and trade-names ⇐39—Want of consideration to owner of trade-mark held to invalidate license contract, as abrogation of prior agreement.**
In a contract between a corporation, which was in fact the owner of a trade-mark, subject to the right of a partnership to use it on certain preparations, and the partnership, whereby the partnership, for a consideration moving to it and future royalty payments, licensed the corporation to use the trade-mark on preparations other than those on which the partnership was licensed to use it, there was no consideration to the corporation which would make the contract binding on the corporation as an abrogation or novation of the previous contract by which the corporation had acquired the trade-mark.

9. **Corporations ⇐404(2)—President cannot make contract divesting corporation of all assets.**
In the absence of corporate authorization or ratification, a contract which divests the corporation of all its assets is beyond the power of the president to make.

10. **Corporations ⇐426(1)—Sale of assets by president held not ratified.**
A contract by the president of a corporation, transferring all its assets, was not ratified by the corporation, where the next year it claimed to be the owner of the assets, and soon thereafter repudiated the alleged contract, which repudiation was acquiesced in by the other party.

11. **Corporations ⇐404(2)—Transferee's ownership of all stock does not authorize president to transfer all corporate assets.**
The fact that a transferee of all the assets of a corporation owned all the capital stock at the time of the transfer is not equivalent to antecedent corporate authority for the transfer by the president.

12. **Contracts ⇐82—Expressed consideration impliedly excludes another consideration.**
The expression of one consideration in a written contract impliedly excludes any other consideration therefor.

13. **Corporations ⇐458—Transfer of stock to corporate president for his services is not consideration for sale of assets by corporation.**
The fact that the transferee of all of the assets of a corporation, who also owned all the stock of the corporation, afterwards transferred the stock to the corporation's president in consideration for services rendered by him to the transferee, is not consideration to the corporation for the transfer of its assets.

14. **Evidence ⇐231(3)—Rights of transferee from corporation not affected by statements of officer after the transfer.**
The transferee of a trade-mark previously owned by a corporation is not affected as to the rights so acquired by statements of an officer of the company made after the transfer.

15. **Estoppel ⇐98(2)—Transferee held not estopped by inconsistent statements by transferor in other proceedings involving different issues.**
The transferee of trade-mark rights from an individual is not estopped as to such rights by the position taken by the individual in bankruptcy proceedings of a corporation, which also transferred its trade-mark to the transferee, and in a suit by the trustee in bankruptcy in which the individual was attempting to protect his rights as a minority stockholder, where the rights which he transferred were those which he held as an individual, and not as a stockholder.

16. **Estoppel ⇐54—Party claiming must be ignorant of real facts.**
Misrepresentations on which estoppel in pais can be based must consist of facts, not opinions, and the party claiming the estoppel must have been ignorant of the real facts, so that complainant cannot rely on

estoppel without showing that it was ignorant of the facts concerning which the representations were made.

17. Trade-marks and trade-names ⊂=45—Registration does not enlarge rights of owner.

The registration of an existing common-law trade-mark does not confer any greater rights in the use of the mark on the registrant, nor diminish the rights of others entitled to the use thereof.

18. Trade-marks and trade-names ⊂=95(4)—Threat to infringe, not shown to have been sanctioned by defendant, does not authorize injunction.

A bill to enjoin infringement of a trade-mark must be dismissed as to one defendant, where there had been no infringement, and the only threat to infringe was based on a circular issued by a third person, which was not shown to have been sanctioned by that defendant.

19. Trade-marks and trade-names ⊂=93(3)—Transferee held not to infringe rights of prior transferee for specified articles.

Where complainant had acquired exclusive right to use a mark on certain specified toilet preparations, evidence *held* not to show that defendant had infringed complainant's rights, though it used the trade-mark on other toilet preparations, and thereby some confusion had arisen in the minds of the public as to the origin of the different articles.

20. Trade-marks and trade-names ⊂=64—Individual can use own name, which has acquired secondary meaning.

An individual has, subject to certain conditions, the right to use his name in his business, although his surname may have acquired a secondary meaning, and he has also the right to transfer that business to a corporation bearing his name.

21. Trade-marks and trade-names ⊂=61—Transfer of right in connection with stated articles includes only those articles and others closely resembling them.

The transfer of exclusive right to use an existing trade-mark on specified toilet preparations gives the transferee the right to prevent the use of such mark by others only for the same preparations, or for those so closely resembling them as to be calculated to deceive and mislead the public to believe that they are identical with those named in the transfer.

In Equity. Suit by the Andrew Jergens Company against Woodbury, Incorporated, and others. Decree rendered, dismissing the bill.

See, also, 271 Fed. 43.

Thomas F. Bayard, of Wilmington, Del., Keyes Winter, of New York City, and Walter A. De Camp and Dudley V. Sutphin, both of Cincinnati, Ohio, for plaintiff.

John Robert Taylor and Gustav Drews, both of New York City, for defendants.

MORRIS, District Judge. This is a suit to enjoin alleged trade-mark infringement and unfair competition. The complainant, the Andrew Jergens Company, an Ohio corporation, asserts that it has the right to the exclusive use of the name "Woodbury," or "Woodbury's," and of a mark consisting of a representation of a head minus the bust and neck, commonly described as a "neckless head," upon or in connection with toilet articles and dermatological preparations, and that the defendants, Wm. A. Woodbury Distributors, Inc., Woodbury, Inc., and Woodbury System, Inc., are, in violation of complainant's rights, using or threatening to use the name and mark upon similar articles

and preparations. One defendant, the Distributors, denies that the plaintiff's rights in either the name or mark are exclusive, and, while admitting that it, the Distributors, uses the mark and the name upon certain toilet articles and preparations, and the name upon certain others, it denies that in so doing it has entered the field of complainant's rights. The remaining defendants claim that the complainant has failed to show that either of them has used or threatened to use the name or mark as charged. The case was tried in open court upon bill, answer, oral testimony, and documentary evidence. The relief sought is a permanent injunction and an accounting.

The basic issues are: (1) What is the scope and extent of complainant's rights in the mark and name? and (2) Have its rights therein been infringed by the defendants or any of them? The complainant does not contend that it was the first to adopt and use the name or mark, but says that its rights "are based upon and were acquired by it through two contracts, one dated June 13, 1901, * * * and the other dated March 6, 1909." The 1901 contract was made by and between John H. Woodbury, John H. Woodbury Dermatological Institute, a New York corporation, P. R. McCargo, and Wm. A. Woodbury, of the one part, and Andrew Jergens & Co., a copartnership, of the other part. (As complainant's succession in title from the partnership through a New York corporation of similar name is not in issue, they will be considered herein as a single entity and referred to as the complainant, or the Jergens Company.) Prior to 1901 John H. Woodbury and the John H. Woodbury Dermatological Institute were successively the owners of and engaged in the business of making and selling certain proprietary medicated dermatological preparations and toilet articles of the general class of detergents, including, among other things, soap, creams, powders, shampoos, tonics, and lotions, all of which were adapted for use in the care of the human skin, hair, or teeth. The mark was first adopted by John H. Woodbury and used upon the package or receptacle for each commodity. As stated by the complainant:

"He appropriated that symbol as a mark of the entire class of toilet articles and preparations."

The essential feature of the mark, the neckless head, was usually accompanied, above, by the words "John H. Woodbury's" which were immediately followed by the name of the commodity upon which the mark was being used. Beneath, and at the sides of the head, printed matter in the nature of directions for using the article ordinarily appeared. In the year 1889 John H. Woodbury caused that mark, accompanied by his name and other printed matter, as above indicated, to be registered (serial No. 16,958) for facial soap. The next year he caused the John H. Woodbury Dermatological Institute to be incorporated in New York, and in consideration of its entire capital stock transferred to it all his rights, trade-marks, and good will. The Institute prospered. It manufactured and sold, not only the eight articles thereafter sold to the Jergens Company, but many others of the same general class. It also became engaged in the business of treating persons

for facial blemishes and deformities and for diseases of the skin. Wm. A. Woodbury and McCargo were employees and stockholders of the Institute, and had, possibly, acquired through John H. Woodbury, to whom certain rights were reassigned by the Institute, some interest in one or more of the commodities.

Such, in brief, were the conditions when, in 1901, the first contract, through which the complainant claims, was made. By that contract John H. and Wm. A. Woodbury, McCargo, and the Institute transferred and assigned unto the complainant "all their right, title, and interest in and to the commodities known as Facial Soap, Facial Cream, Dental Cream, Tooth Powder, Odorine Powder, Facial Powder, Shaving Sticks, and Shaving Soap, and all the trade-marks, copyrights, and privileges of every name and nature whatsoever appurtenant to the ownership thereof," absolutely; "also the privilege of using only on the articles above mentioned the neckless head trade-mark."

It is not denied that the complainant is still entitled to all the legal rights in and to the name and mark that were acquired by it through that contract, but it is contended by the Distributors that the rights so obtained by the complainant have not been enlarged or increased. The complainant, on the other hand, asserts that the remaining and complementary rights in the name and mark were acquired by it through the contract of March 6, 1909, and that thereby its rights in the name and mark became exclusive.

The circumstances leading up to the last-mentioned contract appear at large in the pleadings in the suit of Stiles, Trustee, against the Jergens Company. Complainant's Exhibit No. 73. Briefly stated, they are that by the contract of 1901 John H. Woodbury also transferred to the complainant herein 50 shares (being one-half) of the capital stock of the Institute. The remaining 50 shares were then owned by John H. Woodbury, 30 shares; Wm. A. Woodbury, 19 shares; and McCargo, 1 share—which had been given to him by Wm. A. Woodbury. After the last-mentioned contract was made, the directorate of the Institute consisted of a representative of the Jergens Company, McCargo, and Wm. A. Woodbury. The business of the Institute continued as theretofore, save as to the eight specified articles sold to the Jergens Company. In 1904 the complainant bought for a very large sum of money the 1 share of stock owned by McCargo, and he was replaced as director by another representative of the Jergens interests. Thereby the complainant acquired control of the board, and consequently of the Institute and its business.

On October 7, 1908, the Institute was adjudged a bankrupt upon a petition filed on the 4th day of the preceding month. The contract of March 6, 1909, through which complainant claims, was made by the trustee in bankruptcy. Through that contract the Jergens Company claims to have acquired all the rights in the mark and name not theretofore owned by it. The trustee in bankruptcy of the Institute thereby undertook to assign to one Leyman, who immediately made a like assignment to the complainant, all the right, title, and interest that the Institute had in the neckless head trade-mark at the time the petition

in bankruptcy was filed; in an application for a trade-mark, serial No. 37,232, filed by the Institute September 4, 1908 (being an application to register the word "Woodbury's" as a trade-mark for hair tonic, scalp cleaner, scalp cream, skin lotion, and massage cream), and—

"The exclusive right to manufacture and sell the proprietary toilet articles known as 'Woodbury's Hair Tonic,' 'Woodbury's Massage Cream,' 'Woodbury's Scalp Cleaner,' 'Woodbury's Clear Skin Lotion,' 'Woodbury's Clear Skin Cream,' 'Woodbury's Scalp Cream,' and to use thereon the so-called 'neckless head' trade-mark, being a mark similar to that registered as United States trademark No. 16,958."

The Distributors contends that the trustee had no title to or interest in the rights he thereby undertook to transfer, and that consequently the complainant took nothing under that assignment. This contention of the Distributors is founded upon an agreement, dated November 10, 1905, between the Institute, of the one part, and the Woodbury Company, a New York corporation, of the other part, whereby the Institute assigned, as the Distributors contends, to the Woodbury Company, absolutely, all the rights that the trustee in bankruptcy of the Institute subsequently attempted to sell and transfer to the complainant through Leyman as hereinbefore pointed out. This agreement of 1905 recites the ownership by the Institute of the neckless head trade-mark and of lists of patients and other persons applying to it for treatment in medical, surgical, and hygienic branches, and lists of names of persons who had applied or were likely to apply to the Institute for such treatment; that the Woodbury Company was desirous of acquiring the exclusive license to use the trade-mark, except in so far as conflicting licenses had been granted to other persons or corporations, "allowing the Institute, however, to reserve to itself the right to use the same so long as the Institute shall continue in active business, but not otherwise"; that the Woodbury Company was desirous of acquiring the lists of patients and mailing lists, and any and all additional or supplementary lists of patients and mailing lists that might be acquired by the Institute, "the same to be the exclusive property of the company if the Institute ever ceases to engage in active business"; and that the Woodbury Company was willing in consideration thereof to issue to the Institute its entire capital stock. The agreement then provides:

"* * * That the Institute, for and in consideration of the issuance and delivery to it of 100 full-paid and nonassessable shares of the capital stock of the company at par, being the entire capital stock thereof, shall and hereby does give and grant to the company the exclusive license to use the aforesaid neckless head trade-mark, which was registered by the Institute on the 3d day of June, 1889, except in so far as conflicting rights have heretofore been given or granted to other persons or corporations, reserving to itself, however, the right to use the same so long as it shall continue in active business, but not otherwise; and the Institute for the consideration aforesaid hereby agrees to forthwith deliver to the company true and accurate copies of any and all lists of patients and mailing lists described above which are now in possession of the Institute, and hereby agrees to supply the company every 30 days with any and all additional and supplemental lists of patients and mailing lists that may be acquired by the Institute in its business; * * * and the Institute, for the consideration aforesaid, further agrees with the company that, if at any time the Institute shall cease to engage in active

business, the right of the Institute to use said lists of patients and said mailing lists shall cease, and the same shall become the exclusive property of the company."

The making of the foregoing contract was duly authorized by both the Institute and the Woodbury Company. The evidence discloses that the Institute ceased to engage in active business on or before September 4, 1908. If the contention of the Distributors be correct the complainant acquired no additional rights through the trustee in bankruptcy of the Institute. It therefore becomes necessary to determine what rights, if any, were acquired by the Woodbury Company under the 1905 contract.

[1] The complainant urges that the contract under consideration transferred to the Woodbury Company only the right to use the neckless head in the treatment of blemishes, deformities, and diseases of the skin; that it did not convey to the Woodbury Company any business or good will of the Institute, or any right to use the trade-name "Woodbury" in connection with the business of selling toilet articles; and that consequently the sale of the trade-mark was a sale in gross and void. The charter of the Institute conferred upon it only the power to manufacture and deal in chemical preparations and to print and sell books and pamphlets, yet, soon after its organization, it became engaged, not only in its authorized commercial business, but also in the business or profession of treating persons for facial blemishes and deformities and for diseases of the skin. By reason of its lack of charter power to engage in such professional business it anticipated an enforced cessation thereof, and in 1905 caused the Woodbury Company to be organized (minutes of January 12, 1905). The charter powers of that company were broad. They included not only the power to "conduct and maintain sanatoriums and other places for the reception and care of patients, and for medical and hygienic treatment of the ailments, diseases, and deformities of such patients, and to employ physicians and surgeons to administer medical, surgical, and hygienic treatment, and to demonstrate and use any and all of the articles hereinbefore mentioned and described," but also the power, mentioned earlier in the charter, to manufacture and deal in soaps, hair tonics, and all other toilet preparations and accessories, proprietary articles of all kinds, drugs, chemicals, and toilet articles.

The offer of the Institute, expressly authorized by its board of directors, to the Woodbury Company for the entire capital stock of the latter company, stated that in consideration of that capital stock it would give to the Woodbury Company "the exclusive right to use *in its business* * * * the neckless head trade-mark, * * *" subject to certain exceptions not here material. That offer was accepted by the Woodbury Company. The authorized business of the latter company was not restricted to the treatment of persons. It included the power to manufacture and sell toilet articles and preparations as well. The contract gives to the Woodbury Company "the exclusive license to use the aforesaid neckless head trade-mark," subject to the specified reservation and exception. The use granted to the Woodbury Company is general, and is not restricted to any particular part

of the business of that company. The exceptions to the grant of the exclusive right to the Woodbury Company are:

(1) "Except in so far as conflicting rights have heretofore been given or granted to other persons or corporations;" and (2) "the right [of the Institute] to use the same so long as it shall continue in active business but not otherwise."

The only rights in the trade-mark theretofore granted by the Institute, so far as appears from the evidence, were the rights conferred upon the plaintiff by the contract of 1901. The rights granted by the contract of 1901 were for the use of the mark upon vendible commodities only, and were in no sense for the use of the mark in connection with professional treatment of persons. If the intent of the parties to the 1905 contract was that the grant of the mark to the Woodbury Company was for the use thereof in connection with professional treatment only the rights to the mark theretofore granted were in no sense "conflicting" and the first exception to the grant in the 1905 contract was meaningless.

[2] Such a construction should be avoided. The second exception is a reservation to the Institute of a right to use the mark for a specified period, and the contract expressly takes away from the Institute and confers upon the Woodbury Company, subject only to the first exception, all rights in the mark after it (the Institute) shall have ceased active business, thereby indicating that the grant to the Woodbury Company was general, and embraced all rights of the Institute in the mark, including use upon its vendible commodities. In paragraph IV of an answer to a bill of complaint of the trustee in bankruptcy of the Institute filed against the complainant herein and others for alleged fraud in connection with the bankruptcy of the Institute the Jergens Company admitted that prior to 1901 the Institute manufactured or caused to be manufactured and sold various toilet preparations; that from June 13, 1901, to January 1, 1908, the Institute continued to manufacture or have manufactured, sell, or advertise to a very small extent toilet and medicated toilet preparations, but the manufacturing, sale, and advertising thereof were until February 28, 1908, "solely incidental to and in connection with the conduct by said Institute of its business * * * of treating persons for facial blemishes and deformities and for diseases of the skin." I find nothing to indicate that it was the purpose of the Institute to dispose of its main business and to retain the business "solely incidental" thereto. For the foregoing reasons I am of the opinion that in the contract of 1905 the grant of the trade-mark rights included the right to use the mark upon vendible commodities.

[3] It also appears from the foregoing that the "patients" of the Institute were both patients and customers. Consequently the grant of the trade-mark was not unaccompanied by a grant of good will for the Woodbury Company also bought from the Institute "all lists of patients" (customers)—a proper means of effecting the sale of a business or good will. Nims on Unfair Competition and Trade-Marks, pp. 34, 35, 318. Hence the sale of the trade-mark was not a sale in gross or void.

[4] The complainant further urges that, if the contract was not void, it constituted but a mere license, personal to the Woodbury Company, to use the mark. I cannot agree with this contention, for I think the agreement discloses a purpose to transfer, and that it did transfer to the Woodbury Company, all rights in the trade-mark, subject only to the two exceptions, and that, although using the word "license," it was, in legal contemplation, an assignment. Sirocco Engineering Co. v. Monarch Ventilator Co. (C. C.) 184 Fed. 84; Griggs Cooper & Co. v. Erie Preserving Co. (C. C.) 131 Fed. 359.

[5] The trade-mark assigned was the common-law trade-mark of the Institute as used on its various products, identified in the contract by reference to the Patent Office certificate of registration as applied to facial soap. As the neckless head was accompanied in the trade-mark by the name "John H. Woodbury," as hereinbefore shown, the trade-mark assigned included the name "John H. Woodbury" and the word "Woodbury's," by which abbreviated name the commodities in connection with which the trade-mark was used had become known to the purchasing public. It should also be noted that the corporate name of the assignee is "the Woodbury Company." I think the contract of 1905 conferred upon the latter company, after the Institute ceased active business, all rights to use the trade-name "Woodbury" that the Institute had theretofore enjoyed, save only such limited rights as were granted by it to the complainant in 1901.

[6, 7] The complainant contends, however, that such rights as the Woodbury Company may have had were abandoned by nonuser. But abandonment is a matter of intention. Baglin v. Cusenier Co., 221 U. S. 580, 597, 598, 31 Sup. Ct. 669, 55 L. Ed. 863. I find nothing in the evidence to indicate any intention on the part of the Woodbury Company to abandon its rights so acquired, but, on the contrary, it seems to have been the purpose of both the Woodbury Company and the Institute, then its sole stockholder, to retain the Woodbury Company with all its rights as a fortified base to which those interested in the Institute could retreat in the event the Institute should meet with disaster by reason of its exercise of rights not conferred upon it. The idea of abandonment is wholly inconsistent with the very purpose for which the Woodbury Company was organized and the contract of 1905 made. It follows that the assignment of March 6, 1909, from the trustee in bankruptcy of the Institute to the complainant was without effect and that the complainant acquired no rights thereunder.

The complainant offers other evidence intended to defeat the effect of the contract of 1905. This evidence consists of an alleged contract of April 26, 1909, purporting to have been made between the complainant and the Woodbury Company, whereby, it is contended by the complainant, the contract of 1905 was abrogated and novated. The instrument alleged to have this effect recites that—

"The Andrew Jergens Company is the owner of the exclusive right to manufacture and sell and the good will of the business of manufacturing and selling the proprietary toilet articles known as 'Woodbury's Hair Tonic,' 'Woodbury's Scalp Cream,' 'Woodbury's Scalp Cleaner, and 'Woodbury's Clear Skin Lotion,' and to use thereon United States trade-mark No. 16,958, registered August 20, 1889, and the name 'Woodbury's,' as set forth in applica-

tion for United States trade-mark, serial No. 37,232, filed September 4, 1908, and is the owner of various common-law trade-marks and trade-names for the use on said articles for the registration of which it is about to apply to the Commissioner of Patents of the United States," and that the "Woodbury Company is desirous of acquiring the exclusive right and license to manufacture and sell and to use the good will of the business of manufacturing and selling said proprietary toilet articles and of using thereon said trade-marks and trade-names registered and to be registered."

The instrument then provides:

"That the Andrew Jergens Company, for and in consideration of the sum of $1 and other valuable considerations to it in hand paid by the Woodbury Company, and in consideration of the payments to be hereafter made as set forth herein, has given and granted unto said the Woodbury Company, and by these presents does herewith give and grant unto said the Woodbury Company, the exclusive right and license to manufacture and sell, and to use the good will of the business of manufacturing and selling the proprietary toilet articles known as 'Woodbury's Hair Tonic,' 'Woodbury's Scalp Cream,' 'Woodbury's Scalp Cleaner,' and 'Woodbury's Clear Skin Lotion,' and the exclusive right and license to use thereon United States trade-mark No. 16,958, and the common-law trade-mark similar thereto now and heretofore used thereon; the exclusive right and license to use thereon the trade-mark set forth and described in application for United States trade-mark, serial No. 37,232, and the exclusive right and license to use thereon all common-law trade-marks, trade-names, and trade labels heretofore and now used thereon."

It provides for royalties to be paid by the Woodbury Company equal to 10 per cent. upon the net sales of said preparations, but the amounts to be so paid were to be not less than $3,000 a year for the first two years and $4,500 a year thereafter. It also contains these provisions:

"The Woodbury Company hereby stipulates and agrees that the Andrew Jergens Company is the sole and exclusive owner of the right to manufacture and sell and of the good will of the business of manufacturing and selling said toilet articles, and the sole and exclusive owner of said trade-marks, trade-names and trade labels, and that the same are valid and subsisting trade-marks, trade-names, and trade labels, and that the Woodbury Company will not use the same upon any articles except those enumerated herein, or in any business except the manufacture and sale of the articles enumerated herein. * * *

"It is mutually covenanted and agreed, * * * if any payment herein stipulated to be paid is not paid when due, or if the Woodbury Company shall violate any covenant of this agreement, * * * then this agreement and all rights hereunder shall terminate and be at an end, as fully as if this agreement had not been made, and all rights and licenses hereunder shall revert to said the Andrew Jergens Company; otherwise, this agreement shall remain in force for 50 years.

"It is covenanted and agreed between the Andrew Jergens Company and the Woodbury Company that this license is personal to the Woodbury Company and shall not inure to its successors or assigns."

[8] Is the alleged agreement of April 26, 1909, a valid and binding agreement? It must be so found; otherwise, the contention of the complainant that thereby the contract of 1905 was abrogated and novated cannot be sustained. To be valid and binding it must be supported by a consideration, and it must also be the act of the Woodbury Company. Before and at the time of making the purported agreement of April 26, 1909, the last-named company was the owner of the trade-mark, trade-name and good will of the defunct Institute, save only such rights therein and thereto as had been acquired by the complainant under the 1901

contract. If complainant's contention be sound, the Woodbury Company, owning all the rights it had acquired under the 1905 contract, paid to the complainant, which had none of those rights, a substantial sum to have the latter assign to it (the Woodbury Company), for a limited term and under heavy royalty, something which the complainant did not have, but which the Woodbury Company did have. The purported contract of April 26, 1909, expresses the consideration therefor. As expressed, that consideration passes from the Woodbury Company to the complainant, and not from the complainant to the Woodbury Company, as would be expected if the Woodbury Company were in effect granting rights to the complainant. A consideration moving from the Woodbury Company to the complainant will not support a grant or surrender of the rights of the Woodbury Company.

[9, 10] Again, if the contention of the complainant be correct, the instrument of April 26, 1909, completely divested the Woodbury Company of its entire assets. Such a contract is, in the absence of corporate authorization or ratification, beyond the power of the president of a corporation to make. De la Vergne Co. v. German Savings Inst., 175 U. S. 40, 53, 20 Sup. Ct. 20, 44 L. Ed. 65. No antecedent corporate authority therefor has been shown. Nor was there subsequent corporate ratification or acquiescence, for the complainant herein as early as December, 1910, admitted (in paragraph VIII of its answer to the bill of complaint of the trustee in bankruptcy of the Institute against the complainant herein and others) that the Woodbury Company had, since the bankruptcy of the Institute, claimed to be the owner of the trademarks, mailing and patients' lists by virtue of the 1905 agreement. In January, 1911, the Woodbury Company in its answer filed to the same bill of complaint expressly stated that it so claimed. Soon thereafter the Woodbury Company repudiated its alleged contract of April 26, 1909, with the complainant and that repudiation was acquiesced in by the Jergens Company.

[11, 12] At the time the last-mentioned contract was made, the complainant owned all the capital stock of the Woodbury Company and the complainant advances the thought that such ownership was equivalent to and of the same effect as antecedent corporate authority. I cannot subscribe to this contention. De la Vergne Co. v. German Savings Inst., 175 U. S. 40, 53, 20 Sup. Ct. 20, 44 L. Ed. 65; Machen on Corp. § 1290. Nor do I find that by reason of the unauthorized, unratified, and repudiated act of its president in executing the contract of April 26, 1909, the Woodbury Company is estopped from asserting its rights under the 1905 contract. After April 26, 1909, the Jergens Company transferred the entire capital stock of the Woodbury Company to the president of the latter company as compensation for services theretofore rendered by him to the complainant, and it seeks to use this transfer as a consideration for the contract of April 26, 1909. The alleged contract, however, states another consideration and the expression of the one impliedly excludes the other.

[13] Furthermore, the transfer of the shares by the complainant to Buggeln, the president of the Woodbury Company, was as compensa-

tion for services rendered to the complainant by him in an individual and personal capacity. The transfer of the shares to Buggeln was res inter alios acta, and in no way affected the rights of the Woodbury Company. It follows, in my opinion, that the instrument of April 26, 1909, did not by estoppel or otherwise affect the rights of the Woodbury Company, acquired by it through the contract of 1905.

The complainant advances still another ground upon which it contends the defendants may not successfully dispute its claims to the exclusive use of the mark and name. This contention is that by reason of certain acts and statements of Wm. A. Woodbury the Distributors is estopped from denying that the rights of the complainant are exclusive. This contention makes necessary an inquiry into the alleged authority of the Distributors to use the name and mark and into the relation of Wm. A. Woodbury to its business. The Distributors seeks to justify its acts by authority and rights derived, as it asserts, through a contract of 1918, from two separate and distinct sources, namely, from the Woodbury Company and from the individual Wm. A. Woodbury. Wm. A. Woodbury, a cousin of John H. Woodbury, became in the year 1892 an employee of the Institute and then or subsequently a stockholder and an officer thereof. His duties seem to have been those of a general manager with more or less supervision over all the departments of the Institute, but in charge particularly of its advertising.

The evidence discloses that after the bankruptcy of the Institute he directed his attention to an intelligent and comprehensive study of all phases of the business in which the Institute had theretofore been engaged. He made extensive investigations of the literature pertaining to the care of the person, directed mainly to the care of the complexion, hair, hands, and feet. His investigations revealed that comparatively little intelligent consideration had been given to these subjects, and that the literature was mostly confined to the exploitation of particular commodities or preparations. Accordingly Wm. A. Woodbury, utilizing the information acquired by him through his employment with the Institute and through his own subsequent research, prepared a series of lessons severally directed to a particular branch of the art of the care of the person. These lessons were distributed by him in the form of a correspondence course to those engaged in the art professionally, such as manicure shops, beauty parlors, and the like, as well as to individuals not so engaged, but interested in such matters. Subsequently he published a series of books, each dealing with some particular phase of the general subject. Ultimately one complete book, embodying all phases of the general subject-matter, was written and caused to be published by him. He also wrote many articles for newspaper syndicates. As one skilled in the care of the person he acquired an extensive reputation.

Originally it was the purpose of Wm. A. Woodbury not to engage in the manufacture and sale of toilet articles, but his several publications brought to him numerous requests for preparations to be used in the care of the person. Consequently he began furnishing to such inquirers preparations put up by himself, and he continued so to do until he

made his arrangement with the Distributors. Included among his preparations were soaps, creams, powders, and similar articles. The rights which the Woodbury Company undertook to confer upon the Distributors, and which the latter now claims consist of the selling agency for all the products which the Woodbury Company had the right to manufacture under the contract of 1905, the right to use thereon the neckless head trade-mark, including the name "John H. Woodbury" and the name "Woodbury." The rights that Wm. A. Woodbury undertook to confer upon the Distributors, and which the latter now claims, consist of the right to use the name "Wm. A. Woodbury" as part of its corporate name, the right to use that name on toilet preparations sold by it, the right to avail itself of the knowledge of Wm. A. Woodbury, acquired in the business of the Institute from 1892 to 1908, the right to utilize the name "Wm. A. Woodbury" and his reputation, acquired by and resulting from his widely distributed publications during the period of approximately 10 years beginning about 1909, and the right to utilize the good will and business of Wm. A. Woodbury in the sale of toilet preparations marketed by him during the same period.

[14] The contention of the complainant that the Distributors, in so far as it claims through the Woodbury Company, is estopped from asserting that the Woodbury Company is possessed of any rights under the 1905 contract, by reason of certain acts and statements of Wm. A. Woodbury, is based upon affidavits and pleadings of Wm. A. Woodbury of an alleged contrary tenor, filed by him or on his behalf in the bankruptcy proceedings of the Institute, and in a suit brought by the trustee in bankruptcy of the Institute against the complainant herein. In that suit the Jergens Company was charged by the trustee with fraudulently bringing about the bankruptcy of the Institute, to its detriment, and particularly to the damage of its minority stockholders. It, of course, needs no argument to show that the acts and statements of Wm. A. Woodbury, made after the Woodbury Company had acquired its rights under the contract of 1905, can in no way affect the rights of the Distributors, in so far as it claims through the Woodbury Company.

[15] Is the Distributors estopped by the acts and statements of Wm. A. Woodbury from denying that the complainant has the rights which it (the Distributors) claims through him? Whatever position may have been taken by Wm. A. Woodbury in the bankruptcy proceedings and in the suit of the trustee in bankruptcy against the Jergens Company, the questions there involved are not the questions presented here. In those proceedings Wm. A. Woodbury was attempting to protect his rights as a minority stockholder of the Institute as against the Jergens Company. The rights of Wm. A. Woodbury properly to use his own name and fame in the business of manufacturing and selling toilet articles were not there involved. The rights which in this suit the Distributors claims through Wm. A. Woodbury are rights derived from him individually; they are personal rights, as distinguished from the rights of a stockholder. The rule that a party will not be allowed in a subsequent judicial proceeding to take a position inconsistent with a position taken by him in a former judicial proceeding does not

apply to suits in which the issues and the parties are not the same. 10 R. C. L. 702.

[16] If, however, the estoppel of the Distributors, as set up by the complainant, does not depend upon the rule touching inconsistent positions in judicial proceedings, but upon estoppel in pais, it is met by the insuperable difficulty that the alleged misrepresentations of Wm. A. Woodbury must consist of facts, not of "opinion, or a conclusion of law from a comparison of facts" (Bigelow on Estoppel, 634, 635), and of the further difficulty that a party setting up an estoppel must have been ignorant of the real facts as to the matter in controversy (Bigelow on Estoppel, 681). The complainant has not shown, and is not in a position to show, that it was ignorant of any fact as to which statements were made by Wm. A. Woodbury in the bankruptcy proceedings. I think, therefore, that the Distributors is not estopped by any act or statement of Wm. A. Woodbury from denying that the complainant has the rights which it asserts.

[17] The complainant caused a combination mark, consisting of the word "Woodbury's" and the neckless head, to be registered for use upon some of the commodities which it claims through the assignment of the trustee dated March 6, 1909; but under the facts of this case such registration neither conferred any greater rights in the use of that name or mark upon the complainant, nor diminished the rights of others entitled to the use thereof. Thomas G. Carroll & Son Co. v. McIlvaine & Baldwin (C. C.) 171 Fed. 125, affirmed 183 Fed. 22, 105 C. C. A. 314; Sarrazin v. W. R. Irby Cigar & Tobacco Co., 93 Fed. 624, 35 C. C. A 496, 46 L. R. A. 541; Scandanavia Belting Co. v. Asbestos & Rubber Works, 257 Fed. 937, 169 C. C. A. 87.

In view of the foregoing conclusions I am of the opinion that the rights and the only rights that the complainant has in the neckless head trade-mark and in the name "Woodbury" are those acquired by it through the contract of June 13, 1901. Its rights to the use of the neckless head trade-mark are expressly limited by that contract to the eight articles specifically mentioned therein. Its rights under that contract to the use of the name "Woodbury" have been determined by the Court of Appeals of the state of New York, the state in which the contract was made, in a suit of the complainant against John H. Woodbury. The rights of Wm. A. Woodbury to use his own name were not any more surrendered by the contract of 1901 than were the rights of John H. Woodbury to use his name, both of whom were parties thereto. The Court of Appeals in that case (197 N. Y. 66, 90 N. E. 344) said:

"The contract which is the basis of the plaintiff's right to use the name 'Woodbury' entitled them to use that name only when applied to the several commodities expressly specified therein. It leaves the defendants entitled to use that name as applied to any other articles which they manufacture and sell, except such as so resemble the articles specified in the contract that they are calculated to deceive and mislead the public to believe that they are identical with those named in the contract. The trial court has found that the article manufactured and sold by the defendants as 'Woodbury's New Skin Soap' is thus calculated to deceive and mislead the public. That finding has been unanimously affirmed by the Appellate Division, and hence is conclusive upon

this court. It follows that the injunction embodied in the judgment is right, so far as it is effectual to restrain the defendants from using the name 'Woodbury' in connection with any of the articles specified in the contract and also so far as it restrains them from making and selling 'Woodbury's New Skin Soap.' It goes too far, however, in forbidding the defendants from using the name 'Woodbury' on other soaps or in connection with other articles where such use is not deceptive or misleading."

Having ascertained the rights of the complainant in the name and mark there remains to be determined only whether those rights have been infringed by the defendants or any of them. This issue depends upon the acts and doings of the several defendants as disclosed by the evidence. The complainant admits that there is no evidence sustaining its charges of infringement against Woodbury System, Inc., and that as to it the bill should be dismissed.

[18] There is no evidence showing that Woodbury, Inc., has infringed any rights of the complainant (however broad those rights may be), but complainant contends that it has threatened to infringe and bases this contention upon an advertisement of and a circular issued by one Walter J. Pierce & Co. It is unnecessary to determine whether or not the circular or advertisement, if authorized by Woodbury, Inc., would constitute a threat to infringe, for I am unable to conclude from the evidence that the advertisement or circular were in any sense sanctioned by that defendant. The bill as to it should be dismissed, without regard to the limited scope of complainant's rights in the name and mark.

[19] The Distributors has been actively engaged in business. It sold under its own name, "Wm. A. Woodbury Distributors, Inc.," or under the name "Wm. A. Woodbury," some articles by virtue of the rights which it acquired from Wm. A. Woodbury. The Distributors has not used upon such articles the neckless head trade-mark. When selling articles acquired from the Woodbury Company, and other articles not of the species of any of the eight articles upon which the complainant has the exclusive right to use the neckless head, the Distributors has used thereon the neckless head trade-mark. As an illustration of the articles upon which the neckless head has been so used by the Distributors, there are found among the exhibits such articles as Clear Skin Lotion, Face and Hand Lotion, Acne Pimples Soothing Lotion, Hair Tonic, Liquid Shampoo, Mouth Elixir, Coarse Pore Lotion, Cleansing Massage Cream, Cold Cream, Heal Skin Ointment, and Complexion Tablets. As an illustration of the articles upon which the neckless head has not been used by the Distributors, there are found among the exhibits such articles as Wm. A. Woodbury Kleen Odor Soap, Wm. A. Woodbury Sea Maid Soap, Wm. A. Woodbury Olive and Palm Soap, Wm. A. Woodbury Dentate, and Mercuric Iodide Soap.

[20] It cannot be denied that the evidence discloses that some confusion exists in the public mind as to the origin of the articles of the respective parties, yet, so far as I have been able to discover from the evidence, such confusion as does exist arises from the exercise of the legal rights of the respective parties, and not from any wrongful act of

the Distributors. Such confusion seems wholly attributable to the fact that two separate and distinct corporations, deriving their title from a common source, have the right to use the same mark and name upon different articles and preparations of the same general class, and to the further fact that an individual has, subject to certain conditions (observed, I think, by the Distributors), the right to use his name in his business, although his surname may have acquired a secondary meaning, and to transfer that business to a corporation bearing his name. Howe Scales Co. v. Wyckoff, Seamans, etc., 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972; Waterman Co. v. Modern Pen Co., 235 U. S. 88, 35 Sup. Ct. 91, 59 L. Ed. 142.

[21] What constitutes an infringement of plaintiff's rights under the contract of 1901 was decided in Andrew Jergens Co. v. Woodbury, supra. The test for infringement in this suit is the test in that case. Measuring the acts of the Distributors by the rule of that case, I find no infringement committed by it in putting out its articles or in the manner in which such articles are put out. The dress of the articles sold by the Distributors is in no sense a simulation of the dress of the complainant's goods. The articles sold by it do not, in my opinion, "so resemble the articles specified in the contract (of 1901) that they are calculated to deceive and mislead the public to believe that they are *identical* with those named in the contract" of 1901. The mark and name as used by the Distributors are used by it in the exercise of its legal rights. Those rights it has not abused.

While I have given this limited detailed consideration to the question of infringement of complainant's rights by the Distributors, I do not understand the complainant to contend that the defendants or any of them have violated or threatened to violate any rights which the Jergens Company claims under the 1901 contract, its charges of infringement having been predicated mainly, if not entirely, upon the hypothesis that it has the sole and exclusive right to use the neckless head trade-mark and the name "Woodbury" upon toilet articles and dermatological preparations.

In view of the foregoing conclusions and without considering the defense of unclean hands, I am of the opinion that the bill should likewise be dismissed as to the Distributors.

A decree in accordance with this opinion may be submitted.

CONTINENTAL-EQUITABLE TITLE & TRUST CO. v. NATIONAL PROPERTIES CO. et al.

(District Court, D. Delaware. March 24, 1921.)

No. 401.

1. Judgment ⇐299(1), 342(1)—Court cannot reverse or annul final decree after term.

A court cannot reverse or annul its own final decree or judgment for errors of fact or law after the term at which the judgment or decree has been rendered, unless for clerical mistakes, or make any change or modification substantially altering or affecting it in any material thing.

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

2. Mortgages ⊂=495—Foreclosure decree held not final as respects power to modify.

A decree of foreclosure, in so far as providing that the mortgage trustee shall have judgment against the mortgagor for deficiency, is not a final decree as respects the power to modify it, by striking such provision after the expiration of the term at which decree was entered.

3. Corporations ⊂=479—Balance due after foreclosure sale held "due to the plaintiff," trustee of corporate mortgage, so as to warrant deficiency decree.

Under the provisions of a corporate mortgage or trust deed and bonds secured thereby, *held*, that the balance due after foreclosure sale was "due to the plaintiff," trustee of the deed of trust, so as to warrant deficiency decree against the mortgagor in favor of the trustee, under equity rule 10 (198 Fed. xxi).

In Equity. Suit by the Continental Equitable Title & Trust Company against the National Properties Company and its receiver. On application by the named defendant to strike from the decree of foreclosure entered provision for deficiency decree. Motion to strike denied.

Robert H. Richards, of Wilmington, Del., for plaintiff.

Andrew C. Gray, of Wilmington, Del., and H. B. Gill, of Philadelphia, Pa., for defendant National Properties Co.

MORRIS, District Judge. This is a suit in equity for the foreclosure of a mortgage, wherein Continental-Equitable Title & Trust Company, trustee under the mortgage or collateral trust agreement, is plaintiff, and National Properties Company, the mortgagor, and Reuben Satterthwaite, Jr., its receiver, appointed by this court, are defendants. A decree of foreclosure was rendered by this court upon bill and answer at the June term, 1920. A special master was appointed to execute the decree. Included among his duties were the sale of the mortgaged property (in the event of the nonpayment of its indebtedness by the mortgagor within the time fixed by the decree) and the ascertainment of the balance, if any, due over and above the proceeds of the sale. The decree further provides that—

"The plaintiff shall have judgment against the defendants for the amount so as aforesaid ascertained to be remaining due upon the bonds and coupons secured, as aforesaid, by the said mortgage or deed of trust."

The sale has been had, and the report of the master, showing a balance due over and above the proceeds of sale, has been filed. The present application, made by the mortgagor, is to strike from the decree the provision declaring the liability of the mortgagor for a possible deficiency. The basis of the application is an asserted lack of power in the court to enter in this cause a decree for any deficiency, in that, as the mortgagor contends, the debt of the mortgagor is not due to the trustee.

[1] In opposing the application, the trustee asserts (1) that the decree heretofore entered is in all respects a final decree, and, having been entered at a prior term of this court, has now passed beyond its control; and (2) that the debt of the mortgagor remaining after the

application of the proceeds of sale of the mortgaged property is due and payable to the trustee. It is well settled that a court cannot reverse or annul its own final decree or judgment for errors of fact or law after the term in which the judgment or decree has been rendered, unless for clerical mistakes, or make any change or modification substantially altering or affecting it in any material thing. Sibbald v. United States, 12 Pet. 488, 492, 9 L. Ed. 1167.

[2] Consequently the matter first to be determined is whether the decree of foreclosure, in so far as it provides that the trustee shall have judgment against the mortgagor for the deficiency is or is not a final decree. The nature of such a provision in a foreclosure decree has been frequently under consideration by the courts. 3 Jones on Mortgages, § 1709a. It has been held to be a "nullity" (Parr v. Lindler, 40 S. C. 193, 18 S. E. 636); "no more than declaratory" (Shelden v. Erskine, 78 Mich. 627, 633, 44 N. W. 146); a "contingent decree" (McCarthy v. Graham, 8 Paige, 480); "interlocutory in character" (Parmele v. Schroeder, 61 Neb. 553, 85 N. W. 562, 87 Am. St. Rep. 466; National Life Ins. Co. v. Fitzgerald, 61 Neb. 692, 85 N. W. 948); and a final decree (Lane v. Equitable Trust Co. of New York [C. C. A.] 262 Fed. 918, 925). While certain of the foregoing decisions were by state courts, yet the statutes under which such decisions were made did not differ materially from equity rule 10 (198 Fed. xxi). For the reasons leading the Nebraska court, in the cases cited, to the conclusion there reached, I am of the opinion that the provision of the decree of foreclosure, declaring the personal liability of the mortgagor for a possible deficiency, is not a final decree. Hence in that particular the decree is still under the control of this court and may be altered, notwithstanding the expiration of the term at which the decree was entered. Fourniquet et al. v. Perkins, 16 How. 82, 14 L. Ed. 854. If it be found that a deficiency decree should not be rendered in this cause, the motion to strike should be granted; otherwise, it should be denied.

[3] May a deficiency decree be properly rendered in this cause? Formerly it was not competent for the federal courts, in a suit for the foreclosure of a mortgage, to render a decree for any balance that might be found due over and above the proceeds of the sale. Noonan v. Lee, 67 U. S. (2 Black) 499, 17 L. Ed. 278. Orchard v. Hughes, 68 U. S. (1 Wall.) 73, 17 L. Ed. 560. This was an exception to the general rule that, where a court of equity obtains jurisdiction of an action, it will retain it and administer full relief, so far as it pertains to the same transaction or the same subject-matter. Frank v. Davis, 135 N. Y. 275, 31 N. E. 1100, 17 L. R. A. 306. To abrogate the exception rule 92 was promulgated by the Supreme Court. 68 U. S. vii. That rule, as now embodied in equity rule 10, provides:

"In suits for the foreclosure of mortgages, or the enforcement of other liens, a decree may be rendered for any balance that may be found due to the plaintiff over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in rule 8 when the decree is solely for the payment of money."

The foregoing rule deals solely with remedial, not substantive, rights. It makes no attempt to confer upon a plaintiff in a foreclosure suit substantive rights not already possessed by him. It merely provides a new remedy for the enforcement of existing rights. That the proceeds of the sale were insufficient to pay the amount secured by the mortgage is not questioned by the mortgagor. It contends, however, that the balance ascertained by the master to be due by it is not "due to the plaintiff." Is this contention sound? The answer must be found by ascertaining the respective substantive rights of the trustee and of the bondholders at the time of the institution of this suit. The bonds provide:

"National Properties Company, for value received, hereby promises to pay to the bearer hereof * * * [the principal of the bond] * * * on the 1st day of January, 1946, at the office of" the plaintiff.

The bonds further provide:

"This bond is one of a series of bonds * * * secured by deed of trust, * * * to which deed of trust reference is made for a statement of the nature, character, and extent of the security, *the rights of the holders of the bonds under the same*, and the terms and conditions upon which the bonds are issued and secured."

The latter clause makes the provisions of the deed of trust an essential part of the bonds; consequently the trust deed as well as the bonds must be looked to for the purpose of ascertaining, not only the rights of the trustee, but the "rights of the holders of the bonds" as well. Watson v. Chicago, Rock Island & Pacific R. R. Co., 169 App. Div. 663, 666, 155 N. Y. Supp. 808. Among the provisions of the trust deed are the following:

Article 8, § 2: "If one or more of the following events, hereinafter called events of default, shall happen, that is to say, * * * [enumeration of events of default] * * * the trustee * * * may * * * declare the principal of all the secured bonds then outstanding to be due and payable immediately, and upon any such declaration the same shall become and be immediately due and payable. * * *"

Section 14: "The National Company covenants that, * * * in case default shall be made in the payment of the principal of any of the bonds secured hereby, when the same shall become payable, whether upon the maturity of such bonds or upon declaration as authorized by this indenture, * * * then, upon demand of the trustee, *the National Company will pay to the trustee*, for the benefit of the holders of the bonds and coupons then outstanding, the whole amount which then shall have become due and payable on all the bonds and coupons then outstanding, for interest or principal, or both, as the case may be, with interest upon the overdue principal and on the overdue installments of interest, at the rate of six per cent. (6%) per annum; and in case the National Company shall fail to pay the same forthwith upon such demand, the trustee, in its own name and as trustee for an express trust, shall be entitled to recover judgment for the whole amount so due and unpaid.

"The trustee shall be entitled to recover judgment as aforesaid, either before or after or during the pendency of any proceedings, judicial or otherwise, for the enforcement of the lien of this indenture; and the right of the trustee to recover such judgment shall not be affected by any sale hereunder, or by the exercise of any other right, power or remedy for the enforcement of the provisions of this indenture, or for the foreclosure of the lien thereof; and in case of a sale of the property subject to this indenture and of the application of the proceeds of sale to the payment of the indebtedness hereby secured, *the trustee*, in its own name and as trustee of an express trust, shall be entitled

to enforce payment of, and to receive, all amounts then remaining due and unpaid upon any and all of the bonds then outstanding, for the benefit of the holders thereof, and *shall be entitled to recover judgment for any portion of the debt remaining unpaid, with interest.* No recovery of any such judgment by the trustee, and no levy of any execution upon any such judgment upon property subject to this indenture, or upon any other property, shall in any manner or to any extent affect the lien of this indenture upon the property, or any part of the property, subject to this indenture, or any rights, powers or remedies of the trustee hereunder, or any lien, rights, powers or remedies of the holders of the bonds, but such lien, rights, powers and remedies of the trustee and of the bondholders shall continue unimpaired as before."

Article 10, § 1 (h): "The exclusive right of action hereunder shall be vested in the trustee, until its refusal or failure to act."

"(i) No bondholder shall be entitled to enforce the provisions of this deed of trust until after demand made upon and indemnity offered to the trustee, and refusal of the trustee to act in accordance with the said demand."

One of the events of default enumerated in section 2 of article 8 of the trust deed did happen. Thereupon the trustee declared the principal of the bonds to be due and payable and made demand upon the mortgagor for payment. The mortgagor failed to pay and this suit was instituted. We are concerned with the respective rights of the bondholders and the trustee existing before default of the mortgagor and declaration and demand by the trustee in so far only as the ascertainment of those rights will aid in the ascertainment of the respective rights of those persons at the critical and decisive moment, namely, at and immediately before the time of the institution of this suit. Under the terms of the collateral trust indenture by which the rights of the holders of the bonds, as well as the rights of the mortgagor and the trustee, were fixed, it seems reasonably clear that the title originally acquired by the bondholders to the debt or chose in action evidenced by the bonds and mortgage was not an absolute right or title, but a defeasible title, determinable upon the happening of a condition subsequent, viz. a default by the mortgagor coupled with a declaration and a demand by the trustee. Upon the happening of those events the title to the chose in action passed by force of the trust deed, as in remainder, to the trustee.

If this view be correct, the legal title to the debt or chose in action vested in the trustee upon declaration and demand by it after default made by the mortgagor. The plaintiff thereupon became a trustee in contradistinction to a grantee of a naked power. The last clause of section 14 of article 8 of the trust agreement seems not inconsistent with this conclusion, for, as I understand that clause, the "lien, rights, powers and remedies" of the bondholders which, as therein provided, were to "continue unimpaired as before," notwithstanding recovery of judgment by the trustee, were not the "lien, rights, powers and remedies" of the bondholders existing before default of the mortgagor and declaration and demand by the trustee, but such "lien, rights, powers and remedies" of the bondholders as existed after the happening of those events, and before recovery of judgment. During that period, under the facts disclosed by the record, the title to the chose in action was vested, not in the bondholders, but in the plaintiff. Consequently I am of the opinion that the balance due by the mortgagor over and above the proceeds of the sale is "due to the plaintiff" within

the contemplation of equity rule 10. Watson v. Chicago, Rock Island & Pacific R. R. Co., 169 App. Div. 663, 155 N. Y. Supp. 808. Grant v. Winona & Southwestern Ry. Co., 85 Minn. 422, 89 N. W. 60. Frank v. Davis, 135 N. Y. 275, 31 N. E. 1100, 17 L. R. A. 306. Lane v. Equitable Trust Co. of New York (C. C. A.) 262 Fed. 918, certiorari denied 252 U. S. 578, 40 Sup. Ct. 344. Brant Independent Min. Co. v. Palmer (C. C. A.) 262 Fed. 370. Seattle, L. S. & E. Ry. Co. v. Union Trust Co., 79 Fed. 179, 24 C. C. A. 512. It follows that a deficiency decree may properly be rendered in this cause.

An order denying the motion to strike may be presented.

THE GEO. L. HARVEY (two cases).

(District Court, W. D. Washington, N. D. March 25, 1921.)

Nos. 5608, 5613.

Maritime liens ⊜10—Claims for reconstruction of vessel not maritime.

Claims for labor and material furnished and used in converting a war vessel, after its sale by the Navy Department, into a vessel of commerce and trade, *held* for work in the nature of construction, not giving a right to maritime liens, nor within the admiralty jurisdiction.

In Admiralty. Suits by H. G. McLaughlin, a corporation, and others, and by J. A. Engstrom, against the steamer Geo. L. Harvey. On objection to jurisdiction. Sustained as to certain of the claims, and referred to commissioner as to others.

Daniel Landon and James A. Kiefer, both of Seattle, Wash., for libelants.

Moncrief Cameron, of Seattle, Wash., for respondent.

Robert C. Saunders, U. S. Atty., and F. C. Reagan, Asst. U. S. Atty., both of Seattle, Wash., for the United States.

Walter S. Fulton, of Seattle, Wash., for intervener Bolcom-Canal Lumber Co.

Trefethen & Findley, of Seattle, Wash., for intervener Schwabacher Hardware Co.

James Kiefer, of Seattle, Wash., for interveners Christianson and Skoog.

William H. Gorham, of Seattle, Wash., for intervener Erland & Co., Inc.

Daniel Landon, of Seattle, Wash., for interveners Panama Pacific Commercial Co. and others.

G. E. Steiner, of Seattle, Wash., for intervener Pacific Net & Twine Co.

John W. Heal, Jr., of Seattle, Wash., for intervener Brower.

Shorett, McLaren & Shorett, of Seattle, Wash., for intervener John Paul Lumber Co.

Peters & Powell, of Seattle, Wash., for intervener Northwest Fuel & Supply Co.

Jas. A. Dougan, of Seattle, Wash., for intervener Augustine & Kyer.

Farrell, Kane & Stratton, of Seattle, Wash., for intervener Union Oil Co. of California.

W. M. Williams, of Seattle, Wash., for intervener Partlow.

Chadwick, McMicken, Ramsey & Rupp, of Seattle, Wash., for intervener McMicken.

NETERER, District Judge. McLaughlin Company, a corporation, and five others, present a libel against the respondent for labor and material and seamen's wages, civil and maritime, in the sum of $668, $178.90, $48.38, $48, $381.75, and $74, respectively. Engstrom libels for wages for labor performed on the vessel to the amount of $111. Both libels were consolidated. Fourteen intervening libels have been filed, to cover wages for labor performed, amounting to $2,434.45. Seventeen intervening libels have been filed for material furnished, in the sum of $4,459.85. The United States has filed its appearance, through the United States attorney, and "suggests to the court and gives it to understand and be informed that the above causes involve property and property rights of the United States and are not maintainable against the United States, and that the liens of libels are not maritime liens, and therefore are not within the jurisdiction of this court sitting in admiralty." It is stipulated that the vessel was sold by the United States Navy Department to the Seattle Fisheries Association May 21, 1920, for a small cash consideration and a mortgage for $14,975.

The vessel was built at the Puget Sound Navy Yard by the navy for war purposes—a submarine chaser No. 293—and at the date of sale was a war vessel. Upon delivery to the purchaser it was towed to a dock at the port of Seattle, where the forward cabins were taken off, two bulkheads removed in the hold, two hatches cut out in the deck, a rail built on the deck, vessel lined for the purpose of fitting her for a fishing vessel, and one of the engines was removed. It was then taken to the plant of the West Seattle Boat & Engine Works, where the cutting and lining was finished, and winch and an auxiliary engine installed to operate the winch, and equipped for a fishing boat. It was put on the ways and painted. All of the work performed and material furnished was necessary for converting the vessel from a war vessel to a fishing boat. It was registered September 8, 1920, and was first in commercial navigation September 12, 1920.

The issue to be determined is whether the services rendered and the material furnished were rendered and furnished for a marine service. If it was not, then admiralty and maritime jurisdiction would not obtain. It is primer law that a contract for the construction of a ship or supplying materials therefor is nonmaritime, and not within the admiralty jurisdiction. The admiralty jurisdiction affords peculiar remedies, because of the movable character of the vessel, and in order to bring a vessel within such jurisdiction it must be engaged as an instrument of "navigation, commerce, and trade." Salvor Wrecking Co.

v. Sectional Dock Co., 21 Fed. Cas. 281; The Frances L. Skinner (D. C.) 248 Fed. 818. It may be said that—

"A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house, and subject only to mechanics' liens created by state law and enforceable in the state courts. In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction." Tucker v. Alexandroff, 183 U. S. 424–438, 22 Sup. Ct. 195, 201, 46 L. Ed. 264.

This vessel, however, upon launching, was foreign to commerce and trade. It did not receive, upon launching, a commercial or trade status. It was not subject to admiralty jurisdiction, and before she would be subject to admiralty she must be divested of the attributes of war, and clothed with the conveniences and necessities of commerce and trade. The work performed and the material furnished, except as to Augustine & Kyer and possibly some portions of other claims, is clearly in the nature of construction, and bore in no sense a relation to trade and commerce. The vessel was not registered, and had at no time embarked upon a mission of trade. It had not been fitted to function as intended, and whatever is necessary to qualify it to enter upon the commerce and trade is a part of the construction. The Pradox (D. C.) 61 Fed. 860.

Judge Bellinger in McMaster v. One Dredge (D. C.) 95 Fed. 832, held that a contract for changing a scow into a dredge is a contract for building the dredge, and admiralty is without jurisdiction to enforce a lien given the builder by a state statute. The Supreme Court, in Thames Towboat Co. v. Schooner Francis McDonald et al., 254 U. S. 242, 41 Sup. Ct. 65, 65 L. Ed. —, December 6, 1920, said:

"The doctrine is now firmly established that contracts to construct entirely new ships are nonmaritime, because not nearly enough related to any rights and duties pertaining to commerce and navigation. It is said that in no proper sense can they be regarded as directly and immediately connected with navigation or commerce by water. Edwards v. Elliott, 21 Wall. 532; * * * The William Windom, 73 Fed. 496; Pacific Surety Co. v. Leatham & S. Tow. & Wreck. Co., 151 Fed. 440, 80 C. C. A. 670. And we think the same reasons which exclude such contracts from admiralty jurisdiction likewise apply to agreements made after the hull is in the water, for the work and material necessary to consummate a partial construction and bring the vessel into condition to function as intended."

The language applies to this issue. The war vessel was not related to any rights and duties pertaining to commerce, navigation, and trade, and not until she was fitted suitably for such business was she constructed, and not until the necessary labor and materials were supplied and furnished was the vessel qualified to enter into the service of navigation and trade. The claim of Augustine & Kyer was for supplies furnished September 11, 1920, for a mission of trade upon which the vessel embarked September 13, 1920.

There are some items in some of the intervening libels that may properly be supplies, as distinguished from material and labor necessary to consummate the construction, for the purposes of bringing the

vessel into condition to function as designed, and the case will be referred back to the commissioner, to segregate and determine these items, and for such purpose to take such further testimony as may be necessary, and to report such findings and conclusions to the court.

DONOVAN v. BENN RIGEL CONTRACTING & SUPPLY CO. et al.

(District Court, E. D. New York. June 24, 1921.)

Shipping ⇐54—Charterer liable for injury to barge.

The charterer of a barge, impliedly bound to return her in good condition, ordinary wear excepted, *held* liable for her injury by being driven ashore in a storm while loading alongside a dredge.

In Admiralty. Suit by Timothy J. Donovan against the Benn Rigel Contracting & Supply Company, with the McClellan Dredging Company impleaded. Decree for libelant.

Park & Mattison, of New York City, for libelant.

Macklin, Brown, Purdy & Van Wyck, of New York City, for respondent.

CHATFIELD, District Judge. The barge Eleanor D. Donovan, owned by the libelant, was chartered to the Benn Rigel Contracting & Supply Company for a trip to Port Jefferson harbor, in September, 1918. She was to get a cargo of gravel and to be loaded alongside a dredge. Both parties understood that the boat was to be loaded afloat and in deep water.

The captain of the boat testified that, after she received some 50 tons of her load, she rested upon the bottom, apparently at all stages of the tide, and that subsequently she was driven ashore by a storm, where she undoubtedly received injuries which caused her to leak. The captain also testified that she was leaking from resting on the bottom while loading preceding this storm. But his testimony was so indefinite and given in so inaccurate a manner that the court can place no reliance upon his recollection with regard to the amount which the boat leaked prior to her being driven ashore in this storm.

All the parties to the action agree that at the time of the storm she was driven ashore, left stranded upon the beach, and strained in such a way that she was with difficulty kept afloat by a gasoline pump, on her voyage to New York when fully loaded. At New York the cargo of gravel was not of satisfactory grade, and was therefore taken around to Rockaway, where it was unloaded and disposed of. The boat was then surveyed, found to have been twisted out of line to the extent of six inches, with one knee broken, amidships scarf started, and general searching and caulking necessary.

It appears that the dredging of gravel was being done by the McClellan Dredging Company, that the Benn Rigel Contracting & Supply Company turned the barge over to the dredging company while she was

receiving her load at Port Jefferson, and that in fact she was loaded in deep water at the end of the dredge, until the night of the storm in question.

The McClellan Dredging Company has been brought in by petition, but has not answered and is in default. It also appears that the McClellan Dredging Company has become insolvent and irresponsible, which explains why a default has been suffered. The witnesses, however, for the McClellan Company, have been brought into court by the Benn Rigel Company and examined.

It appears from the testimony that in accordance with the usual custom the charterer agreed to pay for additional insurance to cover the trip of the barge outside of New York harbor, which was the extent of the territory covered by the original insurance. But this insurance, as taken out by the charterer, excluded liability "if this scow should go aground at any time or other while in your service." The language of this policy was communicated to the Benn Rigel Company as a part of the letter confirming the charter. The Benn Rigel Company sought no protection by way of insurance for grounding, and thereby made themselves liable for any damage from grounding due to their negligence, unless it could be shown to be the fault of the captain of the scow with respect to some one of the matters for which the libelant, as owner of the scow and employer of the master, would be responsible.

The charterer agreed to be responsible for "all towing, wharfage, labor, or any other charges," which might accrue on the scow, and the charter impliedly, although not expressly, required the charterer to return the scow in good order and condition, subject to ordinary wear and tear. The libelant, therefore, has a right to look to the Benn Rigel Company for damages to the scow in so far as she was not returned in good order and condition, unless the charterer can show that the injury resulted from some vis major for which it would not be responsible under such charter.

The Benn Rigel Company can, of course, bring in any independent party against which it can show responsibility for the injuries received. In this case the McClellan Dredging Company was in charge of the boat at the time of the storm, and no one has placed on the record any testimony indicating that the captain of the barge was careless at the time of the storm, so as to excuse the dredging company from responsibility for the boat which was in its care, nor is there any evidence to indicate that the storm was of such a nature that the charterer would not be responsible for the consequences thereof. If the McClellan Dredging Company were responsible, their liability would relieve the charterer from the necessity of satisfying the decree; but the charterer cannot, by pleading their insolvency, avoid the secondary obligation resting upon him of making good, if they fail so to do. He had the privilege of taking out additional insurance, with a warning that grounding was excepted from the policies in force, and it would seem that the libelant is entitled to recover.

ORMSBY v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. June 17, 1921.)

No. 3513.

1. **Judgment ⟸829(1)—Records of Supreme Court of District of Columbia are entitled to same credit as those of state courts.**
The Supreme Court of the District of Columbia is a court of the United States, and its records and judicial proceedings are entitled to the same faith and credit as are given to courts of the several states.

2. **Habeas corpus ⟸30(1)—Not granted to review errors by court having jurisdiction.**
Petitioner is not entitled to be discharged on writ of habeas corpus on account of errors or irregularities in the proceedings of the trial court, either at the trial or otherwise, if that court had and still retains jurisdiction of the subject-matter of the prosecution and of the person of defendant.

3. **Libel and slander ⟸152(1)—Indictment held to show communication was not privileged as performance of legal duty.**
An indictment in the Supreme Court of the District of Columbia for libel, contrary to Code D. C. §§ 815–818, providing the punishment therefor, but not defining libel, so that common-law libel is intended under Code, § 1, which indictment alleged that the libelous words were not only false, scandalous, malicious, and defamatory, but were uttered with the unlawful and malicious intention to vilify, defame, scandalize, and disgrace the subject of the publication, shows that the alleged libel was not privileged as the performance of the legal duty required by Criminal Code, § 146 (Comp. St. § 10316), to declare to a public official knowledge of the commission of an offense, though the alleged libel was a communication to the district attorney that an attorney had procured defendant's indictment by perjured evidence.

4. **Habeas corpus ⟸30(2)—Court having jurisdiction can determine sufficiency of indictment without review by habeas corpus.**
Where the Supreme Court of the District of Columbia had jurisdiction of the person of accused and of the subject-matter of the indictment, it had jurisdiction to determine the sufficiency of the indictment, and its action in sustaining the indictment is not reviewable by habeas corpus, but only on writ of error.

5. **Habeas corpus ⟸30(1)—Record as to trial dates held to show irregularities not reviewable.**
Allegations in a petition for writ of habeas corpus that the trial court before which petitioner was convicted first held the indictment showed a privileged communication, and on a second trial held the contrary, sustained only by discrepancy as to dates in calendar and journal entries, *held* not to show a termination of jurisdiction before conviction, but to show at most only an error or irregularity in the proceedings, which cannot be reviewed on habeas corpus.

6. **Criminal law ⟸979(2)—Record held not to show indefinite postponement of sentence.**
The record of the criminal proceedings in which petitioner for habeas corpus was convicted, which showed that sentence was not imposed after motions in arrest and for new trial were denied, but that when the case was continued to the following term a motion by defendant to vacate was pending, and that, when further continuance was granted to a subsequent term, proceedings to determine the insanity of accused were pending, does not show an indefinite postponement of sentence, which defeated jurisdiction of the court to impose sentence after the release of accused from the hospital for the insane.

7. Criminal law ⟸977(3)—**Court can postpone sentence pending motion to vacate denial of new trial or to consider sentence.**

It is competent for the trial court to postpone the imposition of sentence after conviction to give opportunity for the consideration of defendant's motion to vacate the order overruling his motions in arrest of judgment and for new trial, or to enable the judge to better satisfy his own mind as to what the punishment ought to be.

8. Criminal law ⟸979(2)—**Absence of defendant when continuance is granted does not terminate court's jurisdiction.**

The presence of defendant is not imperatively required at the making or hearing of motions which form no part of the trial proper and therefore the absence of defendant when an order continuing the case for the term was granted does not terminate the court's jurisdiction.

9. Criminal law ⟸981(2)—**Special proceeding, and not general inquisition, is applicable after conviction, but before sentence for crime.**

To determine the insanity of accused, after his conviction, but before sentence, proceedings under Code D. C. § 927, which is contained in the chapter devoted to criminal procedure, and in terms expressly relates to insane criminals, is applicable, rather than proceedings under the general provision for inquisitions in equity contained in Code, § 115a.

10. Criminal law ⟸978—**District of Columbia proceedings to determine sanity of convicted person are constitutional.**

Proceedings under Code D. C. § 927, for the determination of the sanity of a person convicted of crime, but not yet sentenced, when considered in connection with the following sections, are constitutional.

11. Criminal law ⟸981(2)—**Statute requiring notice of restoration to sanity of person charged with crime applies to one convicted, but not yet sentenced.**

Code D. C. § 929, requiring notice of restoration to sanity of a person confined in a hospital for the insane, charged with crime and subject to be tried therefor, or undergoing sentence therefor, to be given to the justice holding the criminal court, applies where accused had been convicted, but not yet sentenced, though that case is not within the express words of the section.

12. Criminal law ⟸981(2)—**Proceedings to determine insanity of accused not limited to applications on behalf of accused.**

Code D. C. § 927, providing that when a person is indicted, and before trial or after verdict, prima facie evidence is submitted that accused is then insane, the court may impanel a jury to determine his sanity, is not limited to cases where the application for the hearing is made on behalf of accused, and proceedings thereunder may be instituted by the prosecuting attorney.

13. Jury ⟸70(1)—**Discharge of District of Columbia jurors for term does not prevent impaneling valid jury.**

The fact that a jury for the term of the Supreme Court of the District of Columbia had been discharged, when suggestion was made that accused was insane, does not prevent the impaneling of a valid jury to try that issue under Code D. C. § 927, which expressly provides that, if the regular jurors have been discharged, the court may cause a sufficient number of jurors to be drawn to inquire into the sanity of accused.

14. Criminal law ⟸981(2)—**Record of proceedings to determine insanity of accused held not to negative libelous intent.**

A petition by the district attorney instituting proceedings under Code D. C. § 927, to determine the sanity of accused, after his conviction for libel and before sentence, which stated that the conduct of defendant had impressed petitioner as peculiar, and that since the trial petitioner had formed the opinion accused was insane, and the determination by the jury

that accused was insane at the time of inquiry, does not amend the criminal charge in the indictment, so as to negative the existence of criminal intent.

15. **Criminal law ⇐979(2)—Release by hospital does not defeat jurisdiction to sentence on conviction before commitment.**
Where accused had been found to be insane after his conviction, but before sentence, and had been committed to a government hospital for the insane, his release from the hospital by the superintendent thereof without the required notice to the judge of the criminal court having been given does not defeat the criminal court's jurisdiction thereafter to impose sentence on accused.

16. **Criminal law ⇐979(2)—Proceedings establishing sanity in another district held not to defeat jurisdiction to impose sentence on conviction before commitment.**
Where accused was released from the government hospital for the insane, to which he had been committed after conviction, but before sentence by the Supreme Court of the District of Columbia, went into another judicial district, and there engaged in litigation in the United States District Court, a determination by the latter court that accused was competent to conduct that litigation in his own behalf does not affect the jurisdiction of the Supreme Court of the District of Columbia over the prosecution or the person of accused.

17. **Criminal law ⇐979(2)—Record held not to show criminal court had surrendered jurisdiction to impose sentence on conviction before commitment for insanity.**
The fact that several years had elapsed after accused had been released from the hospital for the insane, to which he had been committed by the Supreme Court of the District of Columbia, after his conviction for a crime, but before sentence, does not show that the court had surrendered jurisdiction to impose sentence, where it appeared that notice of the release of accused was not given to the court as required, and there was no showing that the court was advised of such release until about the time its bench warrant for accused was issued.

Appeal from the District Court of the United States for the Southern District of Ohio; John W. Peck, Judge.

Habeas corpus proceeding by George F. Ormsby to procure his discharge from custody on a bench warrant issued by the Supreme Court of the District of Columbia. From the order discharging the writ, petitioner appeals. Order modified and affirmed.

George F. Ormsby, of Cincinnati, Ohio, pro se.

Richard T. Dickerson, Asst. U. S. Atty., of Cincinnati, Ohio.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. On April 5, 1909, petitioner, George F. Ormsby, was indicted in the Supreme Court of the District of Columbia on a charge of criminal libel. He pleaded not guilty; his trial resulting in a verdict of guilty rendered on May 24, 1910. Motions for new trial and in arrest of judgment were overruled July 15, 1910. Sentence has never been imposed. Pending application to set aside the order overruling motion for new trial and motion in arrest of judgment, the attorney of the United States for the District of Columbia filed in the criminal case his verified petition (supported

by affidavits of others), setting forth his opinion that the defendant (petitioner here) was of unsound mind, and asking for a judicial inquiry into his sanity, to the end that, should he be found insane, the imposition of sentence might be suspended and he committed to the government hospital for the insane for treatment. The petition was granted, and trial by jury had upon the question of sanity, resulting in a verdict, on June 21, 1911, finding the defendant to be of unsound mind. A copy of the verdict was forwarded to the Secretary of the Interior, and under the order of that officer defendant was (apparently on June 22, 1911) committed to the government hospital for the insane in accordance with the laws of the District of Columbia. He was detained at that hospital until November 1, 1917, when he was permitted by the medical authorities of the hospital to leave that institution. It does not appear, however, that notice that defendant had been restored to sanity was given to the court in which defendant had been tried on the criminal charge as well as upon the issue of sanity; nor was the defendant delivered to that court.

It is asserted by petitioner, and without denial, that upon leaving the hospital he came directly to Ohio and has ever since remained in that state. On August 31, 1920, the Supreme Court of the District of Columbia issued in the criminal cause its bench warrant to the marshal for the District of Columbia, commanding petitioner's production before that court. While in custody, by virtue of the removal proceedings, this proceeding in habeas corpus was instituted in the District Court for the Southern District of Ohio.[1] Upon due hearing that court found that petitioner was "lawfully being restrained of his liberty for the purpose of being removed to the jurisdiction of the Supreme Court of the District of Columbia, in compliance with a bench warrant heretofore issued by said court, for the purpose of requiring the said petitioner, George F. Ormsby, to appear before said court for sentence in case No. 26,501 of the criminal docket of said court." The writ of habeas corpus was accordingly discharged. This appeal is from that order denying the writ. Pending appeal, the court below detained petitioner in its custody.

It appears that petitioner's indictment and prosecution for libel grew out of a situation which we state only in briefest outline: Petitioner's wife had obtained in a state court of Ohio a decree of divorce from petitioner, with custody of the infant son of the parties. Petitioner claims this decree was obtained by fraud and imposition upon the Ohio court, and was void for lack of jurisdiction. Petitioner was indicted in the Supreme Court of the District of Colum-

[1] Apparently in connection with the removal proceedings under the bench warrant, petitioner was by the court placed in the custody of his own counsel; and the writ of habeas corpus was directed to that custodian. Petitioner appeared personally on the hearing under the writ. While the record contains no return by the custodian, and presumably no formal return was filed, it sufficiently appears here that on the hearing of the petition the Government justified petitioner's detention by virtue of his conviction under the indictment for libel and the bench warrant thereon. Among the other grounds of error assigned here is that the respondent's return is not sufficient in law to justify petitioner's detention.

bia for alleged abduction of this child, in taking him from Washington, D. C., to Boston, Mass. The alleged libel which is the subject of the indictment here in question consisted in a communication by petitioner to the committee on grievances (said to be a statutory tribunal established by the Supreme Court of the District of Columbia), charging a practicing attorney of that district, who was asserted to be representing petitioner's wife in the marital troubles between those parties, with having procured the indictment of petitioner on the charge of abduction, by making false and fraudulent representations to the United States attorney of the District of Columbia, and by causing and procuring the giving of false and perjured testimony before the grand jury which had the abduction charge under consideration, and with having by improper, dishonest, and corrupt means aided in procuring the arrest of petitioner in Boston, his confinement there, the taking of the child from his custody, and his removal to Washington to answer the indictment for abduction.

The petitioner contends that the warrant for his production before the Supreme Court of the District of Columbia is void for a variety of reasons; those which we deem it important to consider being: (1) That the original indictment for libel was void, as alleging the performance of a statutory and constitutional duty to make a true report of crime to the proper authority, the report thus being a privileged communication, and not a crime; that the libel charge has been discontinued and the jurisdiction of the District of Columbia court lost for a variety of reasons, including: (2) That his trial in the criminal prosecution for libel ended with the overruling of his motions for new trial and in arrest of judgment on July 15, 1910; that no further proceeding was ever had in the libel prosecution, nor were any entries of continuance made in the presence of petitioner, and that jurisdiction over the case thus ended with the close of the term in October, 1910; and that the attempted protracting of the trial on the indictment for libel violates the constitutional guaranty of speedy trial under article 6 of the Amendments to the federal Constitution. (3) That section 927 of the District of Columbia Code, under which the inquisition into petitioner's sanity was had, applies to a criminal case only when the accused wishes to plead insanity, which was not the case here; that section 115a, of the Code furnishes the only applicable authority for such inquiry; and that this last-named section recognizes inquisitions into sanity as civil actions, which are thus not triable in a criminal court, and that the prosecution for libel has thus not been kept alive by valid action. (4) That the action of the United States attorney of December 6, 1910, in instituting the inquiry into petitioner's sanity, amended the criminal prosecution for libel into the claim that the alleged libel was not due to criminal intent, but to insanity, thereby discontinuing the criminal charge, if then still in existence. (5) That in the petition for inquiry into the sanity of the accused it was alleged that the petitioner was insane during his trial, amounting to an allegation that the trial was void, and that the court accepted that allegation, thereby working a discontinuance of the criminal action; that the trial of petitioner's sanity was void for the further

reason that the jury for the term had been discharged, and no valid jury was therefore possible; that under the finding of insanity he was in effect sentenced to the hospital and there confined, under the libel charge, for six years, which is longer than the maximum period imposable for libel. (6) That since leaving the hospital for the insane, in November, 1917, petitioner has remained in Ohio, with the full consent of the authorities of the United States, and that meanwhile the District Court for the Southern District of Ohio has, in litigation in said court to which petitioner was a party, adjudged petitioner free from the disability of insanity and as having capacity to sue without guardian in such litigation. (7) That the bench warrant of August 30, 1920, was procured to be issued by certain defendants in the litigation in the District Court for the Southern District of Ohio, in order to obstruct the administration of justice in that district and to protect such parties in a conspiracy to defraud the United States.

[1] Coming to consider the scope of this hearing on habeas corpus: The Supreme Court of the District of Columbia is a court of the United States, and has the same jurisdiction as the federal Circuit and District Courts, as well as certain further jurisdiction. Code D. C. § 61; In re McFarland, 30 App. D. C. 365; Embry v. Palmer, 107 U. S. 3, 10, 2 Sup. Ct. 25, 27 L. Ed. 346. Its records and judicial proceedings are entitled to the same faith and credit as are given to the courts of the several states. Embry v. Palmer, supra.

[2] Under the well-settled general rule prevailing in the courts of the United States, if the Supreme Court of the District of Columbia had and still retains jurisdiction of the subject-matter of the prosecution in question and of the person of the petitioner, the latter is not entitled to be discharged on account of errors and irregularities in the proceedings of the trial court, either on the trial or otherwise. Questions of mere error and irregularities are generally reviewable only by writ of error or certiorari, for which a writ of habeas corpus is not a substitute. The questions before us are practically limited to such as go to the jurisdiction of the Supreme Court of the District. Ex parte Carll, 106 U. S. 521, 1 Sup. Ct. 535, 27 L. Ed. 288; Ex parte Yarbrough, 110 U. S. 651, 653, 654, 4 Sup. Ct. 152, 28 L. Ed. 274; Stevens v. Fuller, 136 U. S. 468, 477, 10 Sup. Ct. 911, 34 L. Ed. 461; Henry v. Henkel, 235 U. S. 219, 229, 35 Sup. Ct. 54, 59 L. Ed. 203; Glasgow v. Moyer, 225 U. S. 420, 428, 429, 32 Sup. Ct. 753, 56 L. Ed. 1147.

[3] 1. *The Sufficiency of the Indictment.*—The Code of the District of Columbia (sections 815–818) provides the punishment for libel, defining publication, justification, etc., but not libel itself. Common-law libel is thus meant. Code, § 1. The indictment was returned by the grand jury and filed in open court. The contention that it was void as alleging the performance of a statutory and constitutional duty is predicated upon section 146 of the Criminal Code of the United States (Comp. St. § 10316), which makes it misprision of felony for one having knowledge of the commission of a felony cognizable by a federal court to fail to declare the same to some one in civil or mil-

itary authority under the United States (applied in Matter of Quarles, 158 U. S. 532, 15 Sup. Ct. 959, 39 L. Ed. 1080), and upon the doctrine of In re Neagle, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55, where a deputy United States marshal was discharged on habeas corpus from arrest, under a state statute, for a homicide committed in defense of Mr. Justice Field from deadly assault, and upon the ground that the homicide was committed by the accused in the performance of a duty owing to the United States. But the indictment before us is clearly inconsistent with an inference that the asserted libel was a privileged communication or an act done in the performance of a legal duty, because of the allegation in the indictment that the libelous words charged were not only false, scandalous, malicious, and defamatory, but were uttered with the unlawful and malicious intention to vilify, defame, scandalize, and disgrace the subject of the publication.

[4] Apart, however, from this consideration, the District Court had jurisdiction of the person of the accused and of the subject-matter of the prosecution, and power to determine the sufficiency of the indictment. The question of sufficiency was thus addressed to the judicial determination of the trial court, and its action in sustaining and acting upon it is not reviewable by habeas corpus, but only on writ of error or certiorari. Ex parte Yarbrough, supra, 110 U. S. at page 654, 4 Sup. Ct. 152, 28 L. Ed. 274; Ex parte Crouch, 112 U. S. 178, 180, 5 Sup. Ct. 96, 28 L. Ed. 690; Matter of Gregory, 219 U. S. 210, 214, et seq., 31 Sup. Ct. 143, 55 L. Ed. 184; Henry v. Henkel, supra, 235 U. S. at page 229, 35 Sup. Ct. 54, 59 L. Ed. 203.

[5] Equally without help to the petitioner are the allegations in the petition for habeas corpus that it was held by the court upon the trial, on May 23, 1910, that the indictment on its face charged the publication of a privileged communication to the proper recipient; that sinister influences persuaded the court to try the case again on what is alleged to be a second trial on May 24, 1910, when it was held (upon grounds stated in the petition) that under the applicable statute the accused was subject to conviction for innocently publishing a false libel; and that this ruling was made for the purpose of preventing petitioner from showing facts which would have insured his acquittal. It is not alleged in the petition that any judgment or order was made on May 23d, or any other day, dismissing the suit or discharging the jury, or ending the trial. On the contrary, the calendar entries of the proceedings, which are in the record before us, show the following:

"1910—May 23. Jury sworn and respited till tomorrow. May 24. Same jury. Motion to direct verdict of 'not guilty' overruled. Verdict, guilty."

And among what are apparently journal entries are the following:

"Monday, May 23, A. D. 1910. The court resumes its session pursuant to adjournment. Mr. Justice Stafford presiding. * * * United States v. George F. Ormsby, No. 26,501. Indicted for libel."

This was followed by the entry of conviction, which we reproduce in the margin.[2]

Whether or not the judgment entry is misstated in the record as of May 23d instead of May 24th, the calendar and journal entries, taken together, show a conviction under an existing jurisdiction; and such record cannot be overthrown by parol statements such as are contained in the petition. Not only is the allegation that the court's decision of May 23d "ended the trial" not distinctly and unambiguously anything more than petitioner's deduction (Whitten v. Tomlinson, 160 U. S. 242, 243, 16 Sup. Ct. 297, 40 L. Ed. 406), but the facts alleged show, at the most, no more than error or irregularity in the proceedings which might be subject to correction on a review by an appellate court, but which cannot be reviewed on habeas corpus. In our opinion petitioner has not successfully assailed the jurisdiction of the District of Columbia court to receive and act upon the jury's verdict, or the validity and effectiveness of the verdict of conviction as against proceedings in habeas corpus. The question remains whether jurisdiction was lost by what occurred later.

[6] 2. *Jurisdiction to Impose Sentence.*—Assuming that the denial on June 15, 1910, of motion for new trial and in arrest of judgment amounted to a judicial recognition of the validity and finality of the verdict, and conceding that the case was then ripe for sentence, and that an indefinite suspension thereof would have been void (Ex parte United States, 242 U. S. 27, 137 Sup. Ct. 72, 61 L. Ed. 129, L. R. A. 1917E, 1178, Ann. Cas. 1917B, 355), and perhaps would terminate jurisdiction thereafter to impose sentence (United States v. Wilson [C. C.] 46 Fed. 478), the overruling of these motions did not amount to a sentence, and in our opinion jurisdiction to impose sentence was not lost by the adjournment of the term without so imposing it. The record has, in our opinion, no tendency to show that an indefinite postponement was intended. The calendar entries show that on September 28th, when the order of continuance until the October term was made, there was pending a motion, filed by petitioner on August 3d, to vacate the order overruling the motions in arrest of judgment and for new trial. Sentence would not normally be imposed until that motion was disposed of.

[7] It was clearly competent for the trial court to postpone the imposition of sentence to give opportunity for the consideration of this latter motion, or to enable the judge to better satisfy his own mind as to what the punishment ought to be (People v. Brown, 54 Mich. 15, 19 N. W. 571, cited in Ex parte United States, supra), and even though the motion failed to comply with local rules, and so the

[2] "Come again the parties aforesaid in manner as aforesaid and the jury that was respited yesterday; whereupon the conclusion of the evidence the defendant moves the court to direct a verdict of not guilty, which motion is by the court overruled; whereupon, after argument by counsel, and the charge of the court the jury upon their oaths say that the defendant is guilty in manner and form as charged in the indictment; whereupon the defendant, by his counsel, gives notice that he will file a petition for a new trial."

court not bound to entertain it.[3] The continuance of the cause by its own force carried with it petitioner's motion referred to. The fact that the motion had been pending and undecided from August 3d to September 28th tends to indicate that the court was for some reason not then prepared to decide it. In the latter part of December, and before the close of the October term, the petition in lunacy had been filed and granted. It follows from what thus appears that it cannot be said, as matter of law, that the continuance either from the June term until the October term, or from the latter until the January term, was not within the sound discretion of the trial court.

[8] Nor, in our opinion, was jurisdiction to impose sentence lost through the failure of the record to show that petitioner was present when the continuances for the terms were ordered or considered. For the purposes of this hearing we assume that petitioner was absent. It is the general rule that a conviction of felony will be set aside if the defendant is absent at any stage of the actual trial—as when the jury is called and sworn (or on trial of challenges, as in Hopt v. Utah, 110 U. S. 576, 4 Sup. Ct. 202, 28 L. Ed. 262), or when evidence is introduced or the jury charged, or arguments of counsel made, or the verdict rendered or sentence is pronounced, although even this right may under some circumstances and to some extent be waived in noncapital cases.[4] But by what we consider the better authority, the presence of the defendant is not imperatively required on the making or hearing of motions in arrest of judgment or for new trial, or to quash the indictment, or for continuance or change of venue, or when anything else is done which forms no part of the trial proper. Clark's Criminal Procedure (2d Ed.) pp. 495, 496; 1 Bishop's New Criminal Procedure, § 269(1); 2 Wharton's Criminal Procedure, § 1484; State v. Duncan, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888 (continuance); State v. Fahey, 35 L. Ann. 9, 12 (continuance). As said in the latter case:

"It can now be considered as elementary that the absence of the accused during the trial or motions not making part of the actual trial of his guilt or innocence, but having reference to the form or conduct of the trial, will not vitiate the proceedings."

This general rule is recognized in a variety of cases—Com. v. Costello, 121 Mass. 371, 23 Am. Rep. 277 (motion for new trial); Alexis v. United States (C. C. A. 5) 129 Fed. 60, 64, 63 C. C. A. 502 (motion for new trial); State v. West, 45 La. Ann. 928, 934, 13 South. 173 (motion for new trial and in arrest of judgment); State v. El-

[3] If the rule affirmatively appearing in Miller v. United States, 41 App. D. C. 52, 59, to have existed a few months later was in force September 28, 1910, the jurisdiction to continue was expressly conferred thereby, although the existence of such rule was not necessary to jurisdiction to continue. The case of Ex parte United States did not, in our opinion, overrule the Miller Case in any respect here involved.

[4] In most of the states other than Georgia the commission of error, even by receiving a verdict of guilty during a wholly involuntary absence of the accused is treated as merely requiring a new trial. Frank v. Mangum, 237 U. S. 309, 339, 35 Sup. Ct. 582, 59 L. Ed. 969; and as to effect of unlawful continuance, see Miller v. United States, supra, 41 App. D. C. at pages 52 and 59.

kins, 63 Mo. 159, 163 (change of venue)—although there are in some cases, including notably Shelton v. Com., 89 Va. 450, 454, 16 S. E. 355, and Coleman v. Com., 90 Va. 635, 637, 19 S. E. 161, holdings to the contrary, and as applied to continuances. The citation in Lewis v. United States, 146 U. S. 370, 372, 13 Sup. Ct. 136, 36 L. Ed. 1011 of the Virginia case of Hooker v. Com., 13 Grat. (Va.) 763, does not, in our opinion, amount to an approval of the doctrine of the Shelton and Coleman Cases, supra. The Lewis Case involved defendant's absence during the examination and challenging of jurors. Weirman v. United States, 36 Ct. of Cl. 236, is not specially in point, as respects continuances of the nature involved here.

[9] 3. *Insanity Proceedings.*—In our opinion the Supreme Court of the District of Columbia is not shown to have lost jurisdiction over either the subject-matter of the criminal prosecution or the person of petitioner, by reason of the proceedings to determine his sanity, or those connected therewith or consequent thereon. It seems clear that, notwithstanding the general provision for lunacy proceedings in equity, contained in section 115a of the Code, section 927 applies to the situation presented here. This later numbered section was not only later in point of enactment than section 115a, but is contained in the chapter devoted to criminal procedure and in terms expressly relates to insane criminals. So far as presently important, it provides that—

"Whenever a person is indicted for an offense, and before trial or after verdict of guilty prima facie evidence is submitted to the court that the accused is then insane, the court may cause a jury to be impaneled * * * to inquire into the sanity of the accused, and said inquiry shall be conducted in the presence and under the direction of the court. If the jury shall find the accused to be then insane * * * the court may certify the fact to the Secretary of the Interior, who may order such person to be confined in the hospital for the insane. * * *"

The language of the section directly applies to the case before us.

[10] Sec. 927, when considered in connection with the two following sections has been held constitutional and valid, and in a case where the defendant had been convicted, but not sentenced. Wagner v. White, 38 App. D. C. 554. We do not doubt the correctness of this conclusion, or that the statute amply provides for protecting the rights of one whose sanity is in question, through the provision in section 927 that "the person whose sanity is in question shall be entitled to his bill of exceptions and an appeal, as in other cases," in connection with section 929, which provides for notice by the superintendent of the hospital to the justice holding the criminal court when the person so confined is restored to sanity, and for delivering "him to the court according to its proper precept."

[11] While the words of the latter section, "any person confined in a hospital for the insane, charged with crime and subject to be tried therefor or undergoing sentence therefor," do not in terms include one convicted of crime but not yet sentenced, the section was in Wagner v. White, supra, at least impliedly so construed (for that was the situation in Wagner v. White), the provision in question being there spoken of (38 App. D. C. 558) as providing that—

"When one committed under the preceding sections shall be restored to sanity, the superintendent shall give notice thereof to the justice holding the criminal court and deliver him to the court according to its proper precept."

We accept the construction of this statute as adopted by the Court of Appeals of the District.

[12] Nor do we think the section limited to cases where the defendant pleads insanity or himself invokes the provisions of the section. True, in Wagner v. White the application for inquiry was made on defendant's behalf, but the statute does not so limit jurisdiction. By its very terms it is called into operation whenever "prima facie evidence is submitted to the court that the accused is then insane"—language presumably designed to permit application from any legally interested source; and a public officer charged with enforcing the criminal laws is inherently charged with the duty of invoking laws of this character, not only for the protection of society, but of those accused of crime.

[13] We think the proposition that the jury for the term had been discharged, and therefore no valid jury was possible, not sustained. The statute expressly provides that "if the regular jurors have been discharged" the court "may cause a sufficient number of jurors to be drawn to inquire into the sanity of the accused." Code D. C. § 927.

[14] It is also plain that the record precludes an assertion in this habeas corpus proceeding that the action of the district attorney, in instituting inquiry into petitioner's sanity, so amended the criminal charge as to disclaim the existence of criminal intent in the accused, or as to allege his insanity during the trial, or that the trial court judicially adopted either of such propositions. The statutory inquiry was necessarily limited to the sanity of the accused at the time of the trial of the issue under section 927; the specific allegations of mental unsoundness relate to the period since conviction. For example: The petition says "from the first the conduct of the defendant respecting the matters aforesaid impressed your petitioner as peculiar, and since the said trial and conviction your petitioner has formed the opinion that said defendant is of unsound mind," and the pertinent portion of the prayer is that the court "may cause a jury to be impaneled, to inquire into the sanity of the defendant, as by law provided, to the end that, should he be thereby found insane, appropriate proceedings may be taken herein to stay the imprisonment and sentence and effect his commitment to the government hospital for the insane for cure and treatment." The court's preliminary order is not in the record. The applicable calendar entry reads:

"Dec. 21. Petition for lunacy hearing granted, but prayers thereof for commitment of defendant and appointment of alienists denied."

The record of the verdict and judgment recites that the jury found "the defendant to be of unsound mind." The judgment is that petitioner "is an insane person," followed by an order for the certification to the Secretary of the Interior of a copy of the verdict, order referred to, etc. It is true that the affidavits supporting the district attorney's petition are consistent with and have a tendency to prove

petitioner insane for a period long enough to include the trial under the criminal indictment and the publication of the alleged libel; but there has been no adjudication that petitioner was insane previous to his conviction under the criminal charge, and without such adjudication the jurisdiction of the trial court must be regarded, at least for the purposes of our inquiry, as still existing. It is clear that petitioner's commitment to and confinement in the hospital for the insane was not in any sense an imprisonment under and in satisfaction of the criminal charge.

[15] Under the construction put upon the statute in Wagner v. White, supra, we see no escape from the conclusion that the trial court did not, as matter of law, lose jurisdiction over either the subject-matter of the criminal charge or petitioner's person by his commitment to and confinement in the hospital, or by his release therefrom by the superintendent in violation of the statutory requirement of notice to the committing court of a restoration to sanity and the delivery of petitioner to the actual custody of that court, but that such release impaired the court's jurisdiction no more than would an escape. Petitioner's contentions respecting the effect of the insanity proceedings are addressable only to the trial court.

[16] 4. There remains the question whether the jurisdiction of the trial court has been lost by what has occurred since petitioner's discharge from the hospital, during which time he has remained in Ohio. Petitioner alleges that he was all that time engaged in prosecuting certain litigation in equity in the United States District Court for the Southern District of Ohio; that after he had been in Ohio a year the superintendent of the hospital wrote petitioner's attorney that he had no objection to the making of an order by the Ohio federal court that petitioner was under no disability in that (Ohio) district; that the superintendent later entered an appearance in that equity suit in connection with a plea of disability filed by certain defendants therein; that it was adjudged in that equity suit that petitioner was "free from any disability"; that petitioner accordingly wrote the superintendent that he regarded his connection with the hospital ended; that the hospital, having no power to detain any one not under disability, had no jurisdiction over petitioner; that the Ohio federal court had later recognized petitioner's "status" (presumably meaning by permitting him to sue without guardian ad litem); and that "all this was done by consent of the authorities at Washington, D. C. They had a United States attorney here to object if the government desired."

[17] Presumably the statements contained in the last quotation are petitioner's conclusions from the facts stated in the habeas corpus petition;[5] but conceding, for the purposes of this opinion, that the allegations as a whole unexplained, and if petitioner's conclusions are accepted, lend a degree of color to his claim that the issuing of the warrant of August 30, 1920, was instigated by personal and private

[5] It is only distinct and unambiguous allegations of fact that are admitted by lack of denial in the return. Whitten v. Tomlinson, supra, 160 U. S. at page 242, 16 Sup. Ct. 297, 40 L. Ed. 406.

interests concerned in the Ohio litigation, we think it enough to say that we find no assertion that the Supreme Court of the District of Columbia has taken any action or assumed any attitude which, in our opinion, amounts to a surrender of its jurisdiction over petitioner. It does not appear, from the record before us, that that court was ever advised, until about the time its bench warrant was issued (which was in August, 1920), that petitioner had been allowed to leave the hospital. Manifestly, neither the hospital superintendent's knowledge of and attitude toward petitioner's stay in Ohio and his conduct of his litigation therein, nor petitioner's notice to the superintendent that he regarded his connection with the hospital ended, could work a surrender by the trial court of its jurisdiction. It is equally manifest that neither the action which was had by the District Court for the Southern District of Ohio, nor even knowledge and acquiescence on the part of the district attorney either of that district or of the District of Columbia with respect to petitioner's absence from the hospital and his conduct of his litigation in Ohio, could as matter of law, accomplish that result. Even an express consent to that effect by the United States Attorney for either district would be futile until judicially approved by the Supreme Court of the District of Columbia.

The conclusion, therefore, seems inevitable that, notwithstanding the unusual situation which has grown up during this long period of years, the trial court must be deemed, for the purposes at least of this habeas corpus hearing, still to have jurisdiction over the subject-matter of the criminal suit and the person of petitioner.

5. We have considered all of petitioner's contentions and have discussed all which seem to justify discussion. The petition contains more or less allegations addressed to the merits of the criminal prosecution, which manifestly call for no mention. Our conclusion is that the court below properly discharged the writ of habeas corpus.

We think, however, that the bench warrant should be interpreted not (as it seems to have been by the court below) as necessarily ordering the presentation of petitioner for sentence, but rather—in the language of the warrant—"to answer the United States touching the offense charged against him." The trial court may or may not find that petitioner has been restored to sanity. Moreover, so far as appears from the record here, petitioner's motion of August 3, 1910, to vacate the previous order overruling motions in arrest of judgment and for new trial, has never been passed upon.[6] The disposition of the case, whatever it may be, is in the hands of the Supreme Court of the District of Columbia. We of course intimate no opinion as to what that disposition should be.

Subject to the modification we have stated above, the order of the District Court for the Southern District of Ohio discharging the writ of habeas corpus is affirmed.

[6] We interpret the entry of June 26, 1911, as applying to the motion for new trial of the insanity issue.

THE PENN.

THE LORD BALTIMORE.

(Circuit Court of Appeals, Third Circuit. June 18, 1921.)

No. 2707.

1. **Maritime liens ⇐12—Supplies for restaurant on passenger ship "necessaries."**

Supplies for the restaurant of a passenger ship, making 12-hour trips daily, *held* "necessaries," within the maritime sense, for which a maritime lien against the ship may be maintained.

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

2. **Maritime liens ⇐28—Furnisher of supplies on order of charterer held entitled to lien.**

Under a charter party providing that "the working of this charter party" might be assigned by the charterer to a corporation, which was done, the managing officer of such corporation *held* to be a "person to whom the management of the vessel * * * is intrusted," within Act June 23, 1910, § 2 (Comp. St. § 7784), and one furnishing necessaries to the vessel on his order in another port in good faith, in reliance on his statement that the corporation owned the vessel, it having in fact an option to purchase, *held* entitled to a lien therefor under the act.

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

Suits in admiralty by Max Fleishman against the steamer Penn and against the steamer Lord Baltimore. Decrees for respondents, and libelant appeals. Reversed.

Lewis, Adler & Laws, of Philadelphia, Pa. (Otto Wolff, Jr., of Philadelphia, Pa., of counsel), for appellant.

John Cadwalader, Jr., of Philadelphia, Pa., for appellees.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

WOOLLEY, Circuit Judge. These cases were argued together, both below and on appeal, and may be disposed of in one opinion. They raise two questions. The one which evidently controlled the court's judgment in dismissing the libels was: Were the supplies which the libellant furnished the steamers reasonable and proper under the circumstances; or, in other words, were they necessaries?

The Steamers Penn and Lord Baltimore, hailing from the Port of Philadelphia and owned by the Baltimore and Philadelphia Steamboat Company, were chartered to Charles W. Harrison. The charter party gave the charterer an option to purchase the steamers within a named period and the right to assign the "working of this charter party to a corporation of his choice," and provided, among other things, that the charterer should pay all expenses incidental to the operation of the steamers. Pursuant to a contemporaneous agreement between the owner and charterer, the charterer deposited $10,000 with a trust company to secure the owner "against any and all claims of a maritime nature

* * * that may arise during the possession of said steamers by the said Harrison or his assignees under (the cited) charter party." The charterer then assigned the charter party to the Washington-Southern Navigation Company, Inc.

This corporation operated the Steamers Penn and Lord Baltimore, during the time in question, in the transportation of passengers and freight between Washington and Norfolk, and other Bay points, on a daylight schedule, the vessels, bound on opposite courses, leaving one of the named ports in the morning and arriving at the other in the evening. Each carried ordinarily several hundred passengers and maintained a restaurant service, but the passage money did not include the price of meals.

The libelant delivered to the two steamers at Norfolk, Virginia, supplies of the kind, in the amount, and at the prices named in his libels, under orders to which we shall presently refer. These supplies consisted of a variety of things. A few were non-edible, such, for instance, as toothpicks, cigars and matches. But they consisted in the main of food ranging from plain substantial food like potatoes, and bread and butter to delicacies such as spring chicken and ice cream. After payment for the supplies had been refused and libels had been filed, the learned trial judge, on the hearing (first reviewing in the companion case of O'Brian v. Steamer Lord Baltimore [D. C. Pa.] 269 Fed. 824, the law of maritime liens as revised and clarified by the Act of Congress of June 23, 1910, 36 Stat. c. 373 [Comp. St. §§ 7783–7787]), was unable to find from their quantity and character that the supplies "were for the crew or were necessaries," but found that the supplies themselves indicated "that they were intended for a stock in trade to be sold on the ship but in no real sense were intended for her," and on this ground dismissed the libels. These appeals followed.

[1] Thus the real question raised by the decree is whether supplies for the restaurant of a passenger ship are necessaries within the maritime sense, for which a maritime lien against the ship can be maintained.

There is no dispute about the facts. The steamers were licensed passenger ships; they were provided with dining quarters; the charter party provided "that the owners shall * * * furnish at their expense full equipment for dining saloons, lunch counter, etc., ready for service"; the voyage of about twelve hours which each ship made daily covered a time within which at least one of several meals is ordinarily served; and the supplies, though not of the kind and quality usual for victualing a crew, were not unusual for passengers.

There is no hard and fast definition of "supplies or other necessaries" in the maritime law as declared by the act of June 23, 1910. The test of what is necessary is what is reasonably needed in the ship's business. If the ship is a freighter, supplies of the kind and quality usually used for victualing the crew are "necessaries," in that they are needed to enable the ship to prosecute the particular business in which she is engaged. Obviously, supplies of another kind and quality furnished a freighter are not necessaries for which a lien may be enforced under the Act. The Sterling (D. C.) 230 Fed. 543.

If the ship is a passenger ship, or, as in this case, partly one, she becomes engaged in another business with other needs in prosecuting the same. Among these needs are supplies for victualing the passengers she carries, considered with regard, as in this case, to the length and character of her voyages. In The Plymouth Rock, 13 Blatchf. 505, Fed. Cas. No. 11,237, where a passenger steamer plied between the City of New York and Long Branch, New Jersey, making several trips a day each way, the court found that food furnished the steamer for its passengers were necessaries, and, though dispensed to passengers through a restaurant, furnished a basis for a lien on the ship. The same principle, though concerned with wages of one engaged in dispensing nourishment on the ship, was invoked in the J. S. Warden (D. C.) 175 Fed. 314, and in cases there cited. Following these cases, the court in The Satellite (D. C.) 188 Fed. 717, though enforcing a Massachusetts statute distinguished from general maritime law only in that it afforded a maritime lien against a vessel in her home port, granted a maritime lien for liquor supplied a passenger vessel, saying:

"If passengers are carried, whatever may be reasonably supposed to meet the ordinary wants of the class of passengers expected must * * * be necessaries, whether strictly essential to their safety and comfort or not."

Without protracting this discussion, we express the opinion that the law of this line of cases is sound, that the facts of the instant cases invoke its principle, and that, in consequence, the decrees below must be reversed—if the other requisites of a valid maritime lien are present.

[2] The next requisite of a maritime lien for supplies or other necessaries furnished a vessel, enforceable by proceeding in rem under the Act of June 23, 1910, is that they must have been furnished upon the order of "the owner or owners of such vessel, or of a person by him or them authorized." Section 1 (Comp. St. § 7783). In cases where supplies are furnished a vessel, when, as here, there is between the owner and charterer an obligation on the part of the latter to protect the vessel and its owner from maritime liens, and the order for supplies is not given by the owner, the statute meets the situation by naming the persons who "shall be *presumed* to have authority from the owner or owners to procure * * * supplies, and other necessaries for the vessel." Section 2 (section 7784). These are, among others, "any person to whom the management of the vessel at the port of supply is intrusted" (section 2), including officers and agents of a vessel "when appointed by a charterer" (section 3 [section 7785]). But an order for "supplies or other necessaries," even when given by a person with apparent authority, does not sustain a maritime lien when "the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, * * * or for any other reason, the person ordering the * * * supplies, or other necessaries was without authority to bind the vessel therefor." Section 3; The Yankee, 233 Fed. 919, 922, 147 C. C. A. 593; The Oceana, 244 Fed. 80, 156 C. C. A. 508.

The evidence which was offered to prove that the supplies were furnished on the order of one in authority shows that while the actual

orders were given by the stewards of the vessels respectively, they were filled and the supplies delivered at the instance and request of Charles H. St. Johns, the Vice-President and General Manager of the Washington-Southern Navigation Company, Inc. This was the corporation to which the "working of the charter party" had been assigned by the charterer according to the charter party terms, and to which "the management of the (vessels) at the port of supply was intrusted"; and St. Johns was the managing officer of the corporation. We find nothing in the evidence to indicate that the libellant "knew, or, by the exercise of reasonable diligence could have ascertained, that because of the terms of the charter party * * * the person ordering the * * * supplies, or other necessaries, was without authority to bind the vessel." The Yankee, 233 Fed. 919, 147 C. C. A. 593; The Oceana, 244 Fed. 80, 156 C. C. A. 508. On the contrary, the libellant was led to believe that the steamers belonged to the Washington-Southern Navigation Company, Inc. The libellant asked St. Johns whether the steamers belonged to his company and St. Johns replied that his company had purchased them. We are of opinion that on these facts the supplies were delivered on the order of one in authority within the meaning of the Act.

The remaining question is, whether the supplies were delivered to the vessels libeled. As there was no dispute about this, we find that the three essentials of a maritime lien under the Act of Congress of June 23, 1910, as stated by the court below in its opinion and as defined by the Supreme Court in Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co., 254 U. S. 1, 41 Sup. Ct. 1, have been met, and that, in consequence, the decrees below must be reversed and the libels reinstated.

PENNSYLVANIA CO. v. ZAHNER METAL SASH & DOOR CO. et al.

(Circuit Court of Appeals, Sixth Circuit. June 17, 1921.)

No. 3448.

1. Appeal and error ⇐930(4)—Verdict presumed to respond to instructions and proof.

Where, in an action to recover for loss of property by fire, defendant was charged with two acts of negligence, one of which would render it liable for the entire loss, and the other for only part of the loss, as the jury were instructed, and the verdict was for a sum much less than the entire loss, as shown by the evidence but approximately the amount claimed under the second cause of action, it must be presumed to have been based on that cause alone.

2. Railroads ⇐222(5)—Negligence in cutting fire hose proved.

The finding of a jury that employés of a railroad company negligently ran a train over fire hose laid across the track, and that but for the cutting of the hose a building adjoining the one then on fire would have been saved, *held* supported by evidence.

3. Negligence ⇐134(2)—Provable by circumstantial evidence.

Where an allegation that plaintiff sustained injuries by reason of the negligence of defendant is not susceptible of direct proof, it may be sus-

tained by proof of circumstances from which the fact that his injuries were so sustained is a more natural inference than any other.

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

Action at law by the Zahner Metal Sash & Door Company and others against the Pennsylvania Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

The Zahner Metal Sash & Door Company brought an action in the state court of Ohio against the Pennsylvania Company to recover $476,000 damages resulting from the destruction by fire of plaintiff's factory, theretofore located near the city of Canton, Ohio, and in proximity to the railroad tracks of the Pennsylvania Company. The plaintiff relied for recovery upon two assignments of negligence on the part of the Pennsylvania Company: (1) That the fire was caused by sparks thrown upon the roof of the factory building by one of defendant's passing locomotives. (2) In so negligently operating one of its passenger trains during the progress of the fire that the line of hose laid by the city fire department across the tracks of the defendant was cut by this passing train at a time when, had the hose not been so cut, the fire could, and probably would, have been so controlled and arrested as to have saved from destruction the greater part of the plant and property of the Zahner Company.

The several insurance companies that were joined as plaintiffs with the Zahner Metal Sash & Door Company had, prior to the commencement of this suit, paid to that company various sums upon several policies of insurance covering this property, and they ask to be subrogated to the rights of the Zahner Company to the extent of the respective amount paid by each. Upon petition of the defendant the cause was removed to the District Court of the United States, Northern District, Eastern Division of Ohio, in which court the defendant answered, admitting that defendant's factory had been destroyed by fire, and that the hose had been cut by one of its trains; but it denied that the fire had been caused by sparks or cinders from one of its locomotives, and denied it was negligent in reference to the cutting of the hose, and denied that the cutting of the hose was the cause of any proximate damage to the plaintiff.

The plaintiff offered evidence tending to prove that the actual damages occasioned to it by reason of the destruction by fire of its factory and contents was in excess of $476,000, the amount named in the petition. At the close of plaintiff's evidence the defendant moved the court to take from the consideration of the jury the question of defendant's alleged negligence in cutting the hose, for the reason that there was no evidence in the case from which the jury could determine with any degree of certainty the extent to which the plaintiff had been damaged thereby. The court then permitted plaintiff to offer further evidence as to the amount of damages to the two-story part of its building and contents thereof, which plaintiff claimed could have been prevented from burning if the hose had not been cut. This evidence tended to prove that the value of this building and contents was about $110,000. There is further evidence that there was a salvage of personal property of the value of about $40.000 from this part of the factory. After the introduction of this evidence the court overruled defendant's motion to take this second ground of recovery from the jury. At the close of all the evidence the defendant requested the court to instruct the jury to return a verdict for it on both grounds upon which the recovery was sought, which motion the court overruled. Thereupon the defendant requested the court to instruct the jury that there could be no recovery upon the charge of negligence in reference to cutting the hose, which instruction the court also refused.

The court in its general charge instructed the jury in substance that, if the fire was caused by sparks from defendant's engines, the plaintiff was entitled to recover the full amount of the damages it had suffered by reason thereof. It further instructed the jury that, if it found against the plaintiff

upon the question of the fire having been communicated to this factory by fire from defendant's locomotives, but found in favor of the plaintiff upon the second theory of recovery in reference to the cutting of the fire hose, then that the recovery of the plaintiff should be limited to the value of the two-story building and contents, less the salvage of $40,000. The jury returned a verdict for the plaintiff in the sum of $60,000. Motion for new trial was overruled, and judgment entered upon this verdict. It is now contended upon the part of the plaintiff in error that the verdict of the jury was based solely upon this second assignment of negligence in reference to the cutting of the hose by the defendant's passenger train, and reversal of this judgment is asked for the reason that there is no evidence in this record to show: (1) That the defendant was negligent in the operation of the train that cut the hose. (2) That the cutting of the hose was the proximate cause of any damage to plaintiff. (3) That if there was any damage caused to the plaintiff by the cutting of this hose, that there was no evidence offered that would enable the jury to ascertain and segregate this damage from the total loss occasioned by the fire, and that its verdict in that respect is based upon mere speculation.

On the other hand it is insisted by the defendant in error that the verdict of the jury is fully sustained by the evidence upon either or both assignments of negligence; that the verdict is a general verdict, and that therefore the claim on the part of the plaintiff that this verdict is based solely upon the second assignment of negligence is merely conjecture.

W. C. Boyle, of Cleveland, Ohio, and John C. Welty, of Canton, Ohio (McCarty, Armstrong & Kinnison, and Welty & Burt, all of Canton, Ohio, and Squire, Sanders & Dempsey, of Cleveland, Ohio, on the brief), for plaintiff in error.

Horace Andrews, of Cleveland, Ohio, and Thomas F. Turner, of Canton, Ohio (Webber & Turner, of Canton, Ohio, and J. W. Mooney and G. E. Bibbee, both of Columbus, Ohio, on the brief), for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge (after stating the facts as above). [1] The presumption obtains that the jury understood the charge of the court, and that it applied that charge to the facts found by it. Under this charge, and the evidence in relation to the total loss sustained by the plaintiff, if the jury had found that the fire was occasioned by sparks communicated to the building from the defendant's engine, the verdict of the jury would necessarily have been for an amount approximating the amount claimed in the petition. It is therefore, from this record, practically beyond dispute that the verdict of the jury is based upon the second averment of negligence in reference to the cutting of the hose; otherwise, that verdict is not an intelligent response, either to the evidence or the charge of the court, but it is wholly consistent with the evidence and the charge of the court upon the second assignment of negligence. For this reason, if this verdict and judgment are to be sustained, they must be sustained upon evidence relating to the second assignment of negligence only, and to that part of the total loss, if any, occasioned by such negligence. The finding of the jury in favor of the plaintiff upon issues of fact is binding upon this court, if there is any substantial evidence to support that finding. This court has no authority to determine the question of the weight of the evidence.

[2] There is evidence in this record that the engineer knew of this fire when he was quite a distance away from it, but, of course, he could not be sure of its exact location in reference to the railway tracks until he had approached so near that he might by the exercise of ordinary care determine that fact with reasonable certainty. His train was moving at about 12 miles an hour. The smoke from this fire enveloped the railroad tracks upon which this train was approaching, so that it was necessary for him and his fireman to exercise a high degree of care and caution in observing and correctly interpreting the block signals. There is evidence in this record that the chief of the fire department ordered lanterns to be placed upon the track to signal the oncoming trains; that after this was done he observed that the lanterns were too near to the place where the hose crossed the track and ordered them removed to a greater distance; that one of the firemen, in obedience to this order, started in the direction of the lanterns, but this fireman was not called as a witness. Mesnar, the fire chief, testified that, shortly after he had given the order to remove the lanterns, he—

"looked, and I thought they were pretty far, and I was satisfied. The west lantern was over near to the end of the building on the track, and the other two to the east were very near down to the pump on Vine street."

Jacobs, one of the fire captains, testified that—

"There were lanterns set up there. I saw a man down there with a lantern. I saw pieces of lantern picked up that had been knocked off by the engine—I don't know how far. I know I saw a man down there with a red lantern. I saw the broken red lantern that had been picked up after the engine had knocked it off the track."

There is also evidence in this record that as the train approached some of the firemen ran down the track waving lanterns. The plaintiff also offered evidence tending to prove that the firemen and bystanders could see the train for a considerable distance, and that the track was perfectly straight for at least three-quarters of a mile eastward.

Upon this issue of notice to the defendant company the court charged as follows:

"The defendant is not liable merely because of the want of ordinary care or reasonable diligence on the part of such employés in discovering or failing to discover or observe the presence of hose on the track. Defendant's servants are not to be charged with negligence, and defendant's conduct made wrongful, by reason of the want of ordinary care in failing to look out for and observe the hose. Their duty to exercise ordinary care in stopping the train to avoid cutting the hose arises only after they had such actual or imputed notice or warning of the probable presence of hose on the track. * * * Such knowledge may be imputed to them, if you find the trainmen had knowledge of other facts with regard to the existence of the fire, its presence and location, signals given, if any, by warning, lanterns, or otherwise, the presence and activity of firemen, and other facts from which persons of their experience and intelligence should and would have realized the probable presence of hose lines crossing the tracks of the defendant railway company."

This charge fairly states the law applicable to this issue and the finding of the jury in that respect is sustained by some substantial evidence.

There is not, and in the very nature of things there could not be, any direct and positive evidence that, but for the cutting of the hose, the

firemen would have been able to arrest the fire before it destroyed the two-story part of the factory building. From the evidence it appears that this factory building was substantially parallel to the defendant's right of way and a little north thereof. It was 465 feet long, and varied in width from 80 to 140 feet. The west end, about 260 feet in length, where the fire originated, was one story in height. The east end, about 205 feet in length, was two stories. The entire lower floor of both the one-story and the two-story parts of this factory was not divided by any partition. It is claimed, however, that the two-story part was constructed largely of fireproof material and was believed to be fireproof.

There is a serious conflict in the evidence as to whether water was being thrown through these hose upon the fire, at the time they were cut by this train. Without attempting to determine the weight of the evidence upon this subject, it would appear altogether probable that no water was then being thrown, for the reason that the force from the hydrant was not sufficient to throw water such a distance, and some delay had been occasioned in connecting the hose to the fire engine. There is a direct conflict in the evidence as to the exact location of the fire at this particular time. There is, however, some substantial evidence that the fire had not yet reached the two-story building. One of the witnesses estimated the delay occasioned by the necessity of substituting a new section of hose for the one that was cut at 3 minutes, another at 30; but the majority of witnesses vary in their estimates from 5 to 25 minutes. It was for the jury to say whether this delay was for the inconsequential time of 3 minutes, or for the more substantial time estimated by other witnesses. The jury evidently reached the conclusion that the delay occasioned by the cutting of these hose was for such a substantial time as to permit the fire to get under such headway that it could no longer be checked by the efforts of the firemen. In reference to the conflict of the evidence as to the exact location of the fire in the factory at the time the hose were cut, the court charged the jury that:

"Unless you find from a preponderance of the evidence that, except for the cutting of the fire hose, the progress of the fire would have been arrested without entering into and burning and destroying any substantial part of the second-story building and its contents, the plaintiffs cannot recover anything on this second theory of liability. Unless you do so find, there is no evidence here tending to show that the fire might have been arrested after substantially entering the second-story part of the building at any time earlier than it was arrested, or at least at any time early enough to have prevented any damage which so far as the evidence here shows can be separated with reasonable certainty from the damage which would have been done."

[3] The jury, therefore, was fully advised that, if the fire at that time had entered upon the second-story building, the plaintiffs could not recover. It necessarily follows from this instruction that the jury found that the fire, when the hose was cut, was still confined to the one-story part of this building, and that the progress of the fire would have been arrested without entering into and burning and destroying any substantial part of the two-story building and its contents, except for the cutting of this hose. That finding is sustained by some substantial evidence. It is, of course, true that the question of whether

the progress of the fire might have been arrested or not cannot be apodictically established, nor is that question susceptible of direct proof; but, in the absence of such direct evidence, an allegation that one sustains injuries by reason of the negligence of another is sustained by proof of circumstances from which the fact that his injuries were so sustained is a more natural inference than any other. Railway Co. v. Andrews, Adm'r, 58 Ohio St. 426, 51 N. E. 26.

This doctrine also applies to the further question in this case as to the amount of damages sustained by this plaintiff, if any, by reason of the cutting of the hose. The trial court also very carefully instructed the jury upon this question, that in this case is a difficult and delicate one. In reference to this the court said:

"The inquiry there is limited to whether or not, had the fire hose not been cut, the fire would have been arrested before it substantially entered the second-story part of the building. Unless you can say from a preponderance of the evidence and with reasonable certainty that the progress of the fire would have been thus arrested, then you will proceed to consider no further defendant's liability under the second theory. I am saying that for the reason that the evidence here is so uncertain and indefinite that it would be pure guesswork and speculation upon your part to undertake to say when the fire could have been arrested, if it could not have been arrested before it reached the second-story building. * * * The plaintiff has offered no evidence which would permit you to make a finding as to what damages were the direct and proximate result of the fire on this theory of liability, unless your finding should be that the fire could and would have been arrested before it entered the second-story building."

While there is in this record a serious conflict of the evidence touching, not only the question of the negligence of the railroad company in cutting this hose, but also in reference to the delay occasioned thereby, the location of the fire in the factory at that time, and the probability that, if the hose had not been cut, the progress of the fire could have been arrested before it reached the second-story building, nevertheless the jury, before it arrived at the question of damages, must necessarily have reached a conclusion upon all these questions adverse to the defendant. In other words, this verdict means, if it means anything, that the jury found: (1) That the defendant was guilty of negligence in the operation of this train in the particulars stated in the petition. (2) That this negligence resulted in cutting the fire hose. (3) That the delay occasioned thereby was substantial in its nature. (4) That but for such delay the firemen would have been able to have arrested the progress of the fire before it reached the two-story part of this building.

While beyond question the evidence offered on the part of the plaintiff in error tends strongly to show that there was no negligence whatever on the part of its engineer in the operation of this train; that the delay occasioned by the cutting of the hose was so trifling as to be inconsequential; that no water was thrown before the hose was cut, and none for some little time after a new section of hose was substituted for the one destroyed; that at the time the hose was cut the fire had already entered into the second-story part of this building and was practically beyond control; and counsel for plaintiff in error has so persuasively argued the effect of this evidence that the court approached the in-

vestigation and examination of this record upon these questions of fact with a mind favorably inclined to the claims of counsel as to the absolute and overwhelming effect of this evidence, nevertheless, it does appear from an investigation of this record that there is some evidence of a positive and direct nature, as well as circumstantial, that is sufficient under the statute authorizing this review to sustain the verdict of the jury upon all these questions preliminary to the determination of the amount of damages the plaintiff should recover. Especially is this true in view of the plain, unambiguous, and positive instructions of the court as to the facts the jury must first find before the plaintiff would be entitled to recover upon this second assignment of negligence.

These facts once established by the verdict of the jury, it follows that there is a clear and intelligent theory upon which the jury might proceed to separate the damages occasioned by the cutting of the hose from the total damages caused by the fire. The trial court properly and positively instructed the jury that, before it could return any verdict upon this assignment of negligence it must find that the damages occasioned by the burning of the second-story part of this factory and contents was the direct result of the negligence of the defendant resulting in the cutting of these hose. The evidence shows that the value of this building and contents was about $110,000. The jury, of course, did not have to accept that evidence at its full face value; that the value of the property salvaged was $40,000. The verdict for $60,000 is fairly responsive to that evidence and cannot be said to be based upon mere conjecture.

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

BANKERS' TRUST CO. v. VIRGINIA RY. & POWER CO. et al.
O'CONNOR et al. v. SAME.

(Circuit Court of Appeals, Fourth Circuit. May 10, 1921.)

Nos. 1878, 1879.

1. **Appeal and error ⇐78(2)—Order refusing leave to intervene appealable.**
Where the court in a consolidated suit to foreclose mortgages against related corporations in an order of sale reserved jurisdiction to enforce claims of bondholders of one corporation against the property of another for diversion of assets should such claims be sustained, a subsequent order refusing leave to certain of such bondholders to intervene to assert such claims *held* in effect a final adjudication of their rights, and appealable.

2. **Equity ⇐114—Right to come into suit brought by representative of class held not barred by laches.**
Where one bondholder of a corporation filed a petition in a foreclosure suit for the benefit of himself and all others similarly situated who would come in and share the costs of the proceeding, asserting a claim against another corporation for diversion of assets of the mortgagor, a delay of 10 years by other bondholders similarly situated before coming in, during which time the claim was being actively litigated by the petitioner, *held* not laches, which barred their rights against the adverse party; the petitioner making no objection.

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

Appeals from the District Court of the United States for the Eastern District of Virginia, at Richmond.

Suits in equity by the Metropolitan Trust Company and others against the Virginia Passenger & Power Company and others. From orders denying them leave to intervene, the Bankers' Trust Company, Executor, and Thomas O'Connor and others, separately appeal. Reversed.

For opinion below, see 271 Fed. 38.

James Mann, of Norfolk, Va. (Wm. Hodges Mann, of Petersburg, Va., Charles C. Deming, of New York City, Wm. Hodges Mann & Son, of Petersburg, Va., and Mann & Tyler, of Norfolk, Va., on the brief), for appellants.

Henry W. Anderson and Thomas B. Gay, both of Richmond, Va. (Munford, Hunton, Williams & Anderson, on the brief), for appellees.

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

WOODS, Circuit Judge. An outline of the complex litigation concerning the light and power companies of the city of Richmond and vicinity is given in a former appeal. 229 Fed. 633, 144 C. C. A. 43. A short statement will suffice to make clear the issue made by the petitions now presented.

A consolidated suit was brought in the District Court, looking to the foreclosure of mortgages on a number of light and power companies in the city of Richmond and vicinity, among them the Virginia Passenger & Power Company and the Richmond Passenger & Power Company. One of the consolidated suits for foreclosure was that of the Metropolitan Trust Company, trustee of a mortgage securing $1,000,000 bonds of the Richmond Company, known as debenture bonds. In the litigation the Metropolitan Trust Company alleged that the Virginia Company, by purchase of the stock of the Richmond Company, had secured complete control and management of that corporation, and had diverted assets of the Richmond Company for the benefit of the Virginia Company, thus unlawfully decreasing the security of the holders of the debenture bonds and increasing the value of the property under the mortgages of the Virginia Company. The Metropolitan Trust Company insisted that the foreclosure sale should not be made until the rights under this allegation had been ascertained. The court ordered the sale, preserving the rights of the Trust Company and of the debenture bondholders by this provision of the decree:

"The court reserves the right to hereafter determine all questions in connection with the diversion of earnings, business, property, and income to the Virginia Passenger & Power Company from the Richmond Passenger & Power Company, as set forth in the pleadings herein and the reports of the special master, and to enforce against the property purchased and the earnings and income thereof in favor of the said Metropolitan Trust Company of the City of New York, as trustee, and the petitioners, Howe and others, and the debenture bondholders, any lien or claim to which the said trustee or bondholders shall be entitled, and to afford such trustee on bondholders and petitioners such other and further relief as to such alleged diversion with respect to such purchaser, his successors and assigns, and the property pur-

chased, as the court shall determine to be just and equitable, the intent being that the rights of the Metropolitan Trust Company of the City of New York, as trustee, and the debenture bondholders and of the petitioners, Howe and others, to establish any claim they may have for diversion of earnings, property, business and income of the Richmond Passenger & Power Company by the Virginia Passenger & Power Company, or the receivers herein, and to enforce against the property purchased any claim or lien, legal or equitable, to which they may be entitled, and to apply any money or property recovered to the benefit of the debenture bondholders, in all respects as if this decree had not been made."

This decree was affirmed on appeal. 168 Fed. 1021, 93 C. C. A. 671. After the sale the Metropolitan Trust Company refused to press the claim of diversion of the assets of the Richmond Company, giving as a reason lack of support and indemnity from the bondholders.

On March 10, 1910, Charles Hall Davis, as holder of 71 of the debentures, declining to accept as equitable the provision made for the debenture bondholders of the Richmond Company in the reorganization under the sale, filed his petition, "for the benefit of himself and all others similarly situated who will come in and share the costs of this proceeding," making the same allegations as the Metropolitan Trust Company had made as to the diversion of the property of the Richmond Company to the Virginia Company. The District Court dismissed the petition.

This court reversed the decree, holding that if, as alleged, the executive officers of the two companies so managed that a part of the Richmond Company's street railway or any other tangible property or the good will attached to it was turned over to the Virginia Company and fell under the mortgages of that company, thus increasing their security, the mortgagees of the Virginia Company, upon enforcing their security, would be liable to account to the mortgagees of the Richmond Company for the amount they realized, or should have realized, from the converted property as an increment to their security taken from the security of the mortgagees of the Richmond Company. It was further held that Davis, as the diligent creditor, filing and prosecuting his petition to recover the diverted assets, would be entitled to preference over the holders of other securities of the Richmond Company. As no other bondholder had appeared in the proceeding instituted by Davis, this court assumed that all others had accepted the settlement proposed in the reorganization. However, this assumption, of course, did not affect the rights of bondholders, who had not in fact accepted it.

The cause was remanded to the end that the value of the property, if any, including the attached good will, diverted from the Richmond Company to the Virginia Company or the receivers, which was subject to the mortgage securing the debenture bonds, might be ascertained. After the cause was thus remanded an order was made by the District Court, directing Hon. A. L. Holladay, as special master, to take testimony and report upon the alleged diversion of the assets of the Richmond Company. On April 17, 1920, the master made a report in which he found that assets of the Richmond Company, subject to the debenture bonds had been diverted for the benefit of the Virginia Company of the value of $278,420.91, which, with interest to January 1,

1920, amounted to $412,436.19. The exceptions to this report have not yet been passed on by the District Court.

On May 15, 1920, after the report was filed, Thomas O'Connor, A. A. Roberts, Edwin Langdon, Annie H. Spencer, Alvin Beveridge, George E. Fisher in his own right and as executor of G. W. Fisher, and Bankers' Trust Company as executor of Charles L. Jacobus, moved in the District Court to file their petitions of intervention in that court. The petitions which they asked to file set forth the proceedings in the court relating to the litigation of Davis, including the report of the master on the diversion of the assets of the Richmond Company. The petitions allege this report to be incomplete and claim that other diversions of the assets of the Richmond Company are yet to be reported on, if necessary to meet their claims.

As to their own status, the petitioners allege that of the debenture bonds of the Richmond Company secured by the mortgage to the Metropolitan Trust Company there are outstanding 168, besides the 71 claimed by Davis, of which the petitioners own 161, of the face value of $161,000 and interest, and that they did not assent to or participate in the plan of organization. In short, the allegations of the petitioners is that their claims are in precisely the same position as that of Charles Hall Davis, except that he filed his petition on March 12, 1910, and has persisted in asserting his claim from that time, while these petitioners have stood by, without giving any intimation of an intention to intervene or otherwise assert their claims, until after the above-recited report of the master was filed. They allege contribution to the expenses of the Davis litigation, and willingness to make further contribution in their just proportion to expenses hereafter incurred by him, and willingness to allow his claim and counsel fees to be first paid from the value of the assets, if any, found by the court to have been diverted from the Richmond Company and an agreement with Davis to that effect.

The District Court refused to allow the petitions to be filed, holding that the petitioners were barred by laches in having delayed their application for intervention from March 12, 1910, when Davis instituted his proceeding, until May 15, 1920, more than 10 years.

[1] We consider first the motion to dismiss, made on the ground that the order refusing to allow the petition to be filed is not appealable, because the petitioners are not parties to the proceedings, and therefore have no status in the cause. The general rule is well recognized that one not a party to a suit or proceeding has no right to appeal from a decree or order made therein. Ex parte Cutting, 94 U. S. 14, 24 L. Ed. 49; Ex parte Cockcroft, 104 U. S. 578, 26 L. Ed. 856; Ex parte Leaf Tobacco Board, 222 U. S. 578, 32 Sup. Ct. 833, 56 L. Ed. 323.

In the matter before us there can be no dispute that, if the petitioners have any rights to the security of the property which it is alleged was wrongfully taken from the Richmond Company, their mortgagor, they can assert them nowhere except in the District Court for the Eastern District of Virginia, which assumed jurisdiction, sold the property, and in its decrees provided for the assertion and litigation of the rights

of holders of the bonds of the Richmond Company. The denial of their motion to file their petitions was therefore in effect a final adjudication that they had no claim against the property of which that court retained control, in order that their rights and the rights of those in like situation might be finally adjudicated. If this door is closed, there is no other they can enter. In such condition the refusal of the motion to file the petitions is in substance plainly a final adjudication of the rights of the petitioners, and therefore appealable. Credits Co. v. U. S., 177 U. S. 311, 20 Sup. Ct. 636, 44 L. Ed. 782; Ex parte Slater, 246 U. S. 134, 38 Sup. Ct. 265, 62 L. Ed. 621; U. S. Trust Co. v. Chicago Terminal Co., 188 Fed. 292, 110 C. C. A. 270. The same principle was applied by this court to the refusal to allow a supplemental bill to be filed. Rosemary Mfg. Co. v. Halifax Cotton Mills (C. C. A.) 266 Fed. 363. The distinction contended for, between the denial of a motion to file a petition and refusal to consider or grant the petition after it is filed, is too artificial and tenuous for judicial recognition.

[2] On the merits, we agree with counsel for appellees that the sole question now before the court is whether the District Court was right in holding that the allegations of the petitions showed such laches as would prevent the petitioners from coming into the Davis proceeding and setting up their claims to the assets alleged to have been diverted from the Richmond Company. If the petitions were the beginning of an independent proceeding to enforce the claim of the petitioners we would have no hesitation in holding, in the circumstances, that the failure to act until after the expiration of 10 years would be imputed to the petitioners as a declaration that they would not act at all, and that they would be barred by laches. The rule that mere long delay, not satisfactorily explained, either in commencing a suit, in seeking intervention, or in prosecuting a suit or proceeding, will constitute such laches as to bar the right asserted, is too well established for discussion. Abraham v. Ordway, 158 U. S. 416, 15 Sup. Ct. 894, 39 L. Ed. 1036; New York v. Pine, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820; Sullivan v. Portland & K. R. Co., 94 U. S. 806, 24 L. Ed. 324; Brown v. County of Buena Vista, 95 U. S. 157, 24 L. Ed. 422. Where there has been such long delay—

"the party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim, how he came to be so long ignorant of his rights and the means used by the respondent to fraudulently keep him in ignorance, and how and when he first came to a knowledge of the matters alleged in his bill; otherwise, the chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer." Badger v. Badger, 2 Wall. 87, 95 (17 L. Ed. 836).

The reasons alleged by the petitioners for not entering the proceeding and asserting their demands before are: (1) That Charles Hall Davis in terms instituted his proceeding for the benefit of himself and others similarly situated who would come in and share the costs of this proceeding; (2) that they are similarly situated in that they hold bonds of precisely the same nature as those set up by Davis, and have come in under those terms and are sharing the expense of the proceed-

ing; (3) that the question of the alleged diversion of the property securing the bonds now set up had been actively litigated since the filing of the bill of the Metropolitan Trust Company; (4) that it was well known to all persons interested that the bonds held by petitioners were outstanding, that the property was sold and purchased subject to the rights of holders of the debenture bonds of the Richmond Company, that for any diversion of the assets of the Richmond Company the purchaser would be responsible to the holders of the outstanding bonds, and that Davis had been all the time asserting this diversion for the benefit of himself and all others similarly situated who would come in and share the costs of his proceeding.

The argument against the sufficiency of these reasons is strong, but we are bound by the decision of the Supreme Court holding in express language that the reasons given are sufficient against the plea of laches for delay.

"Where the cause of action is of such a nature that a suit to enforce it would be brought on behalf, not only of the plaintiff, but of all persons similarly situated, it is not essential that each such person should intervene in the suit brought in order that he be deemed thereafter free from the laches which bars those who sleep on their rights. Cox v. Stokes, 156 N. Y. 491, 511." Southern Pacific Co. v. Bogert, 250 U. S. 483, 489, 39 Sup. Ct. 533, 536 (63 L. Ed. 1099).

In Cox v. Stokes, 156 N. Y. 491, 511, 51 N. E. 316, 322, the court used this language:

"Knowing that their proceedings were thus attacked, Stokes, the committee, and the United Lines Telegraph Company continued, in defiance of the reorganization agreement, to carry on their scheme, as embodied in the modified agreement. Under these circumstances, no one could have been misled, simply because the plaintiffs waited to see whether relief would come through the pending litigation, or whether the sale would be confirmed, before commencing their action. The defendants proceeded at their peril, because they had full notice that some of the bondholders at least had not acquiesced in their unlawful acts, but were active in the assertion of their rights. We repeat, as applicable to this case, so far as the question of laches is concerned, the language of the court in Boardman v. Railway Company, 84 N. Y. 157, 183: 'It appears that there has been, ever since the expiration of the time when the dividends were due, an active and continuous litigation, and a sharp controversy in the courts with other parties against the old corporation and the defendant, by stockholders who are similarly situated with the plaintiffs, to recover dividends upon the preferred stock. * * * The defendant necessarily was acquainted with the character of the litigation, with the questions involved and the claim of the preferred stockholders to the dividends; and in the face of these facts, with full notice of the nature of the claim, has no ground for insisting that it would have acted otherwise if the plaintiffs had sued at an early date. It was not required that each particular stockholder should sue for his share of the dividends to preclude the defendant from claiming an acquiescence and estoppel; and it is quite sufficient that it was advised of the character of the claim of the respective stockholders. The plaintiffs and other stockholders were entirely justified in awaiting the result of suits pending without incurring the hazard of losing their rights on account of the lateness of their demand.' So the plaintiffs in this action, under all the circumstances, were not obliged to sue more promptly in order to save their rights."

On the authority of the Supreme Court we must hold that the District Court erred in refusing to allow the petitions to be filed. This

conclusion, of course, does not preclude the appellee from setting up any special facts tending to show waiver or estoppel, not covered by the above-cited decision of the Supreme Court as we have applied it.

Nor does it warrant the petitioners, as holders of the debenture bonds, in bringing into the cause any new matter excluded by the refusal to allow the amendment to Davis's petition, proposed by him on January 17, 1914. Davis v. Virginia Ry. & Power Co., 229 Fed. 633, 639, 144 C. C. A. 43. All we decide is that the delay of the petitioners to join in the proceedings instituted by Davis, for the benefit of himself and all others similarly situated who would come in and share the cost of the proceeding, does not constitute such laches as to deprive the petitioners of the results of the litigation instituted by Davis, and that, therefore, they are entitled to file their petitions and to be allowed to intervene.

Reversed.

THE ST. JOHNS.

COLONIAL BEACH CO. v. QUEMAHONING COAL CO., Inc., et al.

(Circuit Court of Appeals, Fourth Circuit. May 12, 1921.)

No. 1866.

Maritime liens ⇐30—Furnisher of supplies not bound to inquire as to ownership of vessel.

A supply man, who knows nothing about a ship other than that it is a ship in possession of those who order supplies for her, may furnish them on her credit, and is not bound, under Act June 23, 1910, § 3 (Comp. St. § 7785), to make further inquiry, to be entitled to a lien therefor.

Woods, Circuit Judge, dissenting.

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

Suits in admiralty by the Quemahoning Coal Company, Inc., and Coale & Co. against the Steamer St. Johns; the Colonial Beach Company, owner and claimant. Decrees for libelants, and claimant appeals. Affirmed.

Hugh H. Obear and Fred N. Oliver, both of Washington, D. C. (Paul Dulaney and Douglas, Obear & Douglas, all of Washington, D. C., on the brief), for appellant.

Richard E. Preece, of Baltimore, Md. (Frank E. Welsh, Jr., of Baltimore, Md., on the brief), for appellees.

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

ROSE, District Judge. The Quemahoning Coal Company, Incorporated, and Coale & Co., referred to herein as the "supply men," libeled the steamer St. John, belonging to the Colonial Beach Company, called the "owner," for the price of sundry lots of bunker coals furnished the

steamer upon the order of the person intrusted with her management at the port of supply, by the Baltimore & Southern Navigation Company, styled the "charterer," then in possession of her, under a written agreement primarily of conditional sale, but which, in certain contingencies, was to be considered as a charter party, and by which the charterer promised not to incur any debts upon the credit of the steamer.

It was in contemplation of both parties to the contract that the charterer should operate the vessel, and it was expressly provided that all proceeds from its operation should be applied first and immediately towards liquidating all operating expenses, pier rentals, necessary office expenses incident to the management of the vessel, and all debts and liabilities which would be a lien on the vessel; such debts and liabilities to be discharged in full as they arose, before the operating receipts were to be used for any other purpose.

The charterer specifically promised not to incur any debts upon the credit of the vessel, and as required by the agreement deposited $10,000 with a trust company to protect the owner against the consequence of any breach of its engagements, and subsequently, within the four months during which the vessel was in its possession, paid $45,000 on account of her purchase price of $90,000. Upon the failure of the charterer to make further payment, the owner repossessed itself of the ship, and held both the sums mentioned, aggregating $55,000, as charter hire; something which the terms of the contract authorized it to do.

Nobody told Coale & Co., one of the supply men, that the person intrusted with the management of the St. John at the port of supply, was appointed by the charterer, and not by the owner, and Coale & Co. never asked any questions on the subject. The owner says that, in refraining from inquiry, Coale & Co. failed to exercise the reasonable diligence required by the proviso to the third section of the act of 1910 (Comp. St. § 7785). The Circuit Courts of Appeal for the Second, the Third, the Fifth, and the Ninth Circuits have held the law to be otherwise. The Oceana, 244 Fed. 80, 156 C. C. A. 508; The Yankee, 233 Fed. 926, 142 C. C. A. 593; The Yarmouth, 262 Fed. 254; The South Coast, 247 Fed. 89, 159 C. C. A. 302.

We are of like mind. A supply man who knows nothing about a ship, other than it is a ship in possession of those who order supplies for her, may furnish them upon her credit, without making further inquiry, taking the chance—usually a remote one—that the possession of her was tortiously acquired.

It is said that, whatever be true as to Coale & Co., the Quemahoning Coal Company, Inc., the other supply man, had been told that the ship was under charter. A witness so swears, but he is flatly contradicted by the agent of the supply man to whom he says he gave the warning. Both men testified in the presence of the learned judge below. It may be he believed the one produced by the supply man rather than the other, who testified for the owner. As, however, he filed no opinion, it is possible that he may have based his decision in

favor of the supply man upon other grounds. From our own examination of the record, we are persuaded that the version given by the agent of Coale & Co. is by far the more probable.

The greater part of the coal was furnished in November, 1919. At that time those who had coal were sought by those who had need of it. They had no occasion to look for customers. It is scarcely conceivable that, under such conditions, the supply man would have knowingly bartered his coal for a lawsuit.

It is easy to see how the vice president and manager of the charterer, who testified that he gave the information, may have been mistaken. He, at least in form, held the same positions contemporaneously with the owner, although he says that, while he was acting for the charterer, his connection with the owner was but nominal. However that may be, he knew all about their relations. It is one of the most common delusions of memory to suppose that we made clear to others what was, to us, a twice-told tale, when in fact we said nothing on the subject, or nothing that in any wise enlightened them.

The Quemahoning Coal Company, Incorporated, must therefore be held equally with its fellow supply man to have been without notice that the St. John was under charter.

It follows, from what has already been said, that each of them has a maritime lien upon the ship for the value of the coal furnished, and the decree below was right. In so saying we do not wish to give the impression that we are of opinion that any other result would necessarily have followed, had either, or both, of the supply men known that the ship was under charter. We are not unmindful that in a number of well-considered cases it has been said that, if the supply man has notice that the ship is under charter, he is bound to inquire whether its terms forbid the charterer to pledge the credit of the ship. But does such a holding give proper effect to the act of 1910? To say that notice of a charter puts a supply man upon inquiry is in effect to hold that there is no presumption that a charterer may charge the ship, but the statute says that precisely that presumption shall exist. The South Coast, 247 Fed. 89, 159 C. C. A. 302; The Yarmouth (C. C. A.) 262 Fed. 254.

Affirmed.

WOODS, Circuit Judge (dissenting). The general facts are stated in the majority opinion. The libelants supplied the coal in the port of Baltimore, not on the order of the owner or master, but on orders received from the office of the charterer in that city. They had no knowledge of the charter or of the ownership of the vessel, and made no inquiry as to either matter at the office of the charterer or elsewhere. The pertinent facts are substantially identical with those in The Valencia, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710, under which the Supreme Court held that the libelant was not entitled to a lien on the vessel, because "the circumstances of the transaction put him on inquiry as to the existence and terms of the charter party, and he failed to make such inquiry, and chose to act on a mere belief that the vessel

would be liable for his claim." That case, therefore, seems conclusive, unless the law has been so changed by the act of 1910 (36 Stat. 604) that one who furnishes supplies to a vessel on the order of a charterer acquires a lien against the owner of the vessel, although the charter forbids the creation of such lien by the charterer, and the furnisher with source of information at hand makes no inquiry as to the ownership or existence and terms of a charter.

The Yankee, 233 Fed. 926, 142 C. C. A. 593, The Oceana, 244 Fed. 80, 156 C. C. A. 508, The South Coast, 247 Fed. 89, 159 C. C. A. 302, and The Yarmouth (C. C. A.) 262 Fed. 254, are relied on as holding that the statute has that effect. In each of these cases the court recognized the authority of The Valencia, and distinguished the facts in the case under consideration. In three of them stress was laid on the fact that the supplies were furnished on the order or the receipt of the master, who was in charge of the vessel by appointment of the owner. But, whatever may be the purport and force of these decisions, it seems to me that the Supreme Court has refused to construe the act as making the radical change of relieving the furnisher of supplies of the obligation to make inquiry concerning the ownership of the vessel and the existence and terms of a charter, under the circumstances appearing here and in the case of The Valencia. In Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co., 254 U. S. 1, 41 Sup. Ct. 1, 65 L. Ed. ——, decided October 11, 1920, the court says:

"The act relieves the libelant of the burden of proving that credit was given to the ship when necessaries are furnished to her upon order of the owner, but it in no way lessens the materialman's burden of proving that the supplies in question were furnished to her by him upon order of the owner or of some one acting by his authority. The maritime lien is a secret one. It may operate to the prejudice of prior mortgagees or of purchasers without notice. It is therefore stricti juris and will not be extended by construction, analogy or inference. The Yankee Blade, 19 How. 82, 89; The Cora P. White, 243 Fed. 246, 248."

In the light of this case, and the case of The Valencia, I venture to think that sections 2 and 3 of the act of 1910 (Comp. St. §§ 7784, 7785) mean this: A charterer, or owner pro hoc vice, or agreed purchaser, or any person to whom the management of the vessel at the port of supply has been intrusted by any one of them, will be presumed to have authority from the owner to procure repairs, supplies and other necessaries, for which the furnisher shall have a lien; but the presumption is not available to the furnisher, when he knew or by the exercise of reasonable diligence could have ascertained that, because of the terms of a charter party, or agreement for sale, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor.

To hold that the furnisher was not bound to make inquiry when the source of information was at hand, as in this case, is to deny any effect to the express and carefully framed limitation of section 3. It is no hardship to the furnisher to require him to make the inquiry of the person in charge of the vessel, or the owner, or the charterer, or other persons at the port of supply who would be naturally expected

to know and tell the truth. On the other hand, the owner of the vessel could not possibly protect himself by notifying or even ascertaining all the persons who might be called on by the charterer or other person in charge of the vessel to furnish supplies.

LUDOWICI CELADON CO. v. POTTER TITLE & TRUST CO.

In re WAITE.

(Circuit Court of Appeals, Third Circuit. June 13, 1921.)

No. 2718.

Limitation of actions ⇐110—Judgment creditor need not revive judgment after bankruptcy to preserve lien against land.

A creditor, who had a valid judgment lien against the land at the time of the judgment debtor's bankruptcy, need not thereafter revive his judgment by scire facias to preserve the lien as against the trustee and the existing creditors, since the rights of all the parties became fixed at the time of bankruptcy, and especially where no trustee had been appointed at the time the scire facias proceedings should have been brought, so that there was no one who could be designated as terre-tenant in such proceedings.

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

In the matter of the estate of John J. Waite, bankrupt. On claim by the Ludowici Celadon Company against the Potter Title & Trust Company, trustee, to share in the proceeds of the sale of real estate by the trustee. From a decree denying the right claimed, claimant appeals. Reversed with directions.

Lowrie C. Barton, Harry M. Stein, and Duff & Carmack, all of Pittsburgh, Pa., for appellant.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

BUFFINGTON, Circuit Judge. The question involved in this case is whether a judgment which is a valid lien against the real estate of a bankrupt in Pennsylvania at the time of his adjudication, but which is not revived by scire facias within five years from its entry, thereby loses its lien against such real estate. The referee and court below held, in an opinion printed in the margin,[1] it did, and rejected the judg-

[1] The Ludowici Celadon Company claimed the right to share in the proceeds of the sale of real estate by the trustee of the bankrupt, after a sale of the real estate had been ordered by the refereee, free and discharged of the liens, and when the proceeds of the sale were before him for distribution. The referee disallowed the claim, and the said company caused him to certify the question to this court as to whether the claim should be allowed.

The petition in bankruptcy was filed in 1913. At that time said creditor was a judgment creditor of the bankrupt upon a judgment recovered in 1912, which judgment was a lien upon the lands of the bankrupt at that time. In October of 1920, the land of the bankrupt was sold, free and discharged of liens. From the time of the entry of the judgment in favor of the creditor and against the bankrupt, up until the date of the sale, a period of over eight

ment as a lien against the proceeds of the bankrupt's real estate. Thereupon the judgment plaintiff took this appeal.

years, no steps were taken by the creditor to revive and continue the lien of its judgment. The creditor now claims that, because its judgment was a lien at the time of filing the petition in bankruptcy, its status, as a lien creditor, was fixed at that time and continued indefinitely, until the property was sold by the trustee. Unfortunately for the creditor, however, while it may have continued to be a creditor down to the date of the sale by the trustee, yet it did not continue to be a lien creditor during all of that time, and was not a lien creditor at the time of the conversion of the lands into money.

It is a well-known principle of law that, where the bankruptcy law is silent, the nature, extent, and duration of a lien must depend upon the law of the state in pursuance of which the lien was created. Creditors who have reduced their claims to judgments in Pennsylvania have a lien upon the real estate of the debtor for a limited period only, unless they avail themselves of the remedy provided by law for the revival and continuance of their liens.

It is unnecessary to detail the laws of Pennsylvania relating to the revival of judgments, but it may be well to call attention to the fact that it is provided that, if the judgment debtor shall have sold his land subject to the lien of a judgment, the judgment creditor, in order to continue the lien upon that particular land, must cause the writ of scire facias to issue, not only against the judgment debtor, but the terre-tenant. Again, a judgment, although it may have lost its lien by reason of the failure to include the terre-tenant, may become a lien upon other after-acquired property, when judgment of revival is entered against the original defendant. Moreover, the judgment itself is a debt, regardless of its character as a lien. It is not unusual for suits to be brought upon the record of a judgment, or to make the same the subject of a proof of claim in bankruptcy.

"The creditor in this case filed no proof of claim against the bankrupt in this proceeding, setting forth the indebtedness upon the judgment. Doubtless the referee would have permitted some distribution to said creditor out of the general estate, if any, in the hands of the trustee. This is probably what the referee had in mind when he refers to the absence of any proof of claim in this case. It is not necessary for a judgment creditor, holding a lien upon real estate, to present any proof of claim, if he desires to rely wholly upon his lien, because his lien, if valid, could not be affected by the bankruptcy law. If a lien creditor desires, at any time, to proceed to the enforcement of his lien, the court will permit him to exercise the remedies which are available, to him, under the law of the state whereby the lien was created. It is a matter commonly accepted, in view of the many authorities, of which Zartman, trustee, v. Bank, 216 U. S. 134, 30 Sup. Ct. 368, 54 L. Ed. 418, is an example, that the trustee in bankruptcy takes the property as the bankrupt had it at the time of the petition, subject to all valid claims, liens, and equities. A judgment creditor of a bankrupt can revive his judgment under the statutes of Pennsylvania, by naming the trustee in bankruptcy as a terre-tenant, after procuring leave of court so to do.

It is interesting to note that in the Matter of Josiah Van Kirk Thomson, Bankrupt, in this court, some hundreds of creditors issued proceedings to revive judgments against the bankrupt, naming the trustees as terre-tenants. Those proceedings are suggestive, as showing the views of the profession upon the necessity of reviving judgments where the judgment debtors are in bankruptcy. In that case, however, this court had to require the judgment creditors to exclude from their writs of scire facias the trustees of the bankrupt as terre-tenants, because all of the bankrupt's property had been sold by direction of this court and the subsequent revival of the judgments in that manner implied either that the sale was without jurisdiction by this court, or that there was property of the bankrupt still in the hands of his trustees, which had not been included within the conveyance.

The case at bar is an example of loss by a creditor by reason of its lack of diligence. The learned referee was clearly right.

We are of opinion the general principle of law decisive of the present case is stated in McKinney, Bankrupt (D. C.) 15 Fed. 913. In that case, after referring to a number of decisions, Judge Acheson there said:

"The underlying principle of these decisions is that mere lapse of time will not bar claims against the trust estate valid and in full life when the trust was created, so long as the estate is unadministered and the trust estate subsists. The principle is perfectly sound, and there is no good reason why it should not prevail in cases under the bankrupt law."

It was accordingly there held that a note of a bankrupt, which was not barred by the Pennsylvania statute of limitations at the time of the adjudication, was not barred by the running of the statutory time while the court was administering the trust. Now, in the present case, the judgment was a valid lien against the land of the trust estate when the trust was created. The rights of contemporaneous or subsequent judgment creditors, of other incumbrance, or of purchasers, are not here concerned. The case only concerns the rights of other cestuis que trustent, whose right, as well as the judgment creditor's, were fixed by the adjudication. The rights of all being as of that date, what was to be gained, lost, or affected by a subsequent scire facias to revive this judgment? In point of fact, no trustee had qualified when the time to revive arrived, and consequently there was no terre-tenant on whom a writ could be served. The time that elapsed before a trustee was chosen on whom the writ could be served, and by whom the trust estate was to be administered, was not the delay of the judgment creditor. The law had the land in its grasp; it had taken it subject to a valid lien; its obligation was to administer the trust pro tanto for the benefit of the lien. In the absence of anything to be accomplished by the formal revival of this judgment, and the rights of no other but fellow cestuis que trustent being here involved, we are clear that neither the reason nor the spirit of the bankrupt law necessitate the revival of a judgment lien valid when the bankrupt trust was created, and such holding is in harmony with the earlier decision of Judge Acheson in this circuit.

The judgment below is therefore reversed, with directions to vacate the decree and allow this judgment to participate as a valid lien. In view of the acquiescence of the judgment creditor in the delay of administration, we leave the quantum of the claim of the judgment creditor for interest to be equitably determined by the court below.

KELLOGG et al. v. SCHAUEBLE.

(District Court, S. D. Mississippi, Jackson Division. May 2, 1921.)

No. 133.

1. **Equity ⇐427(3)—General prayer does not broaden relief sought beyond facts alleged.**
   Where a bill alleged that a deed was procured by undue influence and that the grantor was without legal capacity to execute it, and specifically prayed that the deed be canceled as a cloud on title of the complainants, a prayer for general relief does not operate to enlarge or broaden the relief sought beyond what the facts alleged in the bill show complainants have the right to ask.

2. **Removal of causes ⇐107(4)—Possible amendments cannot be considered in determining whether federal court can give relief sought.**
   On motion to remand a cause to the state court on the ground that the United States court cannot give the relief which the state court could give, the court cannot consider that the bill, which merely sought to cancel a deed as a cloud on title, might be amended to recover possession of the premises and mesne profits, which would be permissible under the state practice.

3. **Removal of causes ⇐11—Bill held to state cause for equitable relief, which can be administered by United States court.**
   A bill which merely alleged that defendants were in possession under a deed from the complainant's ancestor, procured from him by undue influence, when he did not possess sufficient capacity to make the deed, without alleging facts entitling complainants to recover possession of the premises and mesne profits, or specifically praying for such relief, does not seek relief which cannot be granted by the United States court of equity, and therefore such suit may be removed to the United States court, if the requisite diversity of citizenship existed.

4. **Courts ⇐352—Legal relief may be given without sending case to law side.**
   Where the suit is such as involves a matter ordinarily equitable in its nature, a court of equity, having jurisdiction, can determine questions ordinarily determinable at law, such as questions of possession and mesne profits, and the mental capacity of a grantor, under equity rule 23 (198 Fed. xxiv, 115 C. C. A. xxiv), without sending the case or questions to the law side of the court.

5. **Quieting title ⇐49—Equity has jurisdiction to cancel voidable deeds as clouds on title.**
   Where deeds affecting title to land are merely voidable, equity can take jurisdiction of the entire case, and not only cancel the instruments as clouds upon the title, but can also decree possession, rents and profits, and compensation for improvements and taxes.

6. **Quieting title ⇐12(3)—Equity can direct cancellation of void deed to person in possession, if defect does not appear on face.**
   Where a deed to a person in possession of land is void for some reason which does not appear on the face of the deed, or on indisputable facts, such as the mental incapacity of the grantor to execute the deed, equity can order the deed to be delivered up and canceled as a cloud on the title.

7. **Equity ⇐49—Enlargement of common-law remedy, so as to afford adequate relief, does not deprive equity of existing jurisdiction.**
   Where equity has acquired jurisdiction to grant relief in a class of cases because there is no adequate remedy at law, the enlargement of a legal remedy, so as to afford adequate relief, does not deprive equity of its existing jurisdiction.

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

8. Courts ⟸262(2)—**Federal equitable jurisdiction depends on adequacy of legal remedy when first Judiciary Act was adopted.**
Under Judiciary Act 1789, § 16 (Comp. St. § 1244), providing that suits in equity shall not be sustained in any case where plain, adequate, and complete remedy can be had at law, the jurisdiction of the United States courts as courts of equity is to be determined by the adequacy of the remedies at law at the time the original Judiciary Act was adopted.

9. Courts ⟸262(2)—**Common-law ejectment was not adequate remedy against void deed to grantee in possession.**
The common-law remedy of ejectment as it existed at the time of the adoption of the Judiciary Act of 1789 merely determined the right to possession of the property, not the title thereto, and was therefore not adequate to protect the heirs of a grantor against a deed by the ancestor to a grantee who had gone into possession, which was void for mental incapacity, so that the United States court in equity could grant relief in such cases, though the state Constitution and statutes had since enlarged the remedy of ejectment, so as to determine the right to the property.

10. Removal of causes ⟸102—**Want of jurisdiction in equity does not require remand of equitable suit to remove to federal court.**
Where a suit in equity under the state procedure was removed to the federal court for diversity of citizenship, the fact that the federal court in equity would have no jurisdiction to grant the relief sought does not require a remand of the case, or its dismissal, but it will be transferred under rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv) to the law docket.

In Equity. Suit by Charlotte F. Kellogg and others against Paul Schaueble, instituted in the chancery court of the state and removed to the United States District Court on petition of defendant. On motion by complainants to remand to the state court. Motion overruled.

E. L. Brown and Barbour & Henry, all of Yazoo City, Miss., for complainants.

Barnett & Perrin, of Yazoo City, Miss., Boothe & Pepper, of Lexington, Miss., and Brunini & Hirsch, of Vicksburg, Miss., for defendant.

HOLMES, District Judge. This cause was instituted in the chancery court of the state, and on petition of the defendant removed to this court, where a motion to remand was duly made. Briefly put, the bill alleges that the complainants are the sole heirs of Rev. Joseph Kellogg, who died intestate as to the lands in controversy, and who was, at the time of his death, the owner in fee simple of said lands, unless he had alienated them by the deeds assailed as void, because procured by the defendant by the exercise of undue and improper influences, which prevented them from being the result of the free and voluntary act of said decedent, and because at the time of their execution "the said decedent was without that mental capacity legally necessary to enable him to alienate said properties, or any part thereof, or to in any manner bind himself by deed."

I shall not enter upon a metaphysical discussion of the consistency of the two allegations. Whether or not every influence to alienate property exerted upon the mind of one without mental capacity legally necessary to enable one to do it might be denominated an undue and

improper influence is more a question of morality than of law, and might depend in large degree upon the motive of the actor and the ends to be subserved in obtaining the conveyance. If the pleader means to aver that because of undue and improper influences exerted upon the mind of the decedent he was rendered at the time of the execution of the deeds without sufficient mental capacity legally necessary to enable him to alienate the property, the character of the influences becomes highly important; but if the allegation of mental incapacity is absolute, and is intended to stand separate and alone, independent of undue influence, then this allegation, if established, would render the character of influences immaterial. I believe the same result should be reached, regardless of which construction is adopted.

[1, 2] The remedy sought by the specific prayer of the bill is that the two deeds "be canceled, annulled, and held for naught as a cloud upon the title of the complainant in and to said lands." This relief is purely equitable in its nature, and is the only relief the complainants are entitled to under the facts stated. The general prayer does not aid to enlarge or broaden the relief sought beyond what the facts set up in the bill show the plaintiff has the right to ask. In determining whether the relief sought is of a nature that a federal District Court is competent to administer, on the motion now under consideration, this court will look to the face of the complaint, and, upon the facts as there set up, decide what relief should be granted the complainants. The bill is silent on the question of possession and mesne profits, and this court cannot be expected to anticipate evidence or amendments which will enlarge the scope of the prayer for general relief, so as to embrace all the legal and equitable remedies afforded by the Mississippi statute. The general prayer cannot broaden relief beyond the pleadings at this stage of the case. Simkins, A Federal Suit in Equity, p. 283.

[3] There is nothing in the bill to indicate that the complainants were seeking in a state court to avail themselves of blended remedies afforded by a state statute, which a federal court could not administer. The only specific relief asked is the cancellation of two void or voidable deeds, and under the facts set forth this is the only relief which complainants are entitled to under the general prayer. Taking to be true every fact alleged, it does not appear that the complainants need, desire, or are entitled to any other or further relief than the delivery up and cancellation of void or voidable instruments, and a federal court of equity is as fully competent to administer this relief in a proper case as a Mississippi chancery court. The bill does not show a state of facts, as in Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 977, 37 L. Ed. 804, where the plaintiff, under a state statute, was seeking legal and equitable relief which a federal court could not administer in a suit in equity, because the defendant was entitled to a jury trial on the legal issues raised, and the equitable relief sought was premature, until a judgment had been obtained at law and execution returned nulla bona.

This opinion might well end here, and, strictly speaking, should do so; but, as the answer sets up that the defendant is in possession, which was admitted in open court in the argument, and as counsel on both sides have argued orally and in briefs other contentions, which they deem presently before the court for determination, and which, if not necessary for decision on the motion to remand, will be raised immediately by other motions, I think it proper for a trial court, for the sake of expedition, to set forth its views on the other questions so earnestly pressed.

It is conceded that this is a controversy between citizens of different states and that this court has jurisdiction of the subject-matter and of the parties. But it is contended that the complainants have asserted two causes of action—one grounded upon the wrongful possession of the defendant; the other grounded upon the casting of a cloud upon the title of complainants by the outstanding deeds. It is asserted that the remedy to recover possession is adequate and complete at law by ejectment, and that the remedy to remove clouds is adequate and complete in equity; that there are two reasons why the possession was wrongful, and two reasons why the deeds constituted clouds. It is asserted that section 160 of the Mississippi Constitution creates one blended remedy in equity for the two provided by the separate jurisdictions maintained in the federal court. To state the contention in counsel's own words:

"The [Mississippi] Constitution prescribes a bill in equity as a remedy compounded of an action of ejectment and a bill to remove clouds—one remedy, where there had been two required—one remedy 'blending,' or 'commingling,' or 'mixing' the two. The one remedy covers (1) recovery of possession; (2) recovery of rents and profits; (3) allowance of compensation for improvements and taxes; and (4) removing clouds upon title."

It is insisted that, as a federal court of equity cannot give the complainants this full relief, the cause should be remanded, so as not to deprive the complainants of their rights under the state constitutional provision. Without assenting to the conclusion of counsel for complainants, I shall proceed to an examination of the grounds of their major premise, namely, that this court is incompetent to grant full relief.

[4] In the outset, it may be observed, counsel concedes that in so far as the bill seeks to cancel the deeds on the ground of undue influence the suit is equitable in its nature, and the suggestion naturally arises that, if this is a suit for any reason equitable in its nature, then, when matters ordinarily determinable at law arise, such as questions of possession and mesne profits, and whether the deed is void for mental incapacity, under equity rule 23 (198 Fed. xxiv, 115 C. C. A. xxiv), such matters are required to be determined in the suit in equity according to the principles applicable, without sending the case or questions to the law side of the court. Equity rule 23 is as follows:

"If in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court."

As stated by Mr. Justice Pitney in Shaffer v. Carter, 252 U. S. at page 48, 40 Sup. Ct. at page 224 (64 L. Ed. 445):

"On this ground, at least, resort was properly had to equity for relief; and since a court of equity does not 'do justice by halves,' and will prevent, if possible, a multiplicity of suits, the jurisdiction extends to the disposition of all questions raised by the bill. Camp v. Boyd, 229 U. S. 530, 551, 552; McGowan v. Parish, 237 U. S. 285, 296."

It therefore may be regarded as established beyond controversy that equity, if obliged to take cognizance of a cause for any purpose, will ordinarily retain it for all purposes, even though this requires it to determine purely legal rights that would not otherwise be within the range of its authority.

[5] The contention proceeds upon the theory that if the deeds are void for mental incapacity, and not voidable merely, then the complainants would be left to their remedy at law in ejectment. It is clear that, if the deeds are merely voidable, equity will take jurisdiction of the entire case and all incidental legal questions arising in connection with it, and will not only cancel the voidable instruments as clouds upon the title of the complainants, but will also decree possession, rents and profits, and compensation for the improvements and taxes. Allore v. Jewell, 94 U. S. 506, 24 L. Ed. 260.

I shall now proceed to an examination of the bill, with a view of showing that equity has concurrent jurisdiction with courts of law in cases where void deeds are valid upon their face. Let us accept the construction of the pleader that the bill alleges "absolute want of mental capacity, irrespective of health," and irrespective of undue influences.

[6] We have, then, the sole question as to whether equity will entertain a bill to cancel deeds made by a mental incompetent at the time of their execution when the defendant is in possession. Story's Equity Jurisprudence (14th Ed.) § 945, says:

"A question has often occurred how far courts of equity would or ought to interfere to direct deeds and other solemn instruments to be delivered up and canceled, which are utterly void and not merely voidable. The doubt has been in the first place whether, as an instrument utterly void is incapable of being enforced at law, it is not a case where the remedial justice to protect the party may not be deemed adequate and complete at law, and therefore where the necessity of the interposition of courts of equity is obviated; and, in the next place, whether, if the instrument be void and ought not to be enforced, the more appropriate remedy in a court of equity would not be to order a perpetual injunction to restrain the use of the instrument rather than to compel a delivery up and cancellation of the instrument."

After discussing the matter somewhat at length and citing numerous authorities in the notes, it concludes in section 950:

"In cases where the delivery up or cancellation of any deed or other instrument is sought on account of its being void, the old course used to be, if the validity of the instrument was contested, to direct an issue or a trial at law to ascertain the fact. But this, although the common practice, was a matter in the sound discretion of the court, as the determination of a jury upon the point was not indispensable. It was merely ancillary to the conscience of the court of equity when administering relief, and not strictly the right of the party. At present a different and more convenient course seems to prevail

(which is clearly within the jurisdiction of the court), and that is for the court itself to decide the point, without sending the matter to be ascertained at law by a jury, unless it is satisfied from the contradictory character of the evidence or the want of clearness in the proofs that such a determination by a jury would be advisable."

Speaking of the jurisdiction of courts of equity and the mode of relief afforded by them, Blackstone says:

"The want of a more specific remedy than can be obtained in the courts of law gives a concurrent jurisdiction to a court of equity in a great variety of cases. * * * So of waste, and other similar injuries, a court of equity takes a concurrent cognizance, in order to prevent them by injunction. Over questions that may be tried at law, in a great multiplicity of actions, a court of equity assumes a jurisdiction, to prevent the expense and vexation of endless litigation and suits. In various kinds of frauds it assumes a concurrent jurisdiction, not only for the sake of a discovery, but of a more extensive and specific relief; as by setting aside fraudulent deeds, decreeing reconveyances, or directing an absolute conveyance merely to stand as security."

I take the following verbatim from the notes of Lewis' Blackstone:

"Where an instrument is void at common law, as being against the policy of the law, it belongs to the jurisdiction of equity to order it to be delivered up. 11 Ves. 535. In Mayor, etc., of Colchester v. Lowton, Lord Eldon says: 'My opinion has always been (differing from others) that a court of equity has jurisdiction and duty to order a void deed to be delivered up and placed with those whose property may be affected by it, if it remains in other hands.' 1 Ves. & B. 244."

In Allore v. Jewell, 94 U. S. 506, 24 L. Ed. 260, the court recognized the jurisdiction of courts of equity to cancel a deed by one mentally incompetent to execute it, or insane, in these words:

"It is not necessary, in order to secure the aid of a court of equity, to prove that the deceased was at the time insane, or in such a state of mental imbecility as to render her entirely incapable of executing a valid deed," etc. 94 U. S. 513 (24 L. Ed. 260).

I am here discussing the equitable jurisdiction of this court independently of the Mississippi statutory and constitutional provisions, which have enlarged the equitable rights, so as to dispense with the necessity of plaintiff's possession. See Southern Pine Co. v. Hall, 105 Fed. 84, 44 C. C. A. 363, where it is stated, citing numerous authorities, that such an enlargement of equitable rights may be administered in the courts of the United States, where the same does not conflict with the right of the parties to a trial by jury. Judge Shelby says (105 Fed. at page 89, 44 C. C. A. 368):

"If the record in this case showed that the defendant was in actual possession of the lands, so that an action of ejectment could have been brought against her for the lands, then it would appear that there was an adequate remedy at law, and jurisdiction in equity would not exist in the United States courts, although the statute conferred such jurisdiction on the Mississippi state courts. Whitehead v. Shattuck, 138 U. S. 146, 147, 11 Sup. Ct. 276, 34 L. Ed. 873. The result of the decision of the Supreme Court is that a state statute which enlarges equitable rights will be enforced and administered in the United States courts in all cases where its enforcement and administration do not conflict with the right of the parties to a jury trial. Clark v. Smith, 13 Pet. 195, 10 L. Ed. 123; In re Broderick's Will, 21 Wall. 503, 22 L. Ed. 599; Hipp v. Babin, 19 How. 271, 15 L. Ed. 633; Thompson v. Railroad Co., 6 Wall. 134, 18 L. Ed. 765; Insurance Co. v. Bailey, 13 Wall. 616, 20 L. Ed. 501; Grand Chute v. Winegar, 15 Wall. 373, 21 L. Ed. 174; Buzard v. Houston, 119

U. S. 347, 7 Sup. Ct. 249, 30 L. Ed. 451. See, also, Harding v. Guice, 25 C. C. A. 352, 80 Fed. 162; Green v. Turner (C. C.) 98 Fed. 756. To review and quote from these cases would serve no useful purpose. That work has already been done by Judge Taft, speaking for the United States Circuit Court of Appeals for the Sixth Circuit, in Grether v. Wright, 23 C. C. A. 498, 75 Fed. 742. We will, however, quote the following from an opinion of the Supreme Court delivered by Mr. Justice Brown: 'This court has held in a multitude of cases that where the laws of a particular state gave a remedy in equity, as, for instance, a bill by a party in or out of possession to quiet title to lands, such remedy would be enforced in the federal courts, if it did not infringe upon the constitutional rights of the parties to a trial by jury.' Greely v. Lowe, 155 U. S. 58, 75, 15 Sup. Ct. 28, 39 L. Ed. 75. It is conceded that the bill makes a case within the jurisdiction of the Mississippi chancery court, for the statute quoted dispenses with the necessity of the plaintiff's possession. As it appears that the defendant was not in possession of the lands, and that the plaintiff has no adequate remedy at law, and that the defendant is not deprived of the right of a trial by jury, there is no valid objection to the jurisdiction of the United States Circuit Court."

The above statement of Judge Shelby, that, if the record had shown defendant to be in possession, ejectment would have been an adequate remedy, is dictum, because later he says the record shows that defendant is not in possession, and the rule should be limited to cases where the instrument sought to be canceled is void upon its face as a matter of law or upon indisputable facts. Such was the character of instruments evidencing title in Whitehead v. Shattuck, supra. There it was alleged that the land entered and patented was at the time not subject to entry and patent; that the evidences of title were procured without legal right and in violation of law. The entire title of the defendant depended upon the patent, which as a matter of law was void upon its face or upon indisputable facts, and cancellation was unnecessary.

In the case of Hipp v. Babin, 19 How. 271, 15 L. Ed. 633 (which Judge Taft, in Grether v. Wright, 75 Fed. 748, 23 C. C. A. 498, calls the first and leading case on the subject and says is quoted in nearly all the others which have followed) there was no independent equity, no proper allegation that the plaintiffs were seeking cancellation, partition, discovery, or to avoid a multiplicity of suits.

The test here of the adequacy of the legal remedy is this: If the plaintiffs should bring ejectment and recover possession of the property and a judgment for mesne profits, would a court of equity afterwards sustain a bill by them in possession to decree cancellation and surrender up of the void deeds, and this would turn upon whether they were clearly void upon their face or upon indisputable facts, so that no mischief might come of their being outstanding. The rule is well stated in section 1377 of Pomeroy's Equity Jurisprudence, vol. 4. See, also, Pomeroy's Equitable Remedies, § 685.

[7] In the year 1789 the jurisdiction of equity to order void instruments to be delivered up and canceled was well established in cases where the instrument was a deed to land, and the subsequent cognizance of common-law courts, by giving a concurrent remedy in such cases, did not disturb the jurisdiction already acquired by the courts of equity. As stated by Mr. Pomeroy (volume 1, § 182):

"Whenever equity originally acquired jurisdiction over any particular subject-matter, right, or interest, because the law either did not recognize the existence of the right or interest, or could not furnish an adequate remedy for its protection, and the scope of the common law has since become enlarged, so that it now not only admits the particular primary right or interest to be legal, but also furnishes a legal remedy by its actions, which may even be adequate under ordinary circumstances, still the equitable jurisdiction is not in general thereby destroyed or lessened, although it is made to be concurrent, and although the special reasons for its continued exercise—namely, the inadequacy of the legal remedy—may no longer exist."

[8] The above principle is subject to this limitation: That if the scope of the common-law remedy had been enlarged at the time of the adoption of the Judiciary Act of 1789 (Act Sept. 24, 1789, c. 20, 1 Stat. 73), then no suit in equity would lie. The sixteenth section of the Judiciary Act of 1789 (Comp. St. § 1244) provides:

"That suits in equity shall not be sustained * * * in any case where plain, adequate and complete remedy may be had at law."

But this is merely declaratory of the pre-existing rule, and does not apply where the remedy is not "plain, adequate and complete," or, in other words, "where it is not as practical and efficient to the ends of justice and to its prompt administration, as the remedy in equity." It therefore becomes highly important to inquire whether the equitable jurisdiction to cancel void deeds previously acquired was taken away by said section 16, and this turns upon whether the growth and development of the action of ejectment at that time had progressed sufficiently to afford the complainant a plain, adequate, and complete remedy at law. Let us, then, examine the nature and effect of a judgment in ejectment, to ascertain the character and function of the remedy afforded by it.

[9] At common law the judgment in ejectment was that the plaintiff recover his term yet to come and unexpired. 2 Roscoe, Real Action, 601. By virtue of this judgment, the court by its writ of habere facias possessionem put the complainant in possession of the land covered by his unexpired term. The effect of the judgment was the same in the original fictitious action as it was in the modified form:

"It is a recovery of the possession (not of the seisin or freehold) without prejudice to the right as it may afterwards appear, even between the same parties. He who enters under it in truth and substance can only be possessed according to right. If he has a freehold, he is in as a freeholder. If he has a chattel interest, he is in as a termor. If he had no right to the possession, then he takes only a naked possession." Jackson v. Dieffendorf, 3 Johns. (N. Y.) 270; Atkyns v. Horde, 1 Burr. 114.

The action as thus established continued in England unchanged until the Common-Law Procedure Act of 1852 and the amendatory acts of 1854 and 1860. Martin's Civil Procedure, §§ 169, 170. Under sections 1852, 1853, Code Miss. 1906, a judgment in ejectment is res adjudicata as to the parties and their privies claiming by title arising after the commencement of the action. It would perhaps not be inaccurate to say that an action in the nature of ejectment prevails in Mississippi for the trial of title to land, but in determining the

adequacy of the legal remedy we look to the common law as modified by English statutes at the time of the adoption by Congress of the Judiciary Act of 1789. The fact that the state of Mississippi by statute gives an adequate remedy at law is not sufficient to deprive a federal court of equity of its jurisdiction. Greeley v. Lowe, 155 U. S. 58, 15 Sup. Ct. 24, 39 L. Ed. 69.

It is clear that an action that does not try the title, that does not cancel and compel delivery up of outstanding void deeds valid upon their face and which require evidence to establish their invalidity, and which evidence may be lost or destroyed, an action that confers naked possession only without prejudice to the right as it may afterwards appear, even between the same parties, is not a plain, adequate, and complete remedy, sufficient to deprive a court of equity of jurisdiction.

[10] But if the court is in error, if equity has no jurisdiction, it is solely for the reason that, the defendant being in possession, the complainants have a plain adequate, and complete remedy at law in the action of ejectment. In other words, because the legal remedy is as full and efficient as is needed, and after it is afforded complainants they will not need or be entitled to a cancellation of the void deeds, in which case the cause will not be dismissed or remanded, but transferred, under rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv), to the law docket.

On the whole, the complainants are in a difficult position. They must steer between Scylla and Charybdis. If equity has jurisdiction for any reason, either undue influence or mental incapacity, entitling them to invoke the equitable remedies of cancellation and surrender up, then it will take charge of the whole case and do complete justice, settling all matters ordinarily determinable at law, without sending the issues to the law side of the court. On the other hand, if there is no equity in the suit, if a bill to cancel or remove clouds will not lie because defendants are in possession, and ejectment will give complainants adequate relief without the necessity of cancellation, then the cause should simply be transferred to the law docket under rule 22 (198 Fed xxiv, 115 C. C. A. xxiv), and an order entered for the pleadings to be recasted in legal form.

This case is distinguishable on this motion from Cates v. Allen, the main reliance of counsel by analogy, in two important particulars:

First. In the latter case there was no equity of any kind in the federal court on the face of the bill, because a creditors' bill does not lie to set aside a fraudulent conveyance and subject a debtor's property to a lien for a simple contract debt before obtaining a judgment at law.

Second. Because in that case it was beyond doubt that the law afforded no adequate remedy, but a legal action was simply a prerequisite or a condition precedent to a suit in equity.

I conclude that the motion to remand should be overruled.

MEMORANDUM DECISIONS

In re MOTOR SALES & AUTO SERVICE CO. MYERS v. FARMERS' TRUST CO. OF CARLISLE, PA., et al. (Circuit Court of Appeals, Third Circuit. June 24, 1921.) No. 2732. Petition to Revise and Review an Order of the District Court of the United States for the Middle District of Pennsylvania; Charles B. Witmer, Judge. In the matter of the Motor Sales & Service Company, bankrupt. Petition of John E. Myers, attorney against the Farmers' Trust Company of Carlisle, Pa., and J. R. Harkison, trustee in bankruptcy of said bankrupt, to revise and review an order. Order affirmed. E. M. Biddle, Jr., of Carlisle, Pa., and John E. Myers, of Lemoyne, Pa., for petitioner. Merritt F. Hummell, of Carlisle, Pa., for trustee. Ruby R. Vale, of Philadelphia, Pa., and Brinton & Vale, of Carlisle, Pa., for respondents. Before WOOLLEY and DAVIS, Circuit Judges, and THOMPSON, District Judge.

WOOLLEY, Circuit Judge. This cause came on to be heard on the transcript of record from the District Court of the United States, for the Middle District of Pennsylvania, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the order of the said District Court in this cause be, and the same is hereby affirmed, with costs.

In re POTTASH. Petition of NEW JERSEY HOUSING & CONTRACTING CO. (Circuit Court of Appeals, Third Circuit. June 24, 1921.) No. 2725. Petition to Revise and Review an Order of the District Court of the United States for the District of New Jersey; John Rellstab, Judge. In the matter of David Pottash, individually and trading as Clayton Shoddy & Cotton Mills, bankrupt; Willis T. Porch, trustee. On petition by the New Jersey Housing & Contracting Company to revise and review an order of the District Court. Order affirmed. Carr & Carroll, of Camden, N. J., for petitioner. Bilder & Bilder, of Newark, N. J., for trustee. Willis T. Porch, of Pitman, N. J., for respondent. Before WOOLLEY and DAVIS, Circuit Judges, and THOMPSON, District Judge.

WOOLLEY, Circuit Judge. This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the order of the said District Court in this cause be, and the same is hereby affirmed with costs.

In re STANDARD AERO CORPORATION OF NEW YORK. (Circuit Court of Appeals, Third Circuit. June 30, 1921.) No. 2745. Petition to Revise an Order of the District Court of the United States for the District of New Jersey. Involuntary bankruptcy proceeding against the Standard Aero Corporation of New York. On petition by the bankrupt to revise an order affirming rulings of the referee, opposed by Charles H. Leonard, petitioning creditor, and Harry A. Oetgen, trustee. Affirmed. See, also, 270 Fed. 779, 783. Heine, Bostwick & Bradner, of Newark, N. J., for petitioner. McDermott & Enright, of Jersey City, Robert Richards, of Carson City, Nev., and Wm. H. Heald, of Wilmington, Del., for respondent. Before WOOLLEY and DAVIS, Circuit Judges.

WOOLLEY, Circuit Judge. This cause came on to be heard on the transcript of record from the District Court of the United States, for the Dis-

trict of New Jersey, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the order of the said District Court in this cause be, and the same is hereby affirmed, with costs.

STEVENS v. ARNOLD et al. (Circuit Court of Appeal, Third Circuit. August 2, 1921.) No. 2642. Appeal from the District Court of the United States for the District of New Jersey; Thomas G. Haight, Judge. Suit by Samuel F. Nirdlinger against Henry E. Stevens, Jr., in which Arthur S. Arnold and others, executors and trustees, were substituted as parties on the death of plaintiff. From a decree for complainants (262 Fed. 591), defendant appeals. Affirmed. Carr & Carroll, of Camden, N. J., for appellant. Bourgeois & Coulomb, of Atlantic City, N. J. (Robert H. McCarter, of Newark, N. J., of counsel), for appellees. Before BUFFINGTON, WOOLEY, and DAVIS, Circuit Judges.

PER CURIAM. This suit, instituted in the District Court to try the title to land made by accretions to fast land on the ocean front of Atlantic City, was brought under a statute of New Jersey (4 Comp. Stat. 5399) providing procedure almost the precise opposite of that of the common-law action of ejectment. It followed a like action brought with respect to the same land in the state court (Dewey Land Co. v. Stevens, 83 N. J. Eq. 314, 90 Atl. 1040), and there dismissed. The decree from which this appeal is taken overruled the defense of res adjudicata and determined the title to the land in question, in so far as it was affected by the claim of the defendant, to be in the plaintiff. The principles on which this decree was grounded were given by Judge Haight in an opinion written with great care and elaboration. (D. C.) 262 Fed. 591. As we are in complete accord with all his views, we find no occasion to repeat them in an opinion of our own. We therefore affirm the decree below on the opinion filed.

ATCHISON, T. & S. F. RY. CO. v. COLLINS et al. (District Court, N. D. California, N. D. June 30, 1921.) No. 48. Suit in Equity by the Atchison, Topeka & Santa Fé Railway Company against R. E. Collins and others. On motion for preliminary injunction. Denied. Edgar W. Camp and M. W. Reed, both of Los Angeles, Cal., and Platt Kent and M. C. Sloss, both of San Francisco, Cal. (Gardiner Lathrop, of Chicago, Ill., of counsel), for complainant. U. S. Webb, Atty. Gen., of the State of California, Robert W. Harrison, Chief Deputy Atty. Gen., and Frank L. Guerena, Deputy Atty. Gen., for defendants. Before MORROW, Circuit Judge, and DOOLING and DIETRICH, District Judges.

PER CURIAM. This matter coming on to be heard upon the application of complainant for an injunction pendente lite as prayed for in its bill of complaint, it is ordered that said application be denied, provided that, in the event this action be not tried and determined upon the merits before such time as a penalty shall accrue under the laws of the state of California for the nonpayment of any portion of the tax complained of, then such penalty shall only be computed upon the amount due and unpaid in excess of such tax over an amount equal to such portion of $1,833,404.92 as would, if not paid, then incur such penalty, and the state of California and its fiscal agents are authorized and directed to receive at the proper time or times such proportion of said sum of $1,833,404.92 as they would be authorized to receive if such sum of $1,833,404.92 were the whole amount of the tax levied upon the operative properties of complainant for the year 1921. It is further ordered that the payment or payments by the complainant to the state as herein authorized and directed, and the receipt of such payment or payments by the state, shall not prejudice the rights

of either party upon the merits. It is further ordered that a certified copy of this order shall be the warrant for any proceedings taken under its terms.

SOUTHERN PAC. CO. v. COLLINS et al. (District Court, N. D. California, N. D. June 30, 1921.) No. 49. Suit by the Southern Pacific Company against R. E. Collins and others. Application for injunction pendente lite denied. Guy V. Shoup, Henley C. Booth, and M. C. Sloss, all of San Francisco, Cal. (Wm. F. Herrin, of San Francisco, Cal., of counsel), for complainant. U. S. Webb, Atty. Gen., of the State of California, Robert W. Harrison, Chief Deputy Atty. Gen., and Frank L. Guerena, Deputy Atty. Gen., for defendants. Before MORROW, Circuit Judge, and DOOLING and DIETRICH, District Judes.

PER CURIAM. This matter coming on to be heard upon the application of complainant for an injunction pendente lite as prayed for in its bill of complaint, it is ordered that said application be denied, provided that, in the event this action be not tried and determined upon the merits before such time as a penalty shall accrue under the laws of the state of California for the nonpayment of any portion of the tax complained of, then such penalty shall only be computed upon the amount due and unpaid in excess of such tax over an amount equal to such portion of $6,125,700.28 as would, if not paid, then incur such penalty, and the state of California and its fiscal agents are authorized and directed to receive at the proper time or times such proportion of such sum of $6,125,700.28 as they would be authorized to receive if such sum of $6,125,700.28 were the whole amount of tax levied upon the operative properties of the complainant for the year 1921. It is further ordered that the payment or payments by the complainant to the state as herein authorized and directed, and the receipt of such payment or payments by the state, shall not prejudice the rights of either party upon the merits. It is further ordered that a certified copy of this order shall be the warrant for any proceedings taken under its terms.

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⇐176(1) (U.S.C.C.A.N.Y.) Delay in delivery *held* waived.—A. Klipstein & Co. v. Dilsizian, 473.

⇐178(2) (D.C.) Buyer need not return goods which do not conform to contract.—Harriman v. Richardson, 752.

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⇐38 (U.S.D.C.Md.) Breach of bunkering provision by owner does not entitle charterer to cancel.—Trafikatiedolaget Grangesberg Oxelosand v. Ainesworth Coal & Iron Co., 215.

⇐39 (U.S.D.C.Md.) Interlineation in printed charter party prevails over inconsistent printed provision.—Hellenic Transport S. S. Co. v. Archibald McNeil & Sons Co., 290.

⇐52 (U.S.D.C.Md.) Government restrictions on transportation of coal for export *held* not to excuse charterer's failure to furnish cargo.—Hellenic Transport S. S. Co. v. Archibald McNeil & Sons Co., 290.

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⇐52 (U.S.D.C.Md.) Order restricting transportation of cargo to port does not excuse failure to transport before it became effective.—Western Counties Shipping Co. v. Archibald McNeil & Sons Co., 298.

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⇐175 (U.S.D.C.Md.) Charter *held* to impose on charterer risk of delay in getting ship to berth.—Hellenic Transport S. S. Co. v. Archibald McNeil & Sons Co., 290.

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⇐61 (U.S.D.C.Del.) Transfer of right in connection with stated articles includes only those articles and others closely resembling them.—Andrew Jergens Co. v. Woodbury, Inc., 952.

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⇐71 (U.S.C.C.A.Del.) Tire manufacturer has business sufficiently related to automobile maker to entitle latter to prevent appropriation of name.—Akron-Overland Tire Co. v. Willys-Overland Co., 674.

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⇐93(3) (U.S.D.C.Del.) Transferee *held* not to infringe rights of prior transferee for specified articles.—Andrew Jergens Co. v. Woodbury, Inc., 952.

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